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Contracts -- 1956 Tennessee Survey

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CONTRACTS—1956 TENNESSEE SURVEY

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Lapse of Offer Made in Face to Face Conversation: Among the rather considerable number of Tennessee cases involving points of contract law decided since the last issue of the Survey of Tennessee Law, is the case of *Akers v. J. B. Sedberry, Inc.*,[1] which involved a point on the termination of an offer as well as a point on damages for breach of contract. In 1947 complainants were hired for a period of five years for a fixed annual salary, plus a graduated percentage of the net profits of the defendant-corporation. Defendant corporation was engaged in distributing the product of Jay Bee Manufacturing Company and complainants were sent by defendant to work with the Jay Bee Company. Friction developed between the manager of the Jay Bee Company and complainants. Complainants had a conference with the defendant corporation and its president, also a defendant, who had guaranteed complainants contracts of employment. According to defendants' own evidence, complainants offered to resign, at the outset of the conference, but defendants brushed the offer aside and did not accept. Instead the parties continued to discuss internal affairs of the business for several hours. Although the complainants were not so informed, defendant-president testified that she wanted to give the offer some thought and contact the manager of Jay Bee Company. Following the conference complainants, upon defendants' request, returned to their work and proceeded to carry out defendants' instructions. Some time later defendants notified complainants that they were accepting the offers to resign and complainants were discharged from their employment before the expiration of the period for which they were hired. Complainants later instituted this suit for breach of contract.

As the court of appeals correctly pointed out, the principal question presented is whether complainants resigned their employment, or were wrongfully discharged by defendants. That broader issue, in turn, revolved around the question whether the offers to resign had terminated before defendants accepted them. The court seems quite properly to have held that the offers to resign had terminated before the attempted acceptance by defendants, and therefore defendants were liable for damages for a breach of contract with complainants. The court succinctly stated the crux of the matter when it concluded that ordinarily an offer made by one to another in

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1. 286 S.W.2d 617 (Tenn. App. M.S. 1955).

a face to face conversation is deemed to continue only to the close of their conversation, and cannot be accepted thereafter. This is so unless the offer itself or the surrounding circumstances indicate that the offer is intended to continue beyond the immediate conversation. The authorities make this proposition of law abundantly clear.[2] All the manifested circumstances point to the conclusion that there were no circumstances at all to indicate that the offer was intended to continue beyond the immediate conversation. Defendants not only did not accept the offer made at the outset of the conference; but, on the other hand, continued to discuss business affairs with complainants for several hours thereafter. The circumstances make it clear that the offer was to be accepted, if at all, at once. Of course, defendants' secret, undisclosed intentions to take the offer under consideration cannot be binding on complainants. To give effect to such secret intentions would fly squarely in the face of the whole objective theory of the law of offer and acceptance, which is the bedrock of contract law.[3] Moreover, as the court properly points out, the conduct of the defendants would lead a reasonable man to conclude that defendants rejected the offer by brushing it aside and proceeding with the discussion of business as if the offer had not been made.[4]

Among other facets of the case is a point as to damages. Some time after defendants entered the contracts with the complainants, defendants allegedly purchased a controlling interest in the Jay Bee Company, thereby bringing into existence a parent-subsidiary relationship. Defendants contended that complainants should not be allowed damages based on the net profits of the defendant corporation without first deducting the alleged losses suffered by the subsidiary. The loss of the subsidiary was said by the defendants to be the loss of the parent. The court gives two satisfactory answers to this contention. First of all, there was no satisfactory proof of such parent-subsidiary relationship. Defendants' own evidence was wholly inconclusive on this point. Moreover, the court concludes that since the

2. 1 CORBIN, CONTRACTS § 36 (1950); 1 WILLISTON, CONTRACTS § 54 (rev. ed. 1936); RESTATEMENT, CONTACTS § 40 (1932).

3. The objective theory of contract has been expressed by Judge Learned Hand as follows: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort." Hotchkiss v. Nat'l City Bank, 200 Fed. 287, 293 (S.D.N.Y. 1911).

4. "Any words or acts of the offeree indicating that he declines the offer or which justify the offeror in inferring that the offeree intends not to accept the offer, or give it further consideration, amounts to a rejection." 1 WILLISTON, CONTRACTS (rev. ed. 1936).

alleged purchase of the Jay Bee stock did not occur until some months after defendants executed the contracts with complainants, the parties could not reasonably have contemplated any such deduction as the defendants now claim.

Auction Sales—Effect of Seller's Reservation of Right to Reject Bid: In *Moore v. Berry*[5] the Tennessee Court of Appeals was confronted with the question whether a vendor who had some real estate auctioned off had properly reserved the right to reject the bid of the purchaser to whom it had been knocked down. Contending that vendor had not reserved the right to reject his bid, the purchaser sued the defendant-vendor for specific performance. Defendant had listed the property with an auction company for sale and it was advertised widely. There is nothing in the opinion to indicate that the vendor had ever promised to sell without reserve. It was found as a fact that just before the aution started the auctioneer read to the crowd the written terms and conditions of the sale. In these terms and conditions defendant-vendor reserved the right to group any two or more lots in any manner he saw fit. The terms and conditions also provided that all the property would be sold subject to vendor's confirmation. The single tract involved in this suit was auctioned off to the complainant and it was then later put up with another tract and both auctioned off together. The bid for these two lots when put up together was more than the combined bids of the two parcels when auctioned separately.

However, the vendor rejected all the bids. When sued by the purchaser, defendant resisted the claim on the ground that the sale was unenforceable because of the Statute of Frauds since real estate was involved; and that defendant, under the announced terms of the auction, reserved the right to confirm or reject all bids. The court of appeals affirmed the chancellor, who rendered a decree in favor of the defendant and dismissed the complainant's bill. The chancellor had sustained the defendant's plea of the Statute of Frauds and also had held that the defendant had reserved the right to reject complainant's bid. The affirmance was solely on the ground that defendant had reserved the right to reject the bid. The court of appeals did not pass on the Statute of Frauds point.

The conclusion reached by the court appears proper under the facts given. In addition to the authorities cited in the opinion, Mr. Williston's views could also be added. In speaking of whether a bidder is affected by the terms of an auction sale of which he is in fact ignorant, Mr. Williston says:

5. 288 S.W.2d 465 (Tenn. App. E.S. 1955).

> The test must be the same here as that in regard to the formation of contracts generally. A party must be affected by terms which he should reasonably understand to exist or which he should have ascertained, whether in fact he is aware of them or not. Under this principle it cannot be doubted that a bidder is unreasonