

# Vanderbilt Law Review

---

Volume 10  
Issue 5 *Issue 5 - A Symposium on Law and  
Christianity*

---

Article 12

8-1957

## Contracts – 1957 Tennessee Survey

Paul J. Hartman

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Commercial Law Commons](#), [Contracts Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Paul J. Hartman, Contracts – 1957 Tennessee Survey, 10 *Vanderbilt Law Review* 1013 (1957)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol10/iss5/12>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# CONTRACTS—1957 TENNESSEE SURVEY

PAUL J. HARTMAN\*

## DAMAGES

*Breach of contract to publish advertisement—certainty of lost anticipated profits—nominal damages:* The rule of “certainty” with respect to awarding damages for a breach of contract is simply a standard requiring a reasonable degree of persuasiveness in the proof of the fact of damage and of the amount of damage.<sup>1</sup> Through the use of the standard of certainty, the court is enabled to insist that the jury must have factual data—something more than guesswork—to guide them in fixing the award.<sup>2</sup> Loss of commercial profits, claimed as damages for breach of contract, has become the principal field for the application of the standard of certainty.<sup>3</sup>

In cases of breach of contract for advertising, the claim for loss of profits has often failed because too uncertain. Profit on new business which might have been drawn to the advertiser usually has been disallowed because the evidence that is introduced to prove that such profits would have been made if the defendant had not committed the breach of contract is usually thought to be too speculative and uncertain to allow the anticipated profits as an element of damage.<sup>4</sup> The Tennessee Court of Appeals case of *Morristown Lincoln-Mercury, Inc. v. Roy N. Lotspeich Publishing Co.*<sup>5</sup> is illustrative of this position. There plaintiff, a car dealer, sued the defendant, a newspaper publisher, for breach of contract to publish advertisement of sale of new and used automobiles, claiming as damages anticipated profits lost by refusal of the defendant to publish the advertisement. In the trial court, plaintiff recovered a judgment for \$3,000. On appeal, the court of appeals held that the proof was not sufficiently certain to establish actual damages for loss of profits, but permitted plaintiff to recover nominal damages in the amount of \$300.

---

\* Professor of Law, Vanderbilt University; Member, Tennessee Bar.

1. 5 CORBIN, CONTRACTS § 1022 (1951); MCCORMICK, DAMAGES § 26 (1935); 15 AM. JUR., DAMAGES §§ 20, 150 (1938).

2. See *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96 (8th Cir. 1901); *Broadway Photoplay Co. v. World Film Corp.*, 225 N.Y. 104, 121 N.E. 756 (1919); *Macan v. Scandanavia Belting Co.*, 264 Pa. 384, 107 Atl. 750 (1919); 5 CORBIN, CONTRACTS § 1022 (1951); MCCORMICK, DAMAGES § 26 (1935).

3. See MCCORMICK, DAMAGES § 28 (1935); 15 AM. JUR., DAMAGES §§ 152, 153 (1938); Annot., 32 A.L.R.2d 582, 606 (1953). For methods of proving prospective profits, see 5 WILLISTON, CONTRACTS § 1346A (rev. ed. 1937).

4. MCCORMICK, DAMAGES § 30 (1935); Annot., 41 A.L.R. 198, 204 (1926) (collection of cases in some of which recovery allowed and in others of which recovery denied). See 5 CORBIN, CONTRACTS § 1022 (1951) for a very lucid discussion of the meaning of “speculative and uncertain profits.”

5. 298 S.W.2d 788 (Tenn. App. E.S. 1956).

Plaintiff's proof with respect to loss of profits flowing from the breach of its advertisement contract was ineager. Plaintiff's only witness testified that as a result of the breach plaintiff canceled an order for 20 new cars, which he expected to sell as a result of the advertisement and on which he said plaintiff might have made an average profit of \$400 or \$500 per car, if he had sold them. The witness also testified that plaintiff expected to sell forty or fifty cars on the strength of the advertisement.

Under all the facts appearing, the court felt that the anticipated profits from the contract to publish advertisements were not sufficiently proved as a proper element of damages. The evidence presented left uncertain whether or not plaintiff would have made a profit as a result of this advertisement campaign. The court was thus of the opinion that plaintiff's estimate of damages suffered was mere speculation. Hence it concluded that plaintiff had not proved its alleged damages (loss of profits) with reasonable certainty.

In proving a claim for loss of profits, the opinions of witnesses as to the amount of profit that would have been gained under a particular contract are not admissible, except where the opinion is that of an expert based on relevant facts.<sup>6</sup> In the case at hand it was neither shown that plaintiff's witness was an expert nor were any relevant facts presented on which an opinion could be based.

In a few cases of breach of contract for advertising and similar trade stimuli the plaintiff-advertiser has been able to satisfy the requirement of certainty with respect to the profits he would have made from the publicity. The special circumstances of particular cases have enabled the plaintiff to establish a definite loss of profits.<sup>7</sup> However, claims for loss of anticipated profits for breach of an advertising contract, especially in new business, usually have found the certainty obstacle too large to surmount;<sup>8</sup> and the case at hand was no exception.

The Court of Appeals did, however, hold that plaintiff-advertiser was entitled to nominal damages for breach of contract and fixed the amount at \$300. Nominal damages for a breach of contract may be awarded where a plaintiff has failed to prove actual damages, although the proof entirely fails to show that the breach was accompanied by

---

6. *McCORMICK*, DAMAGES § 29 (1935).

7. *E.g.*, *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547, 92 N.E. 761 (1910). There the defendant's breach was a failure to furnish trading stamps after supplying them for a short time. Proof of the rise and fall of plaintiff's business before, during and after the time when the stamps were furnished was held to be sufficient. See also *Marcus v. Myers*, 11 L.T.R. 327 (1895). For a discussion of these cases, see Annot., 41 A.L.R. 198, 205 (1926).

8. *Tribune Co. v. Bradshaw*, 20 Ill. App. 17 (1886); *Stevens v. Yale*, 113 Mich. 680, 72 N.W. 5 (1897); *Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co.*, 141 N.C. 284, 53 N.E. 885 (1906); *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605 (1912). For a discussion of these cases see Annot., 41 A.L.R. 198, 203 (1926).

any injurious consequences to the plaintiff.<sup>9</sup> Nominal damages in a trivial amount may thus be awarded for the breach merely as a recognition of some breach of duty owed by defendant to plaintiff, but such damages are not given as a measure of recompense for loss or detriment sustained.<sup>10</sup> Nominal damages are usually fixed at one cent, one dollar, or some similar small amount.<sup>11</sup> They are thus clearly distinguished from similar sums awarded as compensation for small losses actually suffered.<sup>12</sup> The \$300 nominal damages awarded in the case at hand seem at variance with the generally accepted practice which would consider as "nominal" only an amount such as a few dollars or a few cents.<sup>13</sup> But then maybe the concept of "nominal damages" also has been caught up in the inflation spiral.

*Breach of Contract To Sell—Recovery of Resale Profits:* What is the measure of damages when the defendant-seller refuses to deliver lumber to the plaintiff-buyer, a lumber dealer, and there is no available market elsewhere from which the buyer can obtain lumber to fill his resale orders? That was the question before the Tennessee Supreme Court in *Jennings v. Lamb*.<sup>14</sup>

The defendant (Lamb) had agreed to sell a certain amount of lumber at a list of fixed prices to plaintiff (Jennings) who was an established dealer in finishing and selling rough lumber. Defendant apparently knew that plaintiff was such a dealer. Defendant delivered some lumber to plaintiff under his contract and then defaulted in his contractual obligations by delivering to plaintiff only about half the board feet of lumber called for in the contract. A scarcity of lumber developed in the area and plaintiff was not able to buy on the open market lumber with which to fill his orders. There is a disagreement between the trial court and the court of appeals on the one hand and the Supreme Court on the other as to whether plaintiff could have sold all the lumber which defendant had contracted to deliver to plaintiff. Nevertheless, the Supreme Court was satisfied that the uncontradicted, clear, positive testimony showed that plaintiff could have sold all the

9. MCCORMICK, DAMAGES § 22 (1935); 15 AM. JUR., DAMAGES §§ 5-6 (1938). That a party's recovery of nominal damages is unaffected by the fact that he was benefitted by the breach is generally accepted. *Oklahoma Natural Gas Corp. v. Municipal Gas Co.*, 113 F.2d 308 (10th Cir. 1940).

10. 5 CORBIN, CONTRACTS § 1001 (1951); MCCORMICK, DAMAGES §§ 20-21 (1935); 5 WILLISTON, CONTRACTS § 1339A (rev. ed. 1937); 15 AM. JUR., DAMAGES § 356 (1938).

11. 5 CORBIN, CONTRACTS § 1001 (1951); MCCORMICK, DAMAGES § 21 (1935); 15 AM. JUR., DAMAGES § 5 (1938).

12. MCCORMICK, DAMAGES § 21 (1935); 15 AM. JUR., DAMAGES § 5 (1938).

13. MCCORMICK, DAMAGES § 21 (1935). A judgment for \$200 is not for nominal damages, but for substantial damages. *Mahoney v. Beatman*, 110 Conn. 184, 147 Atl. 762, 66 A.L.R. 1121 (1929). In *Broads v. Mead*, 159 Cal. 765, 116 Pac. 46 (1911), where plaintiff was entitled to only nominal damages, judgment for \$100 was reduced on appeal to \$1.00. See also 15 AM. JUR., DAMAGES § 5 (1938).

14. 296 S.W.2d 828 (Tenn. 1956).

lumber in the regular course of trade, although plaintiff did not show that he had firm orders for all the lumber.

The specific question before the courts was whether plaintiff could recover, as an element of damages for breach of contract, loss of anticipated profits on all the lumber defendant did not deliver. In reversing both lower courts the Supreme Court held that plaintiff could recover such profits.

There are several factors relied on by the court in permitting plaintiff-buyer to recover the lost profits as an element of damages. Plaintiff had an established business and the evidence showed that he could have sold all the lumber in question at the profit claimed, although plaintiff did not have firm orders for all the lumber. Defendant also knew that plaintiff was a lumber dealer and presumably would resell the lumber. Moreover, it should also be pointed out—although the fact was not seemingly relied on by the court as a basis for its decision—that plaintiff was not able to buy other lumber on the open market to fill his orders because a scarcity of lumber had developed in the area.

Section 67 of the Uniform Sales Act, adopted in Tennessee,<sup>15</sup> prescribes rules for measuring damages for breach of contract where a seller fails to fulfill his promise to deliver goods. Section 67(3) takes care of the ordinary situation and expresses the general rule for measuring the damages the buyer can properly recover. It provides that if, at the time of the breach, there is an "available market" in which the buyer can obtain the goods, then his measure of damages, in the absence of "special circumstances" showing greater damages, is the difference between the market price and the contract price. If a market is available to the buyer in which he can buy other goods like those promised by the seller, the buyer is made whole if he is awarded the market value at the time and place fixed for delivery, less any unpaid part of the contract price.<sup>16</sup> So, where such market exists and no "special circumstances" are shown which resulted in a greater loss, the standard just stated is the measure of the buyer's damages.<sup>17</sup>

However, where there is no available market, or where there are "special circumstances" showing damages of a greater amount, the

---

15. TENN. CODE ANN. §§ 47-1201 to -1277 (1956). This is a codification, in essence, of the common law. See *Memphis Casting Works, Inc. v. Bearings & Transmission Co.*, 35 Tenn. App. 164, 243 S.W.2d 145 (W.S. 1951); *McCormick, DAMAGES* § 657 (1935). The Uniform Sales Act has been adopted in 33 states. See 1A *UNIFORM LAWS ANN.* 6 (1956 Supp.) for the states that have adopted it, with the effective date of the Act in each state.

16. See e.g., 46 *AM. JUR.*, *Sales* §§ 677, 689 (1950).

17. See *Black v. Love & Amos Coal Co.*, 30 Tenn. App. 377, 383-84, 206 S.W.2d 432, 434-35 (M.S. 1947); *Tennessee Fertilizer Co. v. International Agricultural Corp.*, 146 Tenn. 451, 463-64, 243 S.W. 81, 85-86 (1922); *McCormick, DAMAGES* § 175 (1935); 5 *WILLISTON, CONTRACTS* § 1383 (rev. ed. 1938).

damages must be determined in some other manner. The Uniform Sales Act leaves the rules for assessing damages rather flexible in situations in which there is no available market, or where there are "special circumstances showing proximate damages of a greater amount" than the differences between the contract price and the market price. The only relevant guide is in section 67(2) of the Uniform Sales Act which provides that the measure of damages "is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract."<sup>18</sup>

Thus, in measuring the buyer's damages when the available market test can not be satisfactorily used, there are two variables which must be reckoned with, namely: (1) the lack of an "available market"; and (2) "special circumstances" which make it inequitable to use the gauge of the difference between the contract price and the market price.

Where the buyer can show lack of an available market, or where he can show "special circumstances," he *may* be able to recover as special damages the profits he would have made according to the contract. Under what circumstances can the buyer recover lost profits? Under some circumstances the buyer may recover his lost profits when it can be shown that the buyer intended to resell the goods which the seller wrongfully failed to deliver and that the seller foresaw such resale when contracting.<sup>19</sup> Since the buyer's claim for lost profits is generally treated as "special" or "consequential" damages, such profits ordinarily are not recoverable unless they were reasonably within the contemplation of the parties at the time of the making of the contract.<sup>20</sup> The courts are not in agreement, however, as to exactly what the buyer must show that the breaching seller knew about the buyer's resale activities in order to satisfy the requirement that loss of profits was within the contemplation of the parties. Is it enough to show that the seller merely had knowledge at the time of the contract that the buyer was a dealer in the kind of goods purchased? Or must the buyer show that he had a resale contract at the time of his contract with the seller and that knowledge of the resale contract was brought home to the seller at the time he contracted with the buyer?

The weight of authority seems to support the view that the seller's

---

18. See 46 AM. JUR., *Sales* § 683 (1950).

19. *Memphis Casting Works v. Bearings & Transmission Co.*, 35 Tenn. App. 164, 243 S.W.2d 145 (W.S. 1951); *Black v. Love & Amos Coal Co.*, 30 Tenn. App. 377, 206 S.W.2d 432 (M.S. 1947); See Annot., 88 A.L.R. 1439, 1445 (1934).

20. *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.*, 255 N.Y. 33, 173 N.E. 913 (1930); *Tennessee Fertilizer Co. v. International Corp.*, 146 Tenn. 451, 243 S.W. 81 (1922); *Memphis Casting Works v. Bearings & Transmission Co.*, 35 Tenn. App. 164, 243 S.W.2d 145 (W.S. 1951); *Black v. Love & Amos Coal Co.*, 30 Tenn. App. 377, 206 S.W.2d 432 (M.S. 1947), 20 TENN. L. REV. 385 (1948). See Annot., 88 A.L.R. 1439, 1441 (1934).

knowledge, at the time he entered into the contract, that the buyer was a dealer in the kind of goods purchased is sufficient to impute to the seller notice of the fact that the goods were for resale and to charge him, upon his breach of the sales contract, with special damages by way of loss of profits based on the buyer's resale of the goods, although the seller had no knowledge of any actual resale or specific customer to whom the goods were to be resold.<sup>21</sup>

A minority view takes the position that such special damages by way of loss of profits resulting from the buyer's inability to complete a resale of the goods cannot be recovered by the buyer from the seller unless the buyer can show that there was an existing contract for resale and that this was brought home to the seller at the time he entered into the contract of sale with the buyer.<sup>22</sup>

Can the buyer, by showing that the seller knew or could reasonably have foreseen that the goods would be resold, automatically recover lost profits, even though there was an available market in which the buyer could have acquired the goods with which to fulfill his resale commitments? The Uniform Sales Act speaks of "special circumstances" warranting a recovery greater than the difference between the contract price and the market price only in connection with goods having an available market.<sup>23</sup> However, this rule which permits the buyer to recover lost profits from the seller ordinarily would seem to presuppose the inability of the buyer to obtain elsewhere in the market goods with which to fulfill his resale commitments. Thus, if there is an available market for the goods in question, rarely will the "special circumstances" exist so as to permit the buyer to recover damages greater than the difference between the contract price and the market price. Ordinarily that will make the buyer whole. The Sales Act does, however, seem to leave room for showing that "special circumstances" justify damages greater than the difference between the contract price and the market price even though there is an available market.

After the buyer has satisfied the requirement of showing that the seller knew enough about the buyer's resale activities to show that loss of profits was within the contemplation of the parties and has shown that there was no available market in which the buyer could have replaced the goods, in order to recover lost profits, must the

---

21. *Roberts, Wicks & Co. v. Lee*, 125 Ky. 709, 102 S.W. 300 (1907); *Parker v. S. G. Shaghahian & Co.*, 244 Mass. 19, 138 N.E. 236 (1923); *Trigg v. Clay*, 88 Va. 330, 13 S.E. 434 (1891); *Eureka Producing Co. v. Hoyt*, 266 S.W. 203 (Tex. Civ. App. 1924); *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100 (1911); see Annot., 88 A.L.R. 1439, 1471 (1935); 46 AM. JUR., *Sales* § 699 (1950).

22. *Setton v. Eberle-Albrecht Flour Co.*, 258 Fed. 905 (8th Cir. 1919); *Foss v. Heineman*, 144 Wis. 146, 128 N.W. 881 (1910); see Annot., 88 A.L.R. 1439, 1475 (1934).

23. UNIFORM SALES ACT § 67(3); TENN. CODE ANN. § 47-1267(3) (1956).

buyer go further and show that the seller had notice that goods could not be obtained to replace those not delivered? That is to say, in order for the buyer to recover his lost resale profits, must he prove that the seller, when contracting, not only knew or at least foresaw the probability that the buyer intended a resale, but also knew or at least foresaw at the time of contracting that equivalent goods would not later be available to the buyer in the event the seller breached his contract of sale by not delivering? Here the courts sharply divide.

As we have seen, only those damages are recoverable which are foreseeable at the time the contract was made. This is, of course, the almost universal rule of *Hadley v. Baxendale*.<sup>24</sup> One special circumstance upon which that landmark case was decided was the lack of knowledge by the breaching party, at the time of contracting, of the unavailability to the injured party of substituted performance by someone else. Following this approach, one view, including New York cases, denies special damages by way of lost profits unless the seller, at the time of contracting, not only had reason to know of the contemplated resale, but also that the seller had reason to foresee when the contract was entered into that other goods could not be obtained by the buyer to fill the place of those not delivered by the seller.<sup>25</sup> Unless, therefore, there is proof that the seller, at the time of contracting, had notice of the contemplated resale by the buyer, as well as notice that other goods could not be obtained by the buyer to replace those not delivered, the courts of this persuasion say that the loss of profits of a resale was not within the contemplation of the parties. In short, if the loss of profits was not foreseeable when the contract was made such loss of profits is not a proper element of damages. Prior Tennessee cases<sup>26</sup> seem in accord with this view, and Mr. Williston's thinking is also in harmony.<sup>27</sup>

However, in *Murarka v. Bachrack Bros., Inc.*,<sup>28</sup> the United States

24. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

25. *Marcus & Co. Inc. v. K.L.G. Baking Co.*, 122 N.J.L. 202, 3 A.2d 627 (1939); *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.*, 255 N.Y. 33, 173 N.E. 913 (1930); *Dreyer Commission Co. v. Fruen Cereal Co.*, 148 Minn. 443, 182 N.W. 520 (1921); *Hammond & Co. v. Bussey*, [1887] 20 Q.B. 79 (C.A.).

26. *Memphis Casting Works v. Bearings & Transmission Co.*, 35 Tenn. App. 164, 243 S.W.2d 145 (W.S. 1951) (loss of profits was recovered where seller knew from the nature of the specially made goods that other like goods could not be obtained elsewhere); *Black v. Love & Amos Coal Co.*, 30 Tenn. App. 377, 206 S.W.2d 432 (M.S. 1947) (loss of profits recovered where seller should have known that no market for coal would be available elsewhere because of shortages and war time governmental regulations).

27. See 3 WILLISTON, SALES 303 (rev. ed. 1948):

"Even though no contract had yet been made by the buyer for a resale, damages may be recovered for loss of one, if the probability of such a resale was contemplated and the defendant knew that other goods of the kind contracted for could not be obtained by the buyer."

See also 5 WILLISTON, CONTRACTS § 1347 (rev. ed. 1938).

28. 215 F.2d 547 (2d Cir. 1954). This case has been criticized with clarity



Court of Appeals for the Second Circuit (purporting to apply New York law) held that where there is *no available market* for goods it is not necessary to show that the seller had notice of the buyer's actual or contemplated resale contracts in order for the buyer to recover damages for loss of profits. Such loss of profits are said to be *general* damages when there is *no available market*, and knowledge of the special circumstances of a contemplated resale by the buyer need not be brought home to the seller when he contracts with the buyer. Further explaining the rationale of the *Murarka* decision, the court says that where there is an available market and the buyer claims from the seller loss of profits as *special* damages, only then must the buyer show that the seller had notice of the buyer's actual or contemplated resale commitments at the time of the contract. Moreover, the *Murarka* opinion does not mention a requirement, in the "no available market" situation, that the buyer show the seller knew or at least foresaw the probability, when contracting, that an available market where the buyer could procure equivalent goods, in the event the seller failed to deliver, would be lacking.<sup>29</sup>

Now let us see the application of some of the various relevant rules of law which we have just examined to *Jennings v. Lamb*. The opinion shows that the defendant-seller knew at the time of contracting that the plaintiff-buyer was a dealer in lumber. By the weight of authority that is sufficient to impute to the seller notice of the fact that the goods were for resale and to charge him, upon breach of his contract of sale, with special damages by way of lost profits based on the buyer's intended resale of the goods.<sup>30</sup> Thus, this one facet of the foreseeability test of measuring damages was satisfied. But what about the foreseeability by the seller, at the time of contracting, of the lack of an available market in which the buyer could replace the goods which the seller might fail to deliver? Although there was no available market, as the opinion shows, when the contract was breached the opinion does not show that the seller foresaw at the time of contracting that there might be no available market in which the buyer could obtain lumber to replace that not delivered by the seller. The opinion is silent on that aspect of the case. By the view supported by a great amount of excellent authority,<sup>31</sup> therefore, plaintiff-buyer failed to prove sufficient facts to justify the court in compensating him for

---

and vigor as erroneously interpreting the New York law. See 24 FORDHAM L. REV. 142 (1955).

29. *Bercut v. Park, Benziger & Co.*, 150 F.2d 731 (9th Cir. 1945) (applying California law) is in accord with the *Murarka* case in repudiating the principle that in order for buyer to recover profits he must prove that the seller knew or foresaw, when contracting, that like goods would not later be available to the buyer with which to replace those not delivered by the seller.

30. See authorities and text in connection with note 21 *supra*.

31. See authorities and text in connection with notes 25, 26 and 27 *supra*.

loss of anticipated profits resulting from a resale since he did not show that the seller foresaw at the time of contracting that other lumber of the kind contracted for could not be obtained elsewhere by the buyer. The case at hand would not, however, be inconsistent with the *Murarka* decision, which required no such showing.

*Jennings v. Lamb* appears inconsistent with prior Tennessee decisions, in so far as it permits the buyer to recover lost profits without requiring a showing that the seller could have foreseen, at the time of contracting, that there might not be an available market in which the buyer could get like lumber if seller defaulted.<sup>32</sup>

#### CONDITIONS

*Meaning and Legal Effect of Condition in a Promise to Buy Land—Necessity of Consideration in Settlement of a Liquidated Claim:* During the period covered by this survey article the Tennessee courts have on two occasions found it necessary to deal with the meaning and legal effect of conditions in a contract.

A condition, as the *Restatement of Contracts*<sup>33</sup> points out, is either (1) "any operative fact that will create some new legal relation, or extinguish an existing relation," or (2) "words or other manifestations that indicate that a fact shall have such operation." The legal effect of a condition in a promise, then, is basically simple; no action can be maintained for breach of promise unless the condition has occurred or has been waived or excused.

In the two cases during the period covered by this survey, the defendants took the position that the nonoccurrence of a condition prevented the plaintiff-promisee from acquiring a right against the defendant. In both cases the court had to deal at length with the disputed point of exactly what was the meaning of the condition.

In *Springfield Tobacco Redryers Corp. v. City of Springfield*<sup>34</sup> the plaintiff, who owned real estate, brought suit against the defendant city to recover damages for an alleged breach of a contract in which the defendant promised to purchase realty from plaintiff. One of the defenses was that a certain condition in defendant's promise to buy had not occurred, and therefore plaintiff could not maintain its action

---

32. This inconsistency is revealed by a quotation from the court's opinion in *Black v. Love & Amos Coal Co.*, 30 Tenn. App. 377, 386, 206 S.W.2d 432, 435 (M.S. 1947) where the court said:

"In view of these circumstances, we think the parties must be held to have contemplated, at the time of the making of the contracts, that there might not be an available market and the defendant's non-delivery of the coal, or any part thereof, might cause complainant to lose such profits as she might make by selling the coal in the ordinary course of her business."

33. RESTATEMENT, CONTRACTS § 250, comment a (1932).

34. 293 S.W.2d 189 (Tenn. App. M.S. 1956).

for a breach of defendant's promise. Defendant-city had contracted with plaintiff to buy certain real estate for \$175,000 under the Industrial Building Revenue Bond Act of 1951. Defendant would then lease this land to a third party, the Wilson Athletic Goods Manufacturing Company. Defendant's promise to buy the real estate from plaintiff was dependent upon two conditions: (1) that the issuance of bonds by defendant with which to buy plaintiff's property be approved by the voters of defendant-city; and (2) that the defendant lease the property to the Wilson Company. The first condition was admittedly satisfied; the voters approved the bonds. However, defendant refused to take plaintiff's property, contending that the second condition had not been satisfied, in that a formal lease had not been executed by defendant and the Wilson Company.

Defendant had executed a contract with Wilson in which Wilson agreed to lease the property; they agreed on the terms of the lease itself; and a copy of the unexecuted formal lease was attached to the contract between Wilson and Defendant. Moreover, Wilson initialed the formal lease, made slight modifications in it and mailed it back to defendant with a letter stating that the "executed" lease was enclosed in the letter. The letter from Wilson to defendant also stated that an "extra executed copy" of the lease was enclosed for defendant to initial. Wilson later refused to take the property from defendant under the lease and refused to do anything further about executing a lease. Defendant then refused to take the property from plaintiff, claiming that the condition of the Wilson lease had not been met. Plaintiff sued defendant for damages for breach of contract. The lower court held for defendant and plaintiff appealed.

The court of appeals reversed the lower court, holding that the condition of the Wilson lease had been satisfied. The court based its decision on this point on two alternative grounds. First, it said that the condition as to the leasing of the property to Wilson was satisfied when defendant and Wilson entered into a contract to make a lease. Second, the condition was satisfied in that, in legal effect, Wilson and defendant did execute a formal lease.

Some question might be raised as to whether the condition should be construed to mean that all that plaintiff and defendant contemplated was that the condition would be satisfied merely by a contract between defendant and Wilson to make a lease. If the parties contemplated a formal lease, then there is some difficulty in understanding how a contract to make a lease would satisfy that condition.<sup>35</sup>

---

35. Cf. *Massee v. Gibbs*, 169 Minn. 100, 210 N.W. 872 (1926) where the court refused to find a binding contract, although the parties seemingly had agreed on all the terms. Nevertheless, the court felt that the parties contemplated a written draft as the consummation of their negotiations.

However, the court seems to be on much firmer ground in holding that Wilson and defendant did, in fact, execute a formal lease. They agreed on the terms of a lease; Wilson initialed the formal document, returned it to defendant in a letter describing it as an executed lease and included a copy for defendant, describing it as an executed lease. For all practical purposes that would seem to be sufficient to constitute the execution of the formal lease.<sup>36</sup>

As the court points out, it is no answer for the defendant to say that Wilson had refused to live up to its agreement with defendant. That was not the agreed condition. Defendant agreed to buy plaintiff's land on the condition that the Wilson Company enter into a lease with defendant. When the lease was made, the condition was fully satisfied and defendant became bound to buy plaintiff's land.<sup>37</sup>

Defendant also contended that it and plaintiff had a subsequent transaction which constituted a settlement of any claim plaintiff might have arising out of defendant's alleged breach of contract. After the Wilson deal fell through and defendant refused to take plaintiff's land, plaintiff did later sell the same land to defendant for \$110,000, or \$65,000 less than defendant had contracted to pay for it. Plaintiff claimed that the sale was made to minimize damages, but defendant took the position that this sale constituted a settlement of plaintiff's claim for breach of contract and a waiver of plaintiff's rights growing out of the defendant's alleged breach of contract.

The court held that this sale to defendant did not constitute a waiver nor a compromise settlement or an accord and satisfaction under the earlier contract. Neither the subsequent contract nor deed made pursuant to it made any reference to the first contract.

The court held that the subsequent contract and deed could not be a binding settlement of plaintiff's cause of action for the additional reason that there was no consideration to support the later contract.

---

36. *Geary v. Great Atlantic & Pacific Tea Co.*, 366 Ill. 625, 10 N.E.2d 350 (1937) has considerable bearing here. There a lessee in possession of premises, mailed to the lessor original and duplicate copies of a renewal lease, to be signed by the lessor and then returned to lessee. The lessor signed both copies of the lease and mailed them to the lessee at 10:30 A.M. However, at 1:30 P.M. on the same day the lessee mailed a letter stating that the lessee did not want to renew the lease. In an action by the lessor against the lessee, the court held there was a valid lease. The lessee sufficiently manifested its assent to all the terms by mailing the copies of the lease and the lessor by signing them. Signing of the formal document by the lessee was not necessary. To the authority cited by the court on the sufficiency of initials as constituting a signature in the execution of the lease, there can be added *International Filter Co. v. Conroe Gin, Ice & Light Co.*, 277 S.W. 631 (Tex. Comm. App. 1925). There the indorsement of "O.K." on an alleged contract amounted to an approval by an executive officer of the Filter Company.

37. Even where a broker's commission is conditioned upon the consummation of a sale of land, the owner is not called upon to sue the vendee and force title upon him in order to bring about the condition. *Amies v. Wesnofske*, 255 N.Y. 156, 174 N.E. 436 (1931).

There may have been no consideration sufficient to make the second agreement a binding obligation so as to constitute a binding compromise or settlement of plaintiff's claim growing out of the earlier contract, even if intended as a settlement. It is well ingrained doctrine that neither a promise to perform, nor the performance, of what one is legally bound to do is sufficient consideration. Nevertheless, we must not lose sight of the fact that a good many states, including Tennessee, have abrogated this doctrine by statute. If, in fact, it had been shown that the parties intended this subsequent sale to be a settlement of the prior claim, then it likely would not fail for want of consideration. Tennessee has a statute eliminating the requirement of consideration where such settlements are in writing.<sup>38</sup> Thus, a settlement in writing, although lacking consideration, would appear to be binding.

*Offer to buy Land—Meaning of Condition, "Upon Buyer's Being Able to Purchase" Other Named Land:* The Tennessee Court of Appeals was also called upon to construe and interpret a condition in an offer to buy land in *Real Estate Management, Inc. v. Giles*.<sup>39</sup> The question was raised by an interpleader action to determine which of two defendants (a prospective purchaser and a prospective vendor of realty) was entitled to certain earnest money held by the complainant, Real Estate Management, Inc., in connection with an offer to buy real estate.

The controversy between the two defendants arose out of three offers made by the prospective purchaser (defendant-Freeman) to purchase three contiguous tracts of land from three separate owners. The offers were made through complainant. Each offer to purchase was expressly contingent "upon the buyer's being able to purchase" two other named properties at stipulated prices. Earnest money was deposited with each offer and the agreement stipulated that the owner (prospective vendor) and complainant would divide the earnest money in the event the purchaser failed to complete the transaction.

One prospective vendor (Miss Giles) accepted Freeman's offer to buy but the offers for the other two tracts did not ripen into agreements to sell. One offer was rejected and the other one was never submitted to the owner. Thereupon, one defendant (Miss Giles) and the other defendant (Freeman) both demanded the earnest money deposited with complainant, Real Estate Management, which brought the interpleader suit to determine who was entitled to the fund. Complainant waived all claims to the money.

Defendant-Giles based her claim to the fund on the forfeiture provision of the offer, claiming that the condition for forfeiting the money

---

38. TENN. CODE ANN. §§ 24-706 to -707 (1956).

39. 293 S.W.2d 596 (Tenn. App. E.S. 1956).

had occurred, in that defendant-Freeman was financially able to purchase all three properties. Defendant-Freeman claimed the fund, alleging that the condition had not occurred, in that he was not able to acquire the other two tracts of land. So the issue of the case was the meaning of the condition in the offer. The question was simply this: Did the condition "upon the buyer's being able to purchase" refer to his financial ability to purchase, or did it refer to the purchaser's being able to acquire the other tracts of land at prices designated in his offer.

The chancellor awarded the deposit to Miss Giles, the prospective vendor, holding that the condition referred to the prospective purchaser's financial ability to purchase.

In reversing the chancellor, the court of appeals held that the condition had reference to the prospective purchaser's ability to acquire the other two tracts of land at his price, and not to the purchaser's financial ability to purchase. The court thought that the chancellor's interpretation of the condition placed a strained construction upon the words of the condition. Moreover, the chancellor apparently disregarded the undisputed proof of the circumstances showing the purpose of the offer, which was that the prospective purchaser was trying to buy all three tracts for business purposes.

Since the condition did not occur (Freeman could not get the other two properties), an enforceable contract between Freeman and Miss Giles did not come into existence. Therefore, the prospective purchaser was entitled to a return of his deposit of \$1,000 made with complainant.

In determining the meaning of the condition it was proper to look to all the surrounding circumstances, including the reading together of the three written offers containing the condition, since they were all part of the same transaction and referred to each other.<sup>40</sup> The court of appeals appears to have adopted the more logical and reasonable construction of the condition in holding that the entire transaction showed that the whole purpose of the prospective purchaser was to obtain the three contiguous properties for a business purpose. Hence, the condition referred to his ability to acquire the other two tracts at his designated price, rather than to his financial ability to purchase the tracts.

Of course, the legal effect of a condition in a promise is that the promisee gets no rights under the promise unless the condition occurs.<sup>41</sup> It did not occur. Therefore the prospective vendor got no rights under the promise of the prospective purchaser.

---

40. *Great American Indemnity Co. v. Utility Contractors, Inc.*, 21 Tenn. App. 463, 111 S.W.2d 901 (M.S. 1937); 3 WILLISTON, CONTRACTS § 628 (rev. ed. 1936); 17 C.J.S., *Contracts* § 298 (1939).

41. 3 WILLISTON, CONTRACTS § 665 (rev. ed. 1936).

## GIFTS OF BANK DEPOSITS

*Assignment of Bank Account—Delivery of Certificate of Deposit to Donee:* The Tennessee Court of Appeals was faced with the problem of the revocability of a gratuitous assignment in *Ray v. Leader Federal Sav. & Loan Ass'n*.<sup>42</sup> T. J. Mathis, just a few hours prior to his suicide, purported to assign a savings account in a savings and loan association to Lavera McCoy Smith. This assignment was attempted by means of a letter, accompanied by the pass book to the account, in which book Mathis, the assignor, wrote, "This is to certify that I have made the account over to Mrs. Lavera McCoy Smith." The accompanying letter also recited substantially the same thing. The letter containing the pass book and some cash was deposited in a rural mail box on a mail route between 10:15 and 10:45 in the morning, and the rural mail carrier picked up the letter and its contents. About one o'clock in the afternoon the letter was deposited in a post office in Memphis, where it was postmarked at 7:00 o'clock in the evening. The letter was delivered to Mrs. Smith, the assignee, the next morning.

In the meantime, at about 11:30 o'clock on the same morning the letter was mailed, Mathis, the assignor, committed suicide.

The account was claimed by Mrs. Smith, the assignee, and by decedent's administratrix. The Association brought an interpleader suit for determination of these adverse claims to the account.

In affirming the chancellor, the court of appeals awarded the savings account to the assignee, Mrs. Smith. It held that the decedent had made an assignment of the savings account and there was a sufficient delivery of the account book to constitute a valid gift inter vivos.

There are at least two main problems involved in the decision in this case. First, was this a revocable assignment, which would be revoked by the assignor's death? The court did not spell out this point very clearly. Second, if the attempted assignment was of such nature that it was not revocable, was there a delivery of the subject matter of the assignment sufficient to complete a gift?

Subject to certain well recognized exceptions, the right acquired by the assignee under a gratuitous assignment is terminated by the assignor's death.<sup>43</sup> There are certain instances, however, where the assignor's death does not terminate the right of the gratuitous assignee, for the reason that the assignment is irrevocable.<sup>44</sup> One of these in-

42. 292 S.W.2d 458 (Tenn. App. W.S. 1953).

43. *Biehl v. Biehl's Adm'x*, 263 Ky. 710, 93 S.W.2d 836 (1936); RESTATEMENT, CONTRACTS § 158(1) (1932); 2 WILLISTON, CONTRACTS § 438A (rev. ed. 1936).

44. RESTATEMENT, CONTRACTS § 158 (1932), sets forth the general rule as to the revocability and the exceptions:

"(1) The right acquired by the assignee under a gratuitous assignment is terminated by the assignor's death, by a subsequent assignment by the assignor, or by notification from the assignor received by the assignee or by the obligor, unless,

stances where the gratuitous assignment is irrevocable is the situation where the assignment is accompanied by what is popularly referred to as "indispensible documents." There are certain contractual rights embodied in such instruments that are more than mere evidence of a claim. Such documents are popularly looked upon as "property" and not merely as the evidence of property.<sup>45</sup> The law has given its approval to this popular view where, by contract or custom, enforcement of the right is conditioned on the surrender of the document evidencing the right.<sup>46</sup> The delivery of such document with donative intent transfers a right, irrevocable if made *inter vivos* and revocable if made *causa mortis* only on the condition to which all gifts *causa mortis* are subject.<sup>47</sup>

Completed gratuitous assignments involving such documents as life insurance policies, non-negotiable stocks and bonds and savings bank books fall into that category of irrevocable assignments.<sup>48</sup> Such documents usually must be surrendered upon payment, and possession is usually regarded as the concomitant of ownership.<sup>49</sup> Such choses in action can therefore be assimilated to chattels, and like chattels a gift can be made of them by *delivery*; that is to say, a gift can be made by manually handing the document to the donee.<sup>50</sup>

---

(a) the assignment is in a writing either under seal or of such nature as to be capable of transferring title to a chattel without delivery thereof and without consideration; or

(b) the assigned right is evidenced by a tangible token or writing, the surrender of which is required by the obligor's contract for its enforcement, and this token or writing is delivered to the assignee; or

(c) the assignor should reasonably expect the assignment to induce action or forbearance of a definite and substantial character by the assignee or a sub-assignee, and before termination of the assignee's right such action or forbearance is induced.

(2) If an assignee under an assignment revocable because gratuitous obtains before revocation,

(a) payment or satisfaction of the obligation, or

(b) judgment against the obligor, or

(c) a new contract of the obligor by novation, he can hold what he has thus acquired.

Whatever he obtains after revocation can be recovered from him by the assignor."

See also 2 WILLISTON, CONTRACTS §§ 438A-40A (rev. ed. 1936). Where the seal has efficacy, a gratuitous assignment under seal is a convenient way of making an assignment irrevocable. *Chase Nat'l Bank v. Sayles*, 11 F.2d 948 (1st Cir. 1926). But the efficacy of the seal has been abolished in Tennessee. TENN. CODE ANN. § 47-1701 (1956).

45. 2 WILLISTON, CONTRACTS § 439 (rev. ed. 1936).

46. *Ibid.*

47. *Ibid.*

48. *Ibid.*; BROWN, PERSONAL PROPERTY § 60 (2d ed. 1955); 4 CORBIN, CONTRACTS §§ 915, 916 (1951).

49. *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 71 (1880) (savings account book); BROWN, PERSONAL PROPERTY § 60 (2d ed. 1955); PATTERSON AND GOBLE, CONTRACTS 597, n.2 (3d ed. 1949).

50. BROWN, PERSONAL PROPERTY §§ 59-60 (2d ed. 1955). For a collection of cases dealing with the execution of a gift by the delivery of a deposit certificate see Annot., 40 A.L.R. 508, 509 (1926).



As a result of the development of this doctrine with respect to these documents, there has evolved a well established exception to the general rule that the death of the assignor can revoke a gratuitous assignment. In essence, this exception says that rights acquired by the assignee under a gratuitous assignment are not terminated by the death of the assignor where the assigned right is evidenced by a tangible token or writing, the surrender of which is required by the obligor's contract for its enforcement, and this token or writing is delivered to the assignee.<sup>51</sup> A checking account deposit book is not such a document. Consequently, the delivery of an ordinary deposit book for a checking account is not effective as an irrevocable gift of a checking account.<sup>52</sup> Though such act is evidence of an intention to give, it does not transfer dominion and control over the fund in the bank. Unlike the savings account passbook, the ordinary passbook is neither a statement of the account between the parties nor a necessary instrument for the withdrawal of the account.

In the case at hand such an "indispensable document" was involved. The assignor's contract with the Association, as evidenced by his account book, provided that in order to make withdrawals the account book must be presented. This account book the assignor (Mathis) assigned and purported to deliver to the assignee (Mrs. Smith).

Hence it seems clear that the decedent did undertake to make a gratuitous assignment that would not be revoked by his death, if there was sufficient delivery of the savings account book to the assignee to consummate an assignment before the assignor's death.

In the *Ray* case the court spent most of its time deciding whether there had been a sufficient delivery and did not very satisfactorily deal with the very basic question of whether the assignment was such that death of the assignor would revoke it. Had not the assignment been accompanied by the indispensable document of the savings account book, death likely would have revoked the assignment; and thus the assignee's rights would have been terminated, irrespective of how complete the delivery of the document of assignment may have been.<sup>53</sup>

The second problem in the *Ray* case is whether there was a valid delivery of the indispensable document of the savings account passbook

---

51. RESTATEMENT, CONTRACTS § 158(1)(b) (1932); 2 WILLISTON, CONTRACTS § 439 (rev. ed. 1936); BROWN, PERSONAL PROPERTY § 60 (2d ed. 1955).

52. *Jones v. Weakley*, 99 Ala. 441, 12 So. 420 (1893); *Szabo v. Speckman*, 73 Fla. 374, 74 So. 411 (1917); *Simpkins v. Old Colony Trust Co.*, 254 Mass. 576, 151 N.E. 87 (1926); *Pace v. Pace*, 107 Miss. 292, 65 So. 273 (1914); *Wilson v. Featherston*, 122 N.C. 747, 30 S.E. 325 (1898). *Contra*, *McCoy's Adm'r v. McCoy*, 126 Ky. 783, 104 S.W. 1031 (1907). In general, see *Havinghurst, Gifts of Bank Deposits*, 14 N.C. L. REV. 129 (1936).

53. *Cook v. Lum*, 55 N.J.L. 373, 26 Atl. 803 (Sup. Ct. 1893) (leading case); RESTATEMENT, CONTRACTS § 158(1) (1932); 4 CORBIN, CONTRACTS § 912 (1951); 2 WILLISTON, CONTRACTS §§ 440, 440A (rev. ed. 1936). See also note 52 *supra*.

to the assignee before the assignor's death. If there was no such delivery before his death then this gratuitous assignment was revoked.<sup>54</sup>

The court found in the *Ray* case that there had been a sufficient delivery of the assigned passbook when the assignor-decedent placed it in the mail box from which it was picked up by the mail carrier, processed thru the post office and delivered to the assignee, although the assignor had committed suicide while the documents were in the possession of the mail carrier.<sup>55</sup>

Mail, of course, can be withdrawn from the post office by the sender by making an application for withdrawal, as prescribed by postal regulations. The court recognized this.<sup>56</sup>

The surrender of power and dominion of the subject matter is generally regarded as the heart of the concept of "delivery."<sup>57</sup> A delivery to a third person (not the agent of the donor) on behalf of the donee is effective, though unknown to the donee, if the transaction is beneficial to the donee.<sup>58</sup> Delivery to a third person who is the agent, trustee or bailee of the donor will not constitute a "delivery" in the eyes of the law, and the gift will fail for lack of a complete "delivery," for in such cases the donor retains by means of control over the agent, dominion and control of the subject matter of the gift.<sup>59</sup>

Testing the *Ray* case by these propositions, the delivery of the letter and pass book to the postal system, which the court thought was not the assignee's agent, should be a sufficient delivery, even though the assignor did have the power to withdraw the document from the mail.

There is, however, one Tennessee case that poses some difficulty. In *Traders' Nat'l Bank v. First Nat'l Bank*,<sup>60</sup> the court held that since a letter could be withdrawn, and was withdrawn, from the mails, then the deposit of the letter in the mails by the bank was not a binding acceptance of a check by the bank when the check was deposited in the mails. In *Traders' Bank* the court also treated the mails as the agent of the sender. Hence a letter in the mails is in the possession of

---

54. *Biehl v. Biehl's Adm'x*, 263 Ky. 710, 93 S.W.2d 836 (1936); 2 WILLISTON, CONTRACTS § 438A (rev. ed. 1936).

55. *Ray v. Trader Sav. & Loan Ass'n*, 292 S.W.2d 458, 466 (Tenn. App. W.S. 1956). When a note representing a loan is deposited in the mails by the maker, there is a sufficient delivery although the maker died while the note was in the mails. *Trego v. Cunningham's Estate*, 267 Ill. 367, 108 N.E. 350 (1915).

56. A postal regulation permitting the withdrawal of a letter has been in effect since 1913. See *Dick v. United States*, 130 Ct. Cl. 703, 82 F. Supp. 326, 329 (1949); *Traders' Nat'l Bank v. First Nat'l Bank*, 142 Tenn. 229, 217 S.W. 977 (1920).

57. BROWN, PERSONAL PROPERTY § 41 (2d ed. 1955).

58. BROWN, PERSONAL PROPERTY § 40 (2d ed. 1955); 2 WILLISTON, CONTRACTS § 439 (rev. ed. 1936). See also *Scott v. Union & Planters' Bank*, 123 Tenn. 258, 272-73, 130 S.W. 757, 761-62 (1910).

59. BROWN, PERSONAL PROPERTY 94-100 (2d ed. 1955). See also *Scott v. Union & Planters' Bank*, 123 Tenn. 258, 272-74, 130 S.W. 757, 760-62 (1910).

60. 142 Tenn. 229, 217 S.W. 977 (1920).

an agent of the sender. If the questionable rationale of the *Traders' Bank* case were followed, there would seem to be no delivery sufficient to complete the gift in the case at hand, since the passbook was in the possession of the assignor's agent (the mails) when the assignor committed suicide.

*Deposits in Name of Depositor and Donee Claimant—Donee as Third Party Beneficiary:* In *Peoples Bank v. Baxter*,<sup>61</sup> the Tennessee Court of Appeals was confronted with the validity of an attempt by a donor-depositor to make a gift of a bank deposit by making the deposit payable to depositor, or on her death payable to the alleged donee, in an action to determine the rightful ownership of the deposit, as between the rival claimants to the deposit, consisting of the alleged donee and the remaining next of kin of the depositor.

On May 21, 1951 the depositor made a deposit for one year with Peoples Bank and received a certificate of deposit payable to the order of herself, "or payable on her death to Mrs. W. A. Nippers" (her daughter) on the return of the certificate. This deposit was renewed some four times, with some increases being made in the amount, but the form of the certificate remained the same. On May 6, 1955, the depositor died intestate before the maturity date of the last certificate of deposit in the amount of \$2,040. At least this last deposit certificate was delivered by her to Mrs. Nippers some time before the depositor's death. Mrs. Nippers claimed the deposit, and so did the depositor's other next of kin. To settle the matter, the depository bank filed a bill of interpleader, naming the rival claimants as defendant.

In her answer to the bill of interpleader, Mrs. Nippers claimed the fund on the ground that the depositor and the bank entered into a valid contract by which the depository bank agreed to pay the money to Mrs. Nippers. The opposing heirs of the depositor claimed the fund was part of Mrs. Baxter's estate, on several grounds. They alleged that the depositor was mentally incapable of entering into the contract represented by the certificate of deposit; and that Mrs. Nippers used fraud and undue influence on Mrs. Baxter.

The chancellor found in favor of Mrs. Nippers (the donee) and the other heirs appealed. The Tennessee Court of Appeals affirmed the chancellor by a two to one vote. The majority held for Mrs. Nippers on the ground that she was a third party donee beneficiary of the contract between the depository bank and the depositor, as represented by the certificate of deposit. Having concluded that Mrs. Nippers was a third party beneficiary of the contract between the bank and depositor, the court held that under the law of Tennessee she could en-

---

61. 298 S.W.2d 732 (Tenn. App. W.S. 1956).

force the contract, even though the suit is a bill of interpleader brought by the depository bank.

Judge Carney delivered a rather lengthy dissenting opinion in which he thought Mrs. Nippers should not receive these funds on "time deposit" as a gift. He thought the account should constitute a part of the estate of Mrs. Baxter. He felt that the whole transaction was testamentary in nature and did not comply with the law of wills.

A large number of courts do hold that when a bank accepts a deposit in the name of the depositor and another, it is regarded as undertaking an obligation to the persons named. Consequently, a contract for the benefit of a third person is established. The depositor is the promisee, as well as one of the beneficiaries of the contract, while the donee (the other person) is the third party donee beneficiary. The donee, as a third party beneficiary, can enforce the contract which the bank had with the depositor for the benefit of the donee beneficiary.<sup>62</sup> This is the theory on which the court upheld the gift of this bank account to Mrs. Nippers.

The majority of the court was convinced that there was neither a gift *inter vivos* nor *causa mortis* in the *Baxter* case. True, it clearly is not a gift *causa mortis*, because it was not made by depositor in contemplation of the imminent peril of death.<sup>63</sup> Also, there may not have been a gift of the deposit certificate itself at the time it was delivered to Mrs. Nippers. But to say that it is not a gift *inter vivos* is not very realistic, for in whatever light the matter is viewed there is a gratuitous transfer of funds of the donor to the donee, Mrs. Nippers. It would be much more to the point to say that the rules governing gifts of choses in possession do not control here, but that the gift is brought about through the medium of a binding contract between the depositor and the bank, whereby the bank agreed to pay the deposit to the donee, Mrs. Nippers.<sup>64</sup> Slice it any way you will, depositor made a gift to Mrs. Nippers, and it must be a gift *inter vivos*, else it is a testamentary disposition and it will fail.

What about the testamentary character of the transaction in question, since Judge Carney delivered a forceful dissent on the ground that the gifts to Mrs. Nippers should fail on the ground that the trans-

62. *First Nat'l Bank v. Mulich*, 83 Colo. 518, 266 Pac. 1110 (1928); *Illinois Trust & Sav. Bank v. Van Vlack*, 310 Ill. 185, 141 N.E. 546 (1923); *Perry v. Leveroni*, 252 Mass. 390, 147 N.E. 826 (1925); *New Jersey Title Guaranty & Trust Co. v. Archibald*, 91 N.J. Eq. 82, 108 Atl. 434 (Ct. Err. & App. 1919); *Cleveland Trust Co. v. Scobie*, 114 Ohio St. 241, 151 N.E. 373 (1926); *Reap v. Wyoming Valley Trust Co.*, 300 Pa. 156, 150 Atl. 465 (1930); *Deal's Adm'r. v. Merchants' & Mechanics' Savings Bank*, 120 Va. 297, 91 S.E. 135 (1917); *Wisner v. Wisner*, 82 W. Va. 9, 95 S.E. 802 (1918); *In re Staver's Estate*, 218 Wis. 114, 260 N.W. 655 (1935). This theory has been expressly rejected elsewhere. *Packard v. Foster*, 95 N.H. 47, 56 A.2d 925 (1948).

63. See BROWN, *PERSONAL PROPERTY* § 54 (2d ed. 1955).

64. See BROWN, *PERSONAL PROPERTY* § 65 (2d ed. 1955).

action did not satisfy the requirements of a testamentary disposition?

Actually it does not appear in the opinion that the heirs ever made any claim, either in the trial court or in the court of appeals that the transaction was testamentary. If the writer interprets the majority correctly, they give what strikes the writer as a wholly novel (if not weird) reason why they do not consider whether the transaction was testamentary. The majority seems to say that Mrs. Nippers (the donee) "concedes" that this was not a testamentary disposition and therefore they are precluded from passing upon the question whether the disposition was testamentary. If that is the reason why the majority did not consider the testamentary aspects, then we have a technique for winning lawsuits that not only is novel but also is nothing short of astounding. For we are thus introduced to the trial technique by which one party can win a lawsuit by "conceding" that the other party is in the wrong, for Mrs. Nippers would be the very party, and the only party who must successfully contend that the transaction was *not* testamentary, else she will lose the gift. Yet, the court has permitted her to cross that stile by "conceding" that it is *not* testamentary.

Assuming that the testamentary character of the transaction was properly before the court, what result should have been reached on that facet of the case? Admittedly the requirements of a testamentary disposition of property were not met.

If the evidence shows that the depositor intended that the putative donee should take no *present* interest in the fund, but only to the payment remaining on the depositor's death, then the weight of authority would strike down the attempted gift because of its testamentary character.<sup>65</sup> It is possible to uphold such gifts of bank accounts, over the objection that they are testamentary, on the theory that, although the enjoyment of the donee (Mrs. Nippers) may be postponed, there is nevertheless a *present* gift of a future right.<sup>66</sup> In the case at hand, where the form of the deposit is payable to the depositor, or in case of death to the claimant-donee, the transaction would seem to have all the earmarks of a testamentary disposition, if we stop there.<sup>67</sup>

Considering all the facts in the case at hand, however, was there a present gift of the deposit with enjoyment postponed until depositor's

---

65. *Cashman v. Mason*, 166 F.2d 693 (8th Cir. 1948); *Packard v. Foster*, 95 N.H. 47, 56 A.2d 925; *Bulen v. Pendleton Banking Co.*, 118 Ind. App. 217, 78 N.E.2d 449 (1948); *Onofrey v. Wolliver*, 351 Pa. 18, 40 A.2d 35, 155 A.L.R. 1074 (1944); *Battles v. Millbury Savings Bank*, 250 Mass. 180, 145 N.E. 55 (1924); *Sawyer v. Mabius*, 107 S.C. 369, 92 S.E. 1029 (1917).

66. *Innes v. Potter*, 130 Minn. 320, 153 N.W. 604, 3 A.L.R. 896 (1915); *Boyle v. Dinsdale*, 45 Utah 112, 143 Pac. 136 (1914); *Union Trust & Savings Bank v. Tyler*, 161 Mich. 561, 126 N.W. 713 (1910); *Candee v. Connecticut Savings Bank*, 81 Conn. 372, 71 Atl. 551 (1908); BROWN, *PERSONAL PROPERTY* § 65 (2d ed. 1955).

67. See *Vercher v. Roy*, 171 La. 524, 131 So. 658 (1930).

death; or on the other hand was there no intention that the claimant (Mrs. Nippers) should have a present interest in the deposit? Judge Carney marshals what he feels is sufficient evidence to warrant the conclusion that there was no intention that Mrs. Nippers should have a present interest. It strikes the writer, however, that it can be argued with some force, at least, that even though it be conceded that there was no intention that Mrs. Nippers should have a present interest at the date of deposit, nevertheless when the depositor delivered the certificate of deposit to Mrs. Nippers she did thereby show an intention to give Mrs. Nippers a present interest at the time she delivered the certificate. Whatever may have been depositor's previous intentions, if she delivered the deposit certificate to Mrs. Nippers, with a *present donative intent*, she divested herself of all control over the deposit and gave the present sole ownership to the donee, Mrs. Nippers.<sup>68</sup> In essence, it is arguable that she then made a gift to Mrs. Nippers by way of a gratuitous assignment of her present interest in the account to Mrs. Nippers and delivered to her the "indispensable document" (deposit certificate), as evidence of her intent to create a present interest in Mrs. Nippers. After she gave Mrs. Nippers the possession of the certificate of deposit, Mrs. Nippers alone could withdraw the funds, for as we saw earlier the possession of a certificate of deposit ("time deposit") is of such significance that it prevents the revocation of that assignment, although gratuitous, either by the assignor-donor's death or by her positive attempts to revoke.<sup>69</sup> The delivery of a certificate of deposit is a device by which a valid present gift of a bank deposit can be made, as we have seen already.<sup>70</sup> One writer concludes, after a searching examination of the cases dealing with gifts of bank accounts, that it "is practically impossible to show a testamentary intent by evidence of oral declarations when there has been delivery of a symbol."<sup>71</sup>

I suppose Judge Carney could properly say, however, that the evidence in the instant case shows that the deposit certificate was delivered to Mrs. Nippers only for the limited purpose of safekeeping and not for the purpose of creating in Mrs. Nippers a present interest—all of which may be entirely the correct analysis of the case.

#### ILLEGAL BARGAINS

*Enforceability of Agreements not to Compete:* In *Herbert v. W. G. Bush & Co.*<sup>72</sup> the Tennessee Court of Appeals was called upon to con-

---

68. Discussed at some length with *Ray* case, *supra* note 42.

69. See notes 44-47 *supra* and text supported thereby.

70. See notes 47-49 *supra* and text supported thereby.

71. Havinghurst, *Gift of Bank Deposits*, 14 N.C. L. REV. 129, 149 (1936).

72. 298 S.W.2d 747 (Tenn. App. M.S. 1956).

strue and apply the Tennessee statute<sup>73</sup> which declares that contracts and agreements which "lessen or which tend to lessen full and free competition" in the manufacture and sale of articles are against public policy, unlawful and void. This case arose in a somewhat unusual way. Plaintiff, who owned shares in defendant corporation, sold his shares of stock to said corporation and agreed not to compete in business with it. Plaintiff later sued to have his agreement not to compete declared against public policy and thus void under the statute.

The plaintiff (Herbert) was at one time president of defendant, W. G. Bush & Company, a corporation manufacturing and selling brick. Plaintiff served in that capacity, until he was discharged in 1949. Apparently plaintiff had been a potent force in helping to put Bush in an excellent business condition. Plaintiff's family owned a large part of the stock in the Bush Corporation. After protracted negotiations plaintiff sold his stock to Bush for cash and as a part of the sales agreement plaintiff agreed not to compete with Bush in its brick business for 25 years in any area where the defendant or any of its named affiliates were then operating. Some years later plaintiff decided to go into the business of manufacturing brick in competition with Bush. He then filed a suit in equity against the Bush Corporation, asking the court to strike down his agreement not to compete on the ground that it was in restraint of trade and void under the Tennessee statute.

The court of appeals affirmed the decree that plaintiff's agreement not to compete was in restraint of trade and void as violating the public policy declared by the Tennessee statute. The public interest in having plaintiff's agreement declared void was thought by the court to be superior to the interest of the defendant corporation in having the agreement enforced. The court further held that plaintiff was not estopped to retain the benefits of his contract of sale with Bush since the agreement was against the public policy of the state. The court also pointed out that this is not a suit to rescind the contract; hence there was no reason for requiring plaintiff to restore the benefits.

Not all agreements in restraint of trade are treated as against public policy and void under the Tennessee statute, but only those that constitute an "unreasonable" restraint.<sup>74</sup> In determining whether the particular restraint of trade comes within the statutory prohibition, Tennessee has thus adopted the "rule of reason" which is the test applied under the Sherman Anti-Trust Act.<sup>75</sup> For practical purposes,

---

73. TENN. CODE ANN. § 69-101 (1956).

74. *Baird v. Smith*, 128 Tenn. 410, 161 S.W. 492 (1913).

75. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). This "rule of reason" was expressly adopted and applied in *State ex rel. Attorney-General v. Burley Tobacco Growers' Ass'n*, 2 Tenn. App. 674 (E.S. 1926); *Dark Tobacco Growers' Ass'n v. Dunn*, 150 Tenn. 614, 266 S.W. 308 (1924); *Baird v. Smith*, 128 Tenn. 410, 161 S.W. 492 (1913).

it appears that the agreements and combinations in restraint of trade to which the Sherman Anti-Trust Act are applicable are the same as those that are made unenforceable by the common law. That is to say, the Sherman Act did not extend the field of unlawful agreements by making unlawful some agreements that had theretofore been lawful.<sup>76</sup> It merely took those agreements in restraint of trade that were already unenforceable at common law because the restraint was unreasonable and provided new penalties and enforcing sanctions.<sup>77</sup> Thus, if an agreement would be condemned as illegal under the Sherman Act, a similar agreement likely would be held unenforceable at common law.<sup>78</sup>

It should be remembered that the interpretation and application of the Sherman Act are variable with the time and place and climate of opinion, in the same fashion as are the determination and application of the rule of common law. Consequently, the criterion of "reasonableness" of the restraint, which is the test under both the Sherman Act and at common law, is not crystallized but must be determined by the courts, case by case.<sup>79</sup>

Since the Tennessee courts have construed the Tennessee statute involved in the case at hand to condemn only restraints of trade that are "unreasonable"—a term which is neither used nor defined in the statute—this question arises: When is such a restraint "unreasonable"? The purpose of any agreement restricting trade is almost always to lessen competition, and this purpose has been regarded as so inimical to the public interest that generally it is only in cases where the restrictive promise is "ancillary" to some other transaction that the validity of the restraint will be upheld.<sup>80</sup> Thus, if a dealer should pay a competitor for his naked promise to stay out of a competing business, the agreement would be an invalid restraint of trade stifling competition.<sup>81</sup> Where, however, the same promise not to compete is a part of

76. See 6 CORBIN, CONTRACTS § 1397 (1951).

77. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *American Tobacco Co. v. United States*, 221 U.S. 106 (1911); 6 CORBIN, CONTRACTS § 1397 (1951).

78. 6 CORBIN, CONTRACTS § 1397 (1951).

79. *Ibid.*

80. *Cline v. Frink Dairy Co.*, 274 U.S. 445, 462 (1927); *Pearson v. Duncan & Sons*, 198 Ala. 25, 73 So. 406 (1916); *Domurat v. Mazzaccoli*, 138 Conn. 327, 84 A.2d 271 (1951); *Vanover v. Justice*, 180 Ky. 632, 203 S.W. 321 (1918); *Bond Elec. Corp. v. Keller*, 113 N.J. Eq. 195, 166 Atl. 341 (Ch. 1933); *Burchell v. Capitol City Dairy, Inc.*, 158 Va. 6, 163 S.E. 81 (1932); see *Brecher v. Brown*, 235 Iowa 627, 17 N.W.2d 377, 378 (1945); 5 WILLISTON, CONTRACTS §§ 1636, 1641 (rev. ed. 1937); RESTATEMENT, CONTRACTS § 515 (1932); 36 AM. JUR., *Monopolies* § 54 (1941).

81. Non-ancillary agreements eliminating actual competition as well as those eliminating potential competition have been invalidated. *Actual competition*: *Oliver v. Gilmore*, 52 Fed. 562 (C.C.D. Mass. 1892); *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 28 So. 669 (1900); *Clemons v. Meadows*, 123 Ky. 178, 94 S.W. 13 (1906); *Clark v. Needham*, 125 Mich. 84, 83 N.W. 1027 (1900).



a transaction by which the competitor's business was purchased, the promise not to compete may be valid in the absence of a tendency of dangerous monopoly.<sup>82</sup>

Was plaintiff's promise not to compete in the *Herbert* case ancillary to some other transaction? He did not sell a business to defendant, but only his shares of stock in defendant. In so far as the requirement of being "ancillary" is concerned, plaintiff's promise not to compete should not be invalidated by the Tennessee statute, for it has been held repeatedly that a shareholder in a corporation has an interest in the good will as well as the tangible assets to such a degree as to justify a promise by him, made to a purchaser of his shares, that he will not thereafter compete with the corporation within a reasonable space and time.<sup>83</sup> This reasoning would seem to have force, however, only where the selling shareholder has been actively engaged in the conduct of the business with wide acquaintance with its customers, as in the case at hand.<sup>84</sup> For unless the corporation's good will would be materially affected by the shareholder's entry into the competing business, it is difficult to see how his promise differs in substance from a naked promise not to compete which is generally declared unenforceable.

If the promise of plaintiff not to compete in the brick business is to be struck down as against the public policy of Tennessee, as expressed in her statute, we must find from other aspects of the case that it was an "unreasonable" restraint of trade since it satisfies the requirement of being "ancillary" to some other transaction. We will next explore other facets that may lead a court to conclude that a promise not to compete is "unreasonable" and therefore unenforceable.

Earlier in the history of the law pertaining to restraints of trade, the courts had to some extent developed rather definite, but artificial, rules for determining whether a particular contract in restraint of trade would be considered against public policy and unenforceable, even though the restraint was ancillary to some other transaction. Thus, an agreement in restraint of trade that was unlimited as to both time and space would generally be treated as a general restraint and

---

*Potential competition:* *Shapard v. Lesser*, 127 Ark. 590, 193 S.W. 262 (1917); *Gross, Kelley & Co. v. Bibb*, 19 N.M. 495, 145 Pac. 480 (1914); *Smith v. Koussakis*, 172 S.W. 586 (Tex. Civ. App. 1915); *Klauff v. Pratt*, 117 Va. 739, 86 S.E. 74 (1915).

82. *Harris Calorific Co. v. Marra*, 345 Pa. 464, 29 A.2d 64 (1942); see 5 WILLISTON, CONTRACTS §§ 1636, 1641 (rev. ed. 1937) and cases cited.

83. *Ireland v. Craggs*, 56 F.2d 785 (5th Cir. 1932); *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34 (6th Cir. 1903); *Martin v. Ratliff Furniture Co.*, 264 S.W. 2d 273 (Ky. 1954); *Hopkins v. Krantz*, 334 Mich. 300, 54 N.W.2d 671 (1952); *Hackenheimer v. Kurtzman*, 235 N.Y. 57, 138 N.E. 735 (1923); see 6 CORBIN CONTRACTS § 1388 (1951); 5 WILLISTON, CONTRACTS § 1641 (rev. ed. 1937).

84. See 6 CORBIN, CONTRACTS § 1388 (1951). An employee of a seller who has no interest in the business and no good will could not validly bind himself not to compete with the buyer. *Domurat v. Mazzaccoli*, 138 Conn. 327, 84 A.2d 271 (1951).

void.<sup>85</sup> Also, an agreement in restraint of trade limited as to time but unlimited as to space often was considered void.<sup>86</sup> On the other hand, an agreement imposing a restraint reasonably limited in space would not be treated as against public policy and void, although it was unlimited as to time.<sup>87</sup> However, an agreement in which the restraint was limited as to both time and space was much more likely to be upheld and enforced.<sup>88</sup>

These artificial rules which spoke only about whether the promise in restraint of trade was unlimited as to time and/or space have virtually disappeared, and the ultimate test now employed by the judiciary in determining the enforceability of a restraint is whether in light of all the circumstances the restriction is "unreasonable."<sup>89</sup> In forming a judgment on the question of "reasonableness" the court (not the jury) will consider (a) whether the promise is wider than is necessary for the protection of the promisee in some legitimate interest, (b) the effect of the promise on the promisor and (c) the effect upon the public.<sup>90</sup> The limitations of time and space, of course, may still be of importance, even under this approach, in determining the reasonableness.<sup>91</sup> The American law is perhaps more concerned with the injury to the public—not that arising indirectly from injury to the promisor, but that arising from lack of competition with the consequent tendency toward at least a partial monopoly, owing to the withdrawal of the promisor from the field.<sup>92</sup> Thus, a contract in restraint of trade and detrimental to the public interest may be declared violative of public policy and void, although it is reasonable between the parties.<sup>93</sup> If, on consideration of all the three facets of "reasonableness," the restriction is such only as to afford fair protection to the interest of the promisee

---

85. See 5 WILLISTON, CONTRACTS § 1639 (rev. ed. 1937); 17 C.J.S., *Contracts* § 242 (1939).

86. See 5 WILLISTON, CONTRACTS § 1639 (rev. ed. 1937); 17 C.J.S., *Contracts* § 243 (1939).

87. See 5 WILLISTON, CONTRACTS § 1638 (rev. ed. 1937); 17 C.J.S. *Contracts* § 244 (1939).

88. See 17 C.J.S. *Contracts* § 245 (1939).

89. See 6 CORBIN, CONTRACTS § 1386 (1951); 5 WILLISTON, CONTRACTS § 1639 (rev. ed. 1937).

90. See 6 CORBIN, CONTRACTS § 1384 (1951); 5 WILLISTON, CONTRACTS § 1636 (rev. ed. 1937). For an opinion that is unbelievably all-inclusive in its collection of authorities dealing, in part, with these three facets of "reasonableness," see *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E.2d 685 (Ohio C.P. 1952).

91. See 5 WILLISTON, CONTRACTS §§ 1638, 1639 (rev. ed. 1937).

92. *Fairbanks Morse & Co. v. Texas Elec. Serv. Co.*, 63 F.2d 702 (5th Cir.), *cert. denied*, 290 U.S. 655 (1933); see *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E.2d 685, 700 (Ohio C.P. 1952); 5 WILLISTON, CONTRACTS §§ 1635, 1640 (rev. ed. 1937) (promise implied on sale of good will); RESTATEMENT, CONTRACTS § 518 (1932).

93. *Farr v. Stearman*, 264 Ill. 110, 105 N.E. 957 (1914); see *Arthur Murray Dance Studios, Inc. v. Witter*, 105 N.E.2d 685, 700-01 (Ohio C.P. 1952); 5 WILLISTON, CONTRACTS § 1636 (rev. ed. 1937); 17 C.J.S., *Contracts* § 249 (1939).

and not so large as to interfere with the public interest or impose undue hardship on the party restricted, the agreement will be held reasonable and enforceable.<sup>94</sup> Each case in which the question of reasonableness of restraint arises must be determined according to its own particular facts.<sup>95</sup>

The limitations of space, while not ordinarily conclusive, may still be of importance in determining the reasonableness not only from the standpoint of the public interest but also as between the parties themselves. The purpose of enforcing a restraining promise that is ancillary to a contract for the sale of a business with its good will is to make good will a salable asset by protecting the purchaser in the enjoyment of that which he has bought.<sup>96</sup> It should follow that a promise by a seller not to compete with the buyer is illegal and unenforceable insofar as the promised restraint is in excess of the extent of the good will purchased. That seems to be the law.<sup>97</sup> A restraint is illegal and unenforceable if it covers territory greater in extent than that in which the seller has already developed business and good will, and it is not made reasonable by the fact that the buyer was already doing business in such larger territory.<sup>98</sup> In the instant case, plaintiff's agreement not to compete extended only to the areas in which defendant and its named subsidiaries were operating at the time of the agreement. Thus, from the standpoint of territorial limitations, plaintiff's agreement not to compete should be enforceable in so far as the parties to the agreement are concerned.

The fact that a restrictive promise is unlimited as to time, or is for a very long period of time, may militate against the reasonableness of the restraint, but it is not conclusive of unreasonableness; if the promise is otherwise unobjectionable, it will be upheld.<sup>99</sup> Of course, it should not be necessary or reasonable for the restraint to continue as long as the business continues, but only as long as the personal business and customer relationships of the seller (plaintiff in the case at

---

94. *E.g.*, *Goldberg v. Tri-States Theatre Corp.*, 126 F.2d 26 (8th Cir. 1942); *Martin v. Ratliff Furniture Co.*, 264 S.W.2d 273 (Ky. 1954); see *State ex. rel. Attorney-General v. Burley Tobacco Growers' Ass'n*, 2 Tenn. App. 674, 685 (E.S. 1926); 17 C.J.S., *Contracts* § 247 (1939).

95. See 6 CORBIN, *CONTRACTS* § 1397 (1951); 17 C.J.S., *Contracts* § 247 (1939).

96. *Checkert-Columbia Co. v. Lipman*, 201 Md. 494, 94 A.2d 433 (1953); *Mattis v. Lally*, 138 Conn. 51, 82 A.2d 155 (1951); see 6 CORBIN, *CONTRACTS* §§ 1385, 1387 (1951); 5 WILLISTON, *CONTRACTS* § 1641 (rev. ed. 1937).

97. *Beit v. Beit*, 135 Conn. 195, 63 A.2d 161 (1948); *Checkert-Columbia Co. v. Lipman*, 201 Md. 494, 94 A.2d 433 (1953); 6 CORBIN, *CONTRACTS* § 1387 (1951); 5 WILLISTON, *CONTRACTS* §§ 1635, 1641 (rev. ed. 1937).

98. See *Schultz v. Johnson*, 110 N.J. Eq. 566, 160 Atl. 379 (Ct. Err. & App. 1932); 6 CORBIN, *CONTRACTS* § 1387 (1951).

99. *Wright v. Scotton*, 13 Del. Ch. 402, 121 Atl. 69 (Sup. Ct. 1923); *Storer v. Brock*, 351 Ill. 643, 184 N.E. 868 (1933); *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 419 (1887) (99 years); 6 CORBIN, *CONTRACTS* § 1391 (1951); 5 WILLISTON, *CONTRACTS* § 1638 (rev. ed. 1937).

hand) remain such that his re-entry into the business would siphon off business from the buyer (defendant in the case at hand). After such danger has passed, the public interest in free competition should govern; and the restraint should be struck down.<sup>100</sup> In essence, the policy of allowing the owner of property to sell it on such terms as to secure to the buyer the value of the property must be balanced against the policy of resisting agreements that place restrictions on competition.<sup>101</sup>

Plaintiff's promise not to compete, in the instant case, had a rather long time limitation (25 years), and that may be longer than is reasonably necessary for the protection of the defendant. If that is true, the court need not have invalidated the entire agreement because it thought the time limit to be unreasonably long. The court may properly fix the limit of reasonableness and limit its enforcement accordingly.<sup>102</sup>

In the instant case, the court laid its heaviest emphasis on the notion that plaintiff's agreement not to compete with defendant should be declared unenforceable because of the public welfare, feeling, presumably that the agreement would lessen the full and free competition in the manufacture and sale of brick and would tend to control the price of brick to the consumer. In support of its thesis that the agreement should be nullified for the benefit of the public, the court arrived at a conclusion which seems a little difficult to support. The court said:<sup>103</sup>

If the agreement not to compete is declared void, the public in the trade area involved will benefit by being able to purchase brick at a reduction of \$5 to \$8 a thousand, or at a savings of 20% to 25% of the present cost price.

While there can be little doubt that such a bonanza to the purchasing public would be most persuasive as an argument for upsetting plaintiff's agreement not to compete, the writer is considerably at loss to understand just how that conclusion could be established as a *fact*. The opinion by the court does not shed any light on this questionable and important point.

Moreover, the court gives very little attention to the question

---

100. 6 CORBIN, CONTRACTS § 1391 (1951).

101. 5 WILLISTON, CONTRACTS § 1636 (rev. ed. 1937).

102. In *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. (20 Wall.) 64 (1873), a restraint for "a period of 10 years" was enforced for only seven. In *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955), an employee's promise not to compete for ten years was held unreasonable, but the court did enforce the agreement for the reasonable period of three years from the date of the judgment. In *Lewis v. Krueger, Hutchison & Overton Clinic*, 153 Tex. 363, 269 S.W.2d 798 (1954), the restraint agreed to by a young physician had no time limitation. The court enforced it for a reasonable period of three years.

103. 298 S.W. 2d at 752.

whether the promisee (defendant corporation) needed the protection from plaintiff's competition. It seems to dismiss this aspect of the case with the observation that the good will of the defendant corporation could not be hurt much if plaintiff went into competition, in light of the fact that defendant had fired plaintiff. There would seem to be a *non sequitur* in that bit of judicial reasoning, however, as the reason for firing plaintiff may have no connection whatsoever with the effect of plaintiff's competition upon defendant.

Balancing its conception of the detriment to the public interest from the lack of plaintiff's competition in the brick business against the protection defendant needed with respect to that competition, the court concluded that the public interest tipped the scales against the validity of plaintiff's agreement not to compete. The court felt that the Tennessee statute was enacted principally to protect the public.

In conclusion, it may not be amiss to quote from the opinion of another court in a similar case, in which a shareholder had likewise sold his stock to his corporation, agreed not to compete and later violated his agreement by competing, claiming his agreement was void as contrary to public policy. In *Ireland v. Craggs*<sup>104</sup> the court enforced the agreement not to compete, saying:<sup>105</sup>

It is the rule generally that, where one tardily ascertaining, after he has had the fruits of a contract, that his agreement was illegal, invokes the public interest "the interest of others than the parties" to enable him to keep the fruits of his contract without standing to his bargain, courts are slow to follow such interested leading. They will cautiously determine for themselves whether there is a dominant public interest, an "interest of others than the parties," involved in the enforcement of the contract sufficient to overthrow the fundamental public policy that men full grown and of sound mind may not, while holding to the benefits of a contract, escape its burdens.

*Validity of Agreement by Public Official to take less Compensation than that Prescribed by Law:* Can a public official or a candidate for public office legally bind himself to take less compensation than that prescribed by law? Such promises of frugality would, no doubt, be most alluring campaign material to many voters. The Tennessee Supreme Court held in *Lane v. Sumner County*<sup>106</sup> that such an agreement by a public official is against public policy and void. It followed, therefore, that the public official who had made such an agreement was not legally bound by the agreement and was entitled to recover the full amount of compensation prescribed by law. In that case the court invalidated, as against public policy, an agreement by a circuit

---

104. 56 F.2d 785 (5th Cir. 1932).

105. *Id.* at 787.

106. 298 S.W.2d 708 (Tenn. 1957).

court clerk not to claim certain compensation to which he was entitled.

It seems that certain public officials, including clerks of circuit courts, are entitled to apply particular fees collected during any term of their office to salary deficiencies occurring in prior years. This particular clerk had agreed with the county court not to make a claim for these fees and the circuit court had entered a decree to that effect based on the agreement. It is not clear from the opinion whether the agreement was made before or after the clerk had acquired a right to the fees. The clerk, as complainant, later petitioned to have that part of the decree stricken on the ground that the agreement was void as contrary to public policy. The Supreme Court affirmed the chancellor who had decreed that the agreement in which it was attempted to reduce the clerk's compensation from that provided by statute is against public policy and void.

A bargain by a public official or of one who is a candidate for a public office for the payment of salary or fees smaller than those prescribed by law has many times been held invalid as violative of public policy.<sup>107</sup> Ordinarily, such agreements would seem to encourage "trafficking in public office." That is to say, such agreements would encourage the granting of public office to the lowest bidder, irrespective of his qualifications for the office.<sup>108</sup> Where the agreement is executed by the actual payment and acceptance of the agreed cut-rate salary in full satisfaction, there is a split of authority as to whether the official can recover the rest of the salary provided by law. There are a good many decisions holding that no further claim can be made, the courts often saying that the public official is estopped to claim the residue of his salary.<sup>109</sup> But the actual payment of the lesser agreed amount should not render the agreement any the less against public policy, for the unwholesomeness of "trafficking in public office" has not been cured

---

107. *United States v. Andrews*, 240 U.S. 90 (1916) (army officer); *Glavey v. United States*, 182 U.S. 595 (1901); *Miller v. United States*, 103 Fed. 413 (C.C.S.D.N.Y. 1900); *Hamilton v. Edmundson*, 235 Ala. 97, 177 So. 743 (1937); *Nortonville v. Woodward*, 191 Ky. 730, 231 S.W. 224 (1921); *Allen v. City of Lawrence*, 318 Mass. 210, 61 N.E.2d 133 (1945); *Saylor v. Trotter*, 148 Tenn. 359, 255 S.W. 590 (1923); *State ex rel. Kercheval v. Mayor and City Council of Nashville*, 83 Tenn. 697 (1885); 6 CORBIN, CONTRACTS § 1453 (1951); 6 WILLISTON, CONTRACTS § 1730 (rev. ed. 1938); Annot., 70 A.L.R. 972 (1931).

108. *Southern Bell Tel. and Tel. Co. v. Mitchell*, 145 Ga. 539, 89 S.E. 514 (1916); *Allen v. City of Lawrence*, 318 Mass. 210, 61 N.E.2d 133 (1945); *Pren-tiss v. Dittmer*, 93 Ohio St. 314, 112 N.E. 1021 (1916); *State ex rel. Kercheval v. Mayor and City Council of Nashville*, 83 Tenn. 697 (1885). A promise to the voters by a candidate to serve for less than the salary prescribed by law, not only has been declared illegal, but it also can vitiate the election. *State v. Collier*, 72 Mo. 13 (1880); *Moore v. White*, 174 Tenn. 32, 122 S.W.2d 451 (1938). Such campaign promises by candidates were held illegal and not enforceable in *Galpin v. Chicago*, 269 Ill. 27, 109 N.E. 713 (1915) and *State ex rel. Kercheval v. Mayor and City Council of Nashville*, 83 Tenn. 697 (1885).

109. *O'Hara v. Town of Park River*, 1 N.D. 279, 47 N.W. 380 (1890); *State ex rel. Hiss v. City of Akron*, 56 Ohio App. 28, 10 N.E.2d 1 (1936); *DeBoest v. Gambell*, 35 Ore. 368, 58 Pac. 72 (1899).

by the performance of the illegal bargain. The contract is not purged of the taint of illegality by reason of having been executed. Consequently, there is good authority which does permit a claim for the remainder of the legally prescribed compensation although the agreement to take less has been executed.<sup>110</sup> The courts of this persuasion will not raise an estoppel or waiver of the right to compensation fixed by statute. Tennessee goes along with those courts which hold that such acceptance of the smaller agreed sum as full satisfaction will not create an estoppel when the public official later tries to recover the remainder of the compensation.<sup>111</sup> Also, Tennessee has permitted the creditors of such public official to recover the remainder of the legally prescribed compensation, although the official had accepted the lesser agreed amount.<sup>112</sup> The acceptance of the lesser sum was said not to estop either the office holder or his creditors from recovering the difference between the amount paid and the amount prescribed by law, since it is against public policy for a public official to agree to remit part of his salary fixed by law. Tennessee has raised the bar of estoppel where the agreement was entered into under apparent statutory right, although the statute was later declared unconstitutional.<sup>113</sup> Likewise an official has been estopped to raise the constitutionality of a statute reducing his compensation for a future term of office when he campaigned on the promise that he would operate under the new law and did take the oath of office under the new law, and operated for some time under it.<sup>114</sup>

Moreover, part payment of a liquidated debt generally is not regarded as a valid discharge, even if so accepted by the creditor, since there is not a sufficient consideration for the promise to accept the lesser amount. Thus, the public official's agreement to take less than the compensation fixed by law, when made after the rendition of the service, is unenforceable for lack of consideration.<sup>115</sup> If payment is received and accepted under a bargain made before the services are

---

110. *Glavey v. United States*, 182 U.S. 595 (1901); *Miller v. United States*, 103 Fed. 413 (C.C.S.D.N.Y. 1900); *Hamilton v. Edmundson*, 235 Ala. 97, 177 So. 743 (1937); *City School Corp. v. Hickman*, 47 Ind. App. 500, 94 N.E. 828 (1911); *Louisville v. Thomas*, 257 Ky. 540, 78 S.W.2d 767 (1935); *Allen v. City of Lawrence*, 318 Mass. 210, 61 N.E.2d 133 (1945); *Pitt v. Board of Education of City of New York*, 216 N.Y. 304, 110 N.E. 612 (1915); *Rhodes v. Tacoma*, 97 Wash. 341, 166 Pac. 647 (1917); 6 WILLISTON, CONTRACTS § 1730 (rev. ed. 1938).

111. *Draper v. Putnam County*, 25 Tenn. App. 269, 156 S.W.2d 348 (1941); cf. *Moore v. White*, 174 Tenn. 32, 122 S.W.2d 451 (1938); *State ex. rel. Kercheval v. Mayor and City Council of Nashville*, 83 Tenn. 697 (1885).

112. *Moore v. White*, 174 Tenn. 32, 122 S.W.2d 451 (1938), 15 TENN. L. REV. 720 (1939).

113. *Collier v. Montgomery County*, 103 Tenn. 705, 54 S.W. 989 (1900).

114. *Saylor v. Trotter*, 148 Tenn. 359, 255 S.W. 590 (1923).

115. *Hamilton v. Edmundson*, 235 Ala. 97, 177 So. 743 (1937); *Rhodes v. City of Tacoma*, 97 Wash. 341, 166 Pac. 647 (1917); *Ballangee v. Board of County Comm'rs*, 66 Wyo. 390, 212 P.2d 71 (1949).

performed there would seem to be no lack of consideration for the discharge of the remainder of the official's compensation claim; but if that bargain is illegal, the consideration falls with it.<sup>116</sup>

If the official collects his statutory fee or salary and then pays an agreed part of it back into the public treasury, that has been held to constitute a discharge of any claim by reason of an executed gift. He is estopped to claim the amount.<sup>117</sup> Also, the courts seem not to find any violation of public policy where an official, pursuant to statutory authorization, assents to a reduction in salary in times of depression and shortage of public income, and a bargain for a reduction in salary made by the official has been held valid.<sup>118</sup>

#### DURESS

*Making of Contract—Effect of Threat of Prosecution on Release Obtained Thereby:* In *Exum v. Washington Fire & Marine Insurance Co.*,<sup>119</sup> the Tennessee Court of Appeals held that a release of a fire insurance claim executed by the insured under an implied threat of prosecution or public charge of arson of the burned insured property was executed under duress and was void and of no effect. Plaintiff, the insured under an automobile fire insurance policy, sued to recover on his fire insurance policy covering an automobile which was destroyed by fire. The insurance company, defendant, held a release of liability executed by the insured by virtue of which release the insured was paid \$1.00, and \$131.85 was paid to the bank holding insured's note for the residue of the purchase price of the burned automobile. The face amount of the policy was \$350. In his bill of complaint in his suit on the policy, plaintiff-insured, a thirty-seven-year-old negro man with an eighth grade education, took the position that the release was not binding on him. He contended: (a) that he did not know what he was signing when he executed the release; and (b) that the release was void and of no effect because it was executed under a threat of prosecution for arson for burning the insured automobile, which constituted duress.

Disagreeing with plaintiff's contention that the release was not binding on him, the trial court entered judgment for the defendant-insur-

116. See 6 CORBIN, CONTRACTS § 1453 (1951).

117. *Hobbs v. City of Yonkers*, 102 N.Y. 13, 5 N.E. 778 (1886). *But cf.*; *Galpin v. Chicago*, 269 Ill. 27, 109 N.E. 713 (1915).

118. In *Vander Burgh v. Bergen County*, 120 N.J.L. 444, 200 Atl. 561 (Ct. Err. & App. 1938) the agreement of a judge to take less than salary prescribed by law was upheld, where a statute authorized such agreement in times of financial distress. The action by the judge was declared patriotic. An agreement to take less in an emergency, where agreement was authorized by statute, was enforced in *McCarthy v. McGoldrick*, 266 N.Y. 199, 194 N.E. 406 (1935).

119. 297 S.W.2d 805 (Tenn. App. W.S. 1955).



ance company. On appeal, the court of appeals reversed the trial court and entered judgment for plaintiff-insured, for the difference between the face amount of the policy and the amount paid the bank in connection with the release. The court of appeals did not hold that the release was void because insured did not know he was signing a release, but did hold the release void and of no effect because it was executed under threats of criminal prosecution for arson, which constituted duress.

The undisputed evidence showed that an agent of the defendant-insurance company investigated the fire loss and refused to pay the loss, telling the plaintiff-insured that he did not believe insured's story as to how the fire occurred and that the matter would be referred to the State Fire Marshal for further investigation as to the possibilities of arson. The agent did report the matter to the Fire Marshal's office and further investigation was made. Plaintiff-insured was required by the Fire Marshal to go to the Fire Marshal's office, where he was interrogated by both the Marshal and the insurance agent. They told insured they believed he burned the automobile. Insured refused to admit burning it. While in the Fire Marshal's office, insured agreed that he would settle for the balance he owed the bank, rather than have his reputation ruined. The release was then executed while insured was in custody of the Fire Marshal.

The court of appeals felt that this undisputed evidence was clear, cogent and convincing and led to the inescapable conclusion that the release was executed under an implied threat of prosecution or public charge of arson. The court then concluded that the release was executed under such circumstances that insured's act was not done as a free and voluntary act on his part, but as a result of duress, and hence the release should be considered void and of no effect.

The modern tendency of the courts is to hold that any unlawful threats which do in fact overcome the will of the person threatened, thus actually inducing him to do an act which he would not otherwise have done and which he was not bound to do, constitutes duress; and this is a question that must be determined by considering the age, sex, capacity, relation of the parties and all the attendant circumstances.<sup>120</sup>

---

120. *Ingalls v. Neidlinger*, 70 Ariz. 40, 216 P.2d 387 (1950); *Slade v. Slade*, 310 Ill. App. 77, 33 N.E.2d 951 (1941); *Morreil v. Amoskeag Sav. Bank*, 90 N.H. 358, 9 A.2d 519 (1939); *Simpson v. Harper*, 21 Tenn. App. 431, 111 S.W.2d 882 (M.S. 1937); see *Darnell-Love Lumber Co. v. Wiggs*, 144 Tenn. 113, 230 S.W. 391 (1921); 5 WILLISTON, *CONTRACTS* §§ 1604, 1605 (rev. ed. 1937); *RESTATEMENT, CONTRACTS* § 493 (1932): "Duress may be exercised by

- (a) personal violence or a threat thereof, or
- (b) imprisonment, or threat of imprisonment, except where the imprisonment brought about or threatened is for the enforcement of a civil claim, and is made in good faith in accordance with law, or
- (c) threats of physical injury, or of wrongful imprisonment or prosecution of a husband, wife, child, or other near relative, or

There are a number of decisions holding that a threat of criminal prosecution does not constitute such duress as to make voidable a transaction induced thereby.<sup>121</sup> The arguments advanced in support of this view are two-fold: (1) that whether the person threatened is guilty or not, a threat of prosecution is not necessarily a threat of immediate arrest and imprisonment, and, is not, therefore, sufficient means of terrorizing another; (2) that if the threatened person is guilty, the threat is one which the person criminally injured has a right to make.<sup>122</sup>

However, the court of appeals is supported both by reason and by good authority in taking the opposite position to the effect that threats of criminal prosecution may constitute duress.<sup>123</sup> Mr. Williston, an eminent authority in the field of contract law, is of the firm conviction that the view which says that threats of criminal prosecution may not be duress is unsound. He is of the opinion that everyone knows that the threat of a well-founded prosecution, which is likely to end in imprisonment, is often quite sufficient to put even a brave man in fear. He also thinks that the argument of this view goes too far, for if sound, threats of prosecution without cause likewise could not be duress, and most courts agree that threats of ill-founded criminal prosecution may be duress.<sup>124</sup> As to the argument that the threat of criminal prosecution can not be duress because the injured party had a right to make the threat, Mr. Williston and those of his persuasion are of the opinion that this argument, too, is unsound. The authorities of this view treating the threats as duress regard it as an improper effort of the threatener to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has thus overcome the mind and will of another for his own advantage, by threatening criminal prosecution, is thought to be guilty of a perversion

- (d) threats of wrongfully destroying, injuring, seizing or withholding land or other things, or
- (e) any other wrongful acts

that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering the transaction."

121. 5 WILLISTON, *CONTRACTS* § 1612 (rev. ed. 1937); 17A AM. JUR., *Duress and Undue Influence* § 13 (1957); Annot., 17 A.L.R. 325, 339 (1922).

122. See, e.g., *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. 272, 273 (1886); *Ingebrigt v. Seattle Taxicab & Trf. Co.*, 78 Wash. 433, 139 Pac. 188, 189 (1914); 17A AM. JUR., *Duress and Undue Influence* § 14 (1957).

123. *Belote v. Henderson*, 45 Tenn. 471 (1868); *Simpson v. Harper*, 21 Tenn. App. 431, 111 S.W.2d 882 (M.S. 1937) (threat to prosecute husband of defendant-indorser constituted duress which gave indorser a defense). See *Ingalls v. Neifinger*, 70 Ariz. 40, 216 P.2d 387, 390-91 (1950); *Coleman v. Crescent Insulated Wire & Cable Co.*, 350 Mo. 781, 168 S.W.2d 1060, 1067 (1943); *Morreill v. Amoskeag Sav. Bank*, 90 N.H. 358, 9 A.2d 519, 524 (1939); 5 WILLISTON, *CONTRACTS* §§ 1612, 1613, 1614 (rev. ed. 1937); *RESTATEMENT, CONTRACTS* § 493 (1932); 17A AM. JUR., *Duress and Undue Influence* § 12 (1957).

124. *Lighthall v. Moore*, 2 Colo. App. 554, 31 Pac. 511, 512 (1892).

and abuse of laws which were made for another purpose.<sup>125</sup> The thinking of Mr. Williston and those courts that agree with his view is that where anything other than satisfaction of the precise civil obligation for which a criminal is liable is obtained by coercion through threats of prosecution by the creditor, the transaction should be voidable on the grounds of duress.<sup>126</sup> The opportunities for abuse are too considerable to allow creditors to use such means to enforce settlements. Also, where the threat of prosecution induces fear of disgrace, it may constitute duress.<sup>127</sup>

Having decided that the implied threat of criminal prosecution for arson constituted duress, in the case at hand, the court of appeals then declared that such duress rendered the release executed by plaintiff-insured "void and of no effect." In declaring the release void and of no effect, the court seems to have gotten itself on somewhat shaky grounds; for duress, as an inducement, generally renders the transaction "voidable" only.<sup>128</sup> That distinction, while not material in the case at hand, can become crucial. The right of the coerced party to rescind a transaction induced by duress ordinarily is a defeasible one which may be lost by his ratification, because it is voidable only and not absolutely void.<sup>129</sup> Or, in situations simply induced by duress, equity will not give relief if land, chattels or negotiable instruments acquired by the duress have gotten into the hands of a bona fide purchaser for value. Thus, where we have a "duress in the inducement," such as in the case at hand, the intervening bona fide purchaser gets an indefeasible title.<sup>130</sup> There may be certain kinds of duress which do make a transaction actually void. Justice Holmes thought that the transaction would be void where one by force compels another to go through certain indications of assent, as by taking his hand and forcibly guiding it. No contract would be made under such circumstances, for there would be a mere automaton and no real expression of assent.<sup>131</sup> That was not the situation in the case at hand, however. Likewise, where

125. See *Morse v. Woodworth*, 155 Mass. 233, 251, 29 N.E. 525 (1892).

126. 5 WILLISTON, CONTRACTS § 1616 (rev. ed. 1937).

127. *Citizens' Nat'l Bank v. Polski*, 122 Neb. 658, 241 N.W. 110 (1932); *Harper v. Murray*, 184 Cal. 290, 193 Pac. 576 (1920).

128. 5 WILLISTON, CONTRACTS §§ 1616, 1624, 1626 (rev. ed. 1937).

129. 5 *id.* § 1626; 17A AM. JUR., *Duress and Undue Influence* § 18 (1957).

130. *Randolph v. Lewis*, 196 N.C. 51, 144 S.E. 545 (1928); *Deputy v. Stapleford*, 19 Cal. 302 (1861). See Annot., 62 A.L.R. 1477 (1929), dealing with the validity of contracts executed under duress exercised by third parties. See also 5 WILLISTON, CONTRACTS § 1627B (rev. ed. 1937).

131. See *Fairbanks v. Snow*, 145 Mass. 153, 13 N.E. 596, 598 (1887); 5 WILLISTON, CONTRACTS § 1624 (rev. ed. 1937); 17A AM. JUR., *Duress and Undue Influence* § 18 (1957). For a case where the Tennessee Supreme Court declared a transaction "void" for duress and further declared that recovery could be had against a third party, although the duress consisted of threats and would seem to be duress only as to inducement, see *Belote v. Henderson*, 45 Tenn. (5 Cold.) 471 (1868). The court thought that although actually void, the transaction could be ratified.

one is coerced into giving apparent assent to a transaction the nature of which he does not know or have reason to know, it is said that the transaction would be void.<sup>132</sup> But in the ordinary case of duress, as in fraud, there is an actual expression of assent to the very transaction in question, though it is inequitable to enforce it because of the manner in which assent is obtained. Hence, the transaction would be rendered voidable only and not void.<sup>133</sup>

#### ASSIGNMENTS

*Delegation of Duties—Effect of Phrase “Or Order” in Written Negotiations for Lease as Authorizing Assignment or Substitution of Third Party:* In *Berger v. Paalzow*,<sup>134</sup> the Tennessee Court of Appeals was called upon to construe an alleged assignment of a contract to lease an office building. The alleged lessors refused to execute a formal lease when it was discovered that the parties who carried on the negotiations (Berger Brothers) had substituted the name of a third party (Halina Berger) as the lessee in the formal lease. In an unsuccessful suit asking for specific performance of the execution of the formal lease or damages, brought by the parties who negotiated the lease, for the use of the substituted third party, against the defendants-alleged lessors, it was claimed that certain language in the written negotiations authorized the substitution of this third party as lessee. The pertinent part of that language appears in a lengthy letter to the defendants written by the parties who negotiated for the lease. After detailing many terms and conditions of a proposed lease, the letter to the defendants-owners concludes in this fashion: “It is understood that if this proposition be accepted a lease embodying these and usual provisions will be executed by the owners of the building and ourselves, *or order*, as tenants.” (Emphasis added). It is claimed by complainants that the words “*or order*” authorized the ostensible lessees (Berger Brothers) to substitute the third party (niece of Berger Brothers) as the lessee.

The defendants-owners purported to accept the proposition offered in the foregoing letter, but added certain modifications. Berger Brothers then, in turn, purported to accept the owners’ offer with its modifications. The key words “*or order*” do not appear again, either in owners’ modified acceptance (counter offer) or in the foregoing letter by Berger Brothers to owner purporting to accept his modified proposition.

When sued for their refusal to execute the formal lease to the third party, the lessors took the position that the Berger brothers (who negotiated the lease) represented themselves to be men of wealth

132. See 5 WILLISTON, CONTRACTS § 1624 (rev. ed. 1937).

133. See *Fairbanks v. Snow*, 145 Mass. 153, 13 N.E. 596, 598-99 (1887); 17A AM. JUR., *Duress and Undue Influence* § 18 (1957).

134. 289 S.W.2d 861 (Tenn. App. E.S. 1956).

and men experienced in the management of office buildings, and had invited defendant-lessors to make a full investigation of these representations. Defendants did make the investigation and learned that the Berger brothers were millionaires and enjoyed a splendid reputation with regard to management of properties of substantial value. Based upon these facts, defendants refused to execute the formal lease, claiming they agreed to deal with the Berger brothers personally and not with a third party (the substituted lessee) about whom defendants knew nothing.

In the correspondence between the parties, the Berger brothers undertook to do a great many things relative to the lease they were negotiating, in addition to the payment of an annual rental in excess of \$30,000 for more than thirty years. Among those additional duties which the Berger brothers agreed to perform were paying taxes, carrying insurance and workmen's compensation, paying certain costs, making alterations and improvements, air conditioning the building and installing new boilers.

It would appear that these duties involve sufficient discretion and judgment on the part of the Berger brothers, as lessees, so that these duties could not be assigned or delegated to a third party in the absence of consent by the owners. The performance required by these varying duties appears to be a personal one which defendant-owners agreed could be performed only by these millionaire Berger brothers, who enjoyed a splendid reputation with regard to management of office buildings of substantial value. Defendant-owners thus reposed special trust and confidence in the Berger brothers. Hence, in the absence of consent by the owners performance of these duties by a substituted person could not be delegated or assigned.<sup>135</sup>

So we come to the next question which is the pivotal point in the case. Did the use of the words "or order" mean that the defendant-owners had thus agreed to permit Berger Brothers to substitute a third party in the lease to perform these duties?

Complainants contended that the words "or order" are words of negotiability, and gave the Berger brothers the right to name a third party (Halina Berger) as lessee in the formal lease. In the writer's opinion the most that these words could mean is that they are equivalent to "or assigns." The phrase "or order" are words of art and appear properly to be used only with negotiable paper.<sup>136</sup> Owners' promise to make a lease cannot be negotiable for in order to be negotiable a prom-

---

135. For an elaborate discussion of this facet of the case, see 4 CORBIN, CONTRACTS § 865-66 (1952); 2 WILLISTON, CONTRACTS § 411-11A (rev. ed. 1936). A duty to construct a building was held nondelegable in *Johnson v. Vickers*, 139 Wis. 145, 120 N.W. 837 (1909). A contract to do electrical wiring was held nondelegable in *Swarts v. Narragansett Elec. Lighting. Co.*, 26 R.I. 388, 59 Atl. 77 (1904).

136. See BLACK, LAW DICTIONARY 1247 (4th ed. 1951).

ise must be for the payment of *money*.<sup>137</sup> Here owners' promise was to deliver a building under a lease.

Even if we assume that the words "or order" are equivalent to the words "or assigns," which may render assignable an otherwise non-assignable contract,<sup>138</sup> still it is believed that these words did not give Berger Brothers the right to substitute a third party as lessee in the formal lease.

It should be noticed that the Berger brothers did not purport to assign a lease, which they had with owners, to the third party; nor did they apparently purport to assign to the third party a contract in which the owners agreed to make a lease to them. The Berger brothers simply undertook to *substitute a third party as the lessee in the formal lease*, thereby apparently letting the brothers completely off the hook insofar as their liability was concerned. So even if it is assumed that the words "or order" would authorize the Berger brothers to assign an executed lease, or to assign a contract whereby the defendant-owners agreed to make a lease, nevertheless that is considerably different from saying that those words of art authorized the brothers to slide out of their obligations and permitted an unknown substituted third party to hold defendant-owners to a lease.

Although a contract is, in fact, "assignable," either because of its inherent nature, or because the other party has consented, the assignor remains personally liable for the performance of his duties under the assigned contract.<sup>139</sup> The assignor cannot escape liability for the performance of his duties by the simple expedient of "assigning" (really delegating) his duties under the contract.<sup>140</sup>

Parties to a bilateral contract often do attempt to effect the substitution of the liability of a new party for that of one of the original parties, and frequently call such an attempted transaction an assignment although it is really a novation.<sup>141</sup> If the so-called assignor intends by the transaction to be free from all further liability, then Mr. Williston says:

Such an offer may always be refused, and if the so-called assignor [Berger brothers] in effect has indicated that he will not thereafter be responsible for the performance of his promise, and that the other party to the contract [defendant-owners] must look solely to the so-called assignee [Halina Berger], there is a repudiation of contract by the assignor which justifies the injured party [defendant-owners] in refusing to continue performance.<sup>142</sup>

---

137. NEGOTIABLE INSTRUMENTS LAW § 1: TENN. CODE ANN. § 47-101 (1956).

138. See 4 CORBIN, CONTRACTS § 871 (1952); 2 WILLISTON, CONTRACTS § 423 (rev. ed. 1936).

139. See 2 WILLISTON, CONTRACTS § 411 (rev. ed. 1936).

140. *Ibid.*

141. 2 *id.* § 420.

142. *Ibid.* To the same effect, see 4 CORBIN, CONTRACTS § 866 (1952).

Does not the statement of this proposition by Mr. Williston pretty well describe the transaction in the case at bar?

This leading authority on contract law, Mr. Williston, elsewhere lends cogent support to the view that the words "or order" would not authorize the Berger brothers to delegate or assign their duties under the lease or under a contract to make a lease. Mr. Williston discusses the effect of adding the word "assigns." He states that as a general rule the insertion of the word "assigns" or its equivalent does indicate a willingness on the part of the obligor to render performance to an assignee if so desired. Then he concludes with this proposition:

Notwithstanding the use of such words, ("assigns"), however, the intention of the parties must be gathered from a consideration of all the terms and of the entire tenor of the contract, interpreted in light of surrounding circumstances, and taking everything into consideration it may appear that assignment was not permitted without the assent of the other contracting party.<sup>143</sup>

As the court points out, there are surrounding circumstances strongly indicating that defendant-owners did not assent to having a third party substituted as lessee. There is the trust reposed in the millionaire Berger brothers, who had splendid reputations for managing office buildings, which information was obtained at the invitation of the Berger brothers during their negotiations. On the other hand, defendant-owners knew nothing about the substituted third party, Halina Berger. Moreover, the brothers in their negotiations for a lease specifically characterized the parties to the lease so as to leave little doubt they personally intended to execute the lease. In these negotiations they used the pronouns "we" twenty times, "our" four times, "us" ten times, and "ourselves" twice. In defendant-owners' correspondence to the Berger brothers, making his modified offer, which the Bergers allegedly accepted, they use the language "your offer," "your part," "in the event you exercise any or all of your options" and "you are to continue throughout the term of the lease." Also, defendant-owners in their modified offer make it clear that the Berger brothers must hold owners harmless against liens "made by you or sub-tenants." Defendants and the Berger brothers had expressly agreed previously that a certain bank would be a sub-tenant of the building in question and the Bergers had signed a lease with the bank in the name of Berger brothers, not in the name of the party they tried to substitute in the lease with defendant-owners.

#### IMPLIED & QUASI CONTRACTS

##### *Action for Services for Managing Farm Where Agreement Indefinite*

---

143. 2 WILLISTON, CONTRACTS § 423 (rev. ed. 1936).

as to Terms: In *Murray v. Grissim*<sup>144</sup> the Tennessee Court of Appeals had before it a question of whether the conduct of the parties was such that a jury was warranted in finding either a claim based on quasi contract or on an implied contract for services in managing a farm, extending over a period of approximately eleven years.

Defendant Murray owned a 296 acre farm which was used for operating a dairy, growing hay and other crops, and raising livestock. Defendant received this farm under his father's will. It was to recover for his services in managing this farm for defendant for the eleven years after the father's death that plaintiff sued. There was no express contract between plaintiff and defendant, but plaintiff contended that he had a valid claim, based on either implied contract or quasi contract.

For several years prior to the time when defendant became owner of the farm, plaintiff had managed it for defendant's father. Defendant's father and plaintiff were close friends, and the father had aided plaintiff in the livestock business. Plaintiff managed the farm for defendant's father without charge. Plaintiff had no dealings, however, with defendant and scarcely knew him prior to the time when defendant received the farm under his father's will. There was evidence from which the jury could have found that when defendant took charge of the farm, he requested plaintiff to continue managing it. Plaintiff testified to this request by defendant and there was no denial. There was, however, no conversation or express agreement or understanding between plaintiff and defendant as to what was to be paid plaintiff for managing the farm. Plaintiff managed the farm for defendant from March, 1941, when defendant received the farm under his father's will, until August, 1952, at which time defendant sold the farm.

Plaintiff's suit was based on both quasi contract and implied contract. Defendant resisted plaintiff's claim on the ground that plaintiff's services were rendered gratuitously and that much of the claim was barred by the six-year statute of limitations. Defendant's contention that plaintiff rendered the services gratuitously was in part based on the fact that plaintiff had managed the farm for defendant's father without pay. Also plaintiff and defendant had a partnership in the race horse business, part of which business was done on plaintiff's own farm and part on defendant's farm. When defendant sold his farm, he sold his interest in the partnership horses to plaintiff for \$4,000. Plaintiff gave defendant a note for this partnership interest, \$2,500 of which was still owing when plaintiff brought the suit in the case at hand. Plaintiff made payments on this partnership claim, and

---

144. 290 S.W.2d 888 (Tenn. App. M.S. 1956).



got extensions of time on the payments of the note, without ever mentioning his claim for managing the farm. All these factors, said defendant, showed that plaintiff managed the farm gratuitously.

The jury rendered a verdict in favor of plaintiff for \$13,600, less a credit of \$2,500, which was the balance owing plaintiff on the partnership note. The trial court entered judgment for plaintiff for \$11,100 and costs. On appeal by defendant to the court of appeals, the court affirmed the judgment for plaintiff by a two to one vote. Judge Shriver rendered a vigorous dissent on the ground that the court should apply the statute of limitations to bar plaintiff's recovery for services performed for more than six years before suit was filed. The majority thought that no part of plaintiff's claim arose until defendant sold the farm, and thus none of it was barred by the six-year statute, since the suit was brought within six years after defendant sold the farm.

Speaking for the majority, Judge Felts wrote an admirable opinion in support of the court's conclusion that the jury was warranted in finding that there was an implied contract. For his major premise, Judge Felts took the position that from the mere rendering of the services by one and their acceptance by another, there may arise liability for the services either in quasi contract, or an implied promise or contract to pay for the services. He then concluded that from the evidence the jury could have found that the defendant requested plaintiff's services not as a favor but under such circumstances that a reasonable man would infer that defendant meant to pay for them; that plaintiff did understand that the defendant would pay him the reasonable value of such services when they were terminated or the farm was sold; and that defendant became liable upon an implied contract to make such payment.

While there are distinct differences between liability based on "quasi contract" and "implied contract," the courts do not always differentiate between these two different theories of liability.<sup>145</sup> Moreover, a case may be one of implied or quasi contract depending upon a slight variation in facts.

The courts often use the term contract "implied in law" to refer to quasi contract, which is a liability imposed by law, irrespective of any manifestation of assent by the parties and sometimes against even a clear expression of dissent, in order, generally, to prevent unjust enrichment.<sup>146</sup> Whereas an "implied contract," often called a

---

145. See *Martin v. Campanaro*, 156 F.2d 127, 130 (2d Cir. 1946); 1 WILLISTON, CONTRACTS § 3 (rev. ed. 1936).

146. See *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865, 867 (1914); *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337, 338-39 (1916); See also *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631 (2d Cir. 1946); 1 CORBIN, CONTRACTS § 19 (1950); 1 WILLISTON, CONTRACTS § 3 (rev. ed. 1936).

contract "implied in fact," is a genuine contract (offer and acceptance) which is spelled out of, or implied from, the conduct of the parties, and differs from an express contract, essentially, only in the method of proof.<sup>147</sup>

If a party giving the performance (plaintiff) expects to be paid, and the other party (defendant) either intended to pay or should have known that plaintiff expected to be paid, then there arises a claim based on implied contract.<sup>148</sup>

If the party giving the performance (plaintiff) expected to be paid, and if plaintiff conferred a benefit on defendant; and if plaintiff was not officious, then plaintiff has a claim based on quasi contract.<sup>149</sup>

It will thus be seen from an examination of the requirements of both implied contract and quasi contract that plaintiff will be denied a recovery if he performed his services gratuitously—without expectation of pay.<sup>150</sup> That was one of the grounds for resisting recovery in the case at hand.

147. *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337, 338-39 (1916). In speaking of implied contracts, in *Morse v. Kenny*, 87 Vt. 445, 89 Atl. 865, 867 (1914), the court said: "[S]uch a promise is implied from the understanding of the parties, inferred as a question of fact from their conduct and the surrounding circumstances; such acts and circumstances as show, according to the ordinary course of dealing and the common understanding of men, a mutual intent to contract.

"... It is inferred from the conduct of the parties instead of from their spoken words; or, in other words, the contract is evidenced by conduct instead of by words." The court said in *Peters v. Poro's Estate*, 96 Vt. 95, 117 Atl. 244, 246-47 (1922): "The terms 'express contract' and 'contract implied in fact' indicate a difference only in the mode of proof. A contract implied in fact is implied only in that it is to be inferred from the circumstances, the conduct, acts, or relation of the parties, rather than from their spoken words." See also *Martin v. Campanaro*, 156 F.2d 127, 130 (2d Cir. 1946); 1 CORBIN, CONTRACTS § 18 (1950); 1 WILLISTON, CONTRACTS §§ 3, 36, 36A (rev. ed. 1936); RESTATEMENT, CONTRACTS §§ 5, 72 (1932).

148. *In re Montgomery's Estate*, 299 Pa. 452, 149 Atl. 705 (1930); *Higgs v. Bigelow*, 39 S.D. 359, 164 N.W. 89 (1917). "And even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefitted is liable. It is a question of fact if services are accepted whether a reasonable man in the position of the parties would understand that they are offered in return for a fair compensation, or would rather suppose either that they are offered gratuitously, or if not, that the recipient might think so." 1 WILLISTON, CONTRACTS § 36 (rev. ed. 1936). "Of course, it does not matter whether the defendant expected to pay for the services or not, the question is as to the natural import of his overt acts. . . . Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what he knew that such was the expectation, he would be bound by accepting the services." Per Justice Holmes in *Spencer v. Spencer*, 181 Mass. 471, 63 N.E. 947, 948 (1902).

149. *Israel v. Baker*, 172 F.2d 63 (10th Cir. 1948); *Chase v. Corcoran*, 106 Mass. 286 (1871); *Karon v. Kellogg*, 195 Minn. 134, 261 N.W. 861 (1935).

150. *Carlson v. Krantz*, 172 Minn. 242, 214 N.W. 928 (1927); *Anderson v. Distiler*, 173 Misc. 261, 17 N.Y.S.2d 674 (Sup. Ct. 1940); *Frain v. Brady*, 48 R.I. 24, 134 Atl. 645 (1926). See Annot., 54 A.L.R. 548 (1928), for a good collection of cases dealing with the various facets of the problem. See also Annot., 7 A.L.R.2d 8 (1949), for an exhaustive collection of cases on the subject dealing with the recovery for services rendered by member of household or family, other than spouse, without express agreement for compensation.

Also, it will be seen that there can be no recovery in quasi contract if plaintiff acted officiously, that is, if he was a "volunteer," even if plaintiff conferred a benefit upon the defendant.<sup>151</sup> The *Restatement of Restitution* uses the term *officiousness* to describe such conduct.<sup>152</sup> In quasi contractual suits, however, the defendant's knowledge or consent to the plaintiff's performance is not necessary for recovery.<sup>153</sup>

Neither the officiousness of the plaintiff, nor the fact that plaintiff conferred no benefit on defendant would seem to be relevant in a claim for implied contract.

While the case at hand is a close one on the facts, the court seems properly to have held that it was a jury question as to whether plaintiff did gratuitously confer those services on defendant for eleven years. Since the jury answered the query in favor of plaintiff, that properly ended this facet of the case.

*Application of Statute of Limitations to Contract for Services for Indefinite Period:* In *Murray v. Grissim* the second defense interposed by defendant—the statute of limitations—also presented a very close question, as is shown by the vigorous opinions, both the majority by Judge Felts and the dissenting opinion by Judge Shriver, who thought the six-year statute of limitations barred all of plaintiff's claim for services performed more than six years before plaintiff's suit was instituted. The pivotal point here, of course, is when did plaintiff's cause of action accrue so as to start the statute running. Both the dissent and the majority agreed that this issue turned on a construction of the contract.

The majority of the court thought that plaintiff's services were continuous and were rendered under one entire contract, and that the cause of action did not accrue and the statute did not start to run, until plaintiff's services were completed or terminated. Since plaintiff managed the farm until it was sold in August 1952, which was less than six years before suit was started, the majority of the court thought none of the claim was barred. The dissent felt that since plaintiff valued his services at \$200 per month, he had put himself on a monthly basis, or that the court should take judicial notice that contracts for the conduct of farming operations are customarily from

---

151. *Braun v. Hamack*, 206 Minn. 572, 289 N.W. 553 (1940) (strong dissent said plaintiff was not a volunteer in this case); *Anderson v. Distiler*, 173 Misc. 261, 17 N.Y.S.2d 674 (Sup. Ct. 1940).

152. *RESTATEMENT, RESTITUTION* §§ 113-17 (1937).

153. See *RESTATEMENT, RESTITUTION* §§ 113-17 (1937); 1 *CORBIN, CONTRACTS* § 19 (1950). A typical situation is where a husband or parent improperly fails to provide support for a wife or minor child. A third party who, though not requested by the parent or husband, furnishes the support may recover the reasonable value thereof in quasi contract. *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295 (1890); *Carr v. Anderson*, 154 Minn. 162, 191 N.W. 407 (1923). See *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390, 397, 399 (1953); *RESTATEMENT, RESTITUTION* §§ 113-14 (1937).

year to year. In any event, the dissent seemed to think, plaintiff's contract was severable, either on a monthly or yearly basis, and the statute, at least, should begin to run either at the end of each month or at the end of each year.

Although the dissenting judge purported to disagree with the majority only as to the applicability of the statute of limitations to a portion of plaintiff's claim, nevertheless he devoted considerable space and forceful efforts to the thesis that plaintiff's claim should be denied in entirety. He was of the opinion that plaintiff's claim was only an afterthought.

In trying to decide whether a portion of plaintiff's claim is barred by the six-year statute of limitations, we should recognize at the outset, as does the majority, that there is a wide-open split of authority concerning the running of the statute of limitations against a claim for services rendered over an extended period under indefinite employment where no time for payment is fixed.

In resolving the matter, first of all a construction must be put upon the agreement, in order to determine whether the law regards the employment by the week, the month, or other specified period, or simply at will.<sup>154</sup> If it is determined that the employment is for a specified period, then the statute of limitations will begin to run when the employee has a right to compensation.<sup>155</sup> Where the agreement is construed as one continuing merely at the will of each party, there the courts are sharply split in at least three ways on the question as to when the statute of limitations starts to run.

Where services are continuously rendered over an extended period of time, under either an express or implied contract which does not fix the term of employment nor the time when compensation shall be payable, perhaps the prevailing view of the courts from a numerical standpoint has treated the contract as an entire one and the statute of limitations does not begin to run against the employee's claim for compensation until the employment is ended.<sup>156</sup> This view, of course,

---

154. 6 WILLISTON, CONTRACTS § 2029 (rev. ed. 1938).

155. 6 *id.* §§ 2024, 2029.

156. *Israel v. Baker*, 172 F.2d 63 (10th Cir. 1948) (applying Oklahoma law). Here services had been rendered over a period of thirty-one years. Plaintiff was allowed a recovery on quasi contract, and it was held that the three-year statute of limitations did not bar any of the claim. Additional cases following this view are: *Lalley v. Escoett*, 146 F.2d 667 (D.C. Cir. 1945); *Hubbard v. Ball*, 59 Idaho 78, 81 P.2d 73 (1938); *Crampton v. Logan*, 28 Ind. App. 405, 63 N.E. 51 (1902); *Sullenbarger v. Ahrens*, 168 Iowa 288, 150 N.W. 71 (1914); *Grisham v. Lee*, 61 Kan. 533, 60 Pac. 312 (1900); *Carter v. Carter*, 36 Mich. 207 (1877); *McCully v. McCully*, 175 Miss. 876, 168 So. 608 (1936); *Officer v. Cummings*, 127 Ore. 320, 272 Pac. 273 (1928); *Gulbranson v. Thompson*, 63 Utah 115, 222 Pac. 590 (1924); *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352 (1902); cf. *Czelusniak v. Ossolinski*, 273 Mass. 441, 173 N.E. 590 (1930). Tennessee apparently was in this camp before the case at hand. See *Walker v. Walker*, 12 Tenn. App. 130, 140 (E.S. 1930).

is the one adopted by the majority in deciding *Murray v. Grissim*. Where the contract of employment is regarded as entire, even though there is a stated or customary time of periodic payments, the statute of limitations is not put into operation from such periodic dates, under this prevailing view, but only from the termination of the employment.<sup>157</sup>

In some instances the statute of limitations against a claim for services rendered without agreement as to a specific term of employment or time for compensation, has not started to run until the termination of the employment, if the claims can be treated as items in an account between the parties against which the statute would not start to run until the entry of the last item.<sup>158</sup> That view could be applied in *Murray v. Grissim* as to that period of time after the parties had their partnership transaction in the horse business.

Where the period of services rendered is greater than the statutory period before suit is started it can logically be argued, as does Judge Shriver in his dissent in the case at hand, that part of the claim should be barred by the statute. Nevertheless Mr. Williston offers a practical reason why the statute is not put into operation until the termination of the employment. He suggests that where the contract fails to fix a precise time of payment, it may throw an unfair burden on the employee if he is compelled at his peril to determine the exact moment when he has a right of action.<sup>159</sup> Hence, he feels that this may constitute a reason why many jurisdictions take the position that the statute of limitations will not begin to run until the termination of the employee's performance under a contract for continuous indeterminate services, even though there is a stated or customary time for periodic payments.

There are jurisdictions that are of a different persuasion, however, where the services are continuously rendered over a considerable period of time. In such circumstances, several courts are of the view that in the absence of any facts showing the actual intent of the parties, or of a custom or usage governing the particular type of employment, it will be implied that the parties contemplated the payment of wages at periodic intervals, monthly or annually, so that the statute of limitations will begin to run from the end of the period,

---

157. See, e.g., *Schaffner v. Schaffner's Estate*, 98 Kan. 167, 157 Pac. 402 (1916); *Grisham v. Lee*, 61 Kan. 533, 60 Pac. 312 (1900); see 6 WILLISTON, CONTRACTS § 2029 (rev. ed. 1938).

158. *McCarthy v. Paris*, 46 Idaho 165, 267 Pac. 232 (1928); *McGrew's Ex'r v. Congleton*, 139 Ky. 515, 102 S.W. 1185 (1907); *Vincent v. Palmer*, 179 Md. 365, 19 A.2d 183 (1941); *Greenwood v. Judson*, 109 App. Div. 398, 96 N.Y.Supp. 147 (4th Dep't 1905); *Trethewey v. Green River Gorge, Inc.*, 17 Wash.2d 697, 136 P.2d 999 (1943); *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073 (1896). Tennessee has applied this rule. *Weatherhead v. Boyers*, 15 Tenn. 359 (1835).

159. See 6 WILLISTON, CONTRACTS § 2029 (rev. ed. 1938).

whatever it may be, in which the employee performed the services. Consequently, no recovery can be had under this view for services performed where the end of the implied periodic interval is more than the statutory period before suit is started.<sup>160</sup> Judge Shriver does some thinking along these lines in his dissenting opinion.

Still other courts permit the statute of limitations to bite even deeper into the employee's claim for compensation. For services rendered continuously over a long period of time without agreement as to when the compensation should be payable, these courts have refused to imply any agreement for the postponement of the payment, holding that the statute begins to run immediately upon the performance of each individual act of service. Thus, under this view claims for all services performed more than the statutory period before suit is started are barred.<sup>161</sup> This view seems to represent the conclusion of the dissenting Judge Shriver in *Murray v. Grissim*.

In the case at hand, there were at least three choices the court could have made with respect to when the statute of limitations started to run on plaintiff's claim for services rendered over a period of eleven years of indefinite employment and without any time for payments being fixed. It could have found that the statute started to run (a) at the termination of the employment, or (b) at periodic intervals implied by the court, or (c) at the time of the rendition of each individual act of service. The majority of the court adopted the view that the statute does not start to run until the termination of the employment. This is perhaps the prevailing view and the view which seems to be preferred by Mr. Williston, the leading authority in the field of contract law. The dissenting judge thought the statute should bar plaintiff's recovery for all services performed more than the statutory period of six years before the suit was started. The positions of both the majority of the court and the dissenting judge are well buttressed by an abundance of authority from highly regarded courts.<sup>162</sup>

---

160. *Ennis v. Pullman Palace-Car Co.*, 165 Ill. 161, 46 N.E. 439 (1896); *In re Gardner*, 103 N.Y. 533, 9 N.E. 306 (1886); *In re Chafee's Estate*, 122 Misc. 768, 204 N.Y.Supp. 765 (Surr. Ct. 1924); *In re Koonce's Estate*, 105 Pa. Super. 539, 161 Atl. 578 (1932). See *Hotsinpiller v. Hotsinpiller*, 72 W. Va. 823, 79 S.E. 936 (1913). At least some courts of this persuasion will postpone the operation of the statute if the facts show an account between the parties, against which the statute of limitations will not run until the entry of the last item of account. *Smith v. Velie*, 60 N.Y. 106 (1875); *Greenwood v. Judson*, 109 App. Div. 398, 96 N.Y.Supp. 147 (4th Dep't 1905). In this connection, see also *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073 (1896).

161. *Dempsey v. McNabb*, 73 Md. 433, 21 Atl. 378 (1891); *Grady v. Faison*, 224 N.C. 567, 31 S.E.2d 760 (1944); *Scott v. Walker*, 141 Tex. 181, 170 S.W.2d 718 (1943). But cf. *Mims' Ex'rs v. Sturtevant*, 18 Ala. 359 (1850); *Vincent v. Palmer*, 179 Md. 365, 19 A.2d 183 (1941).

162. For collection of cases on the various views, see Annot., 7 A.L.R.2d 198 (1949).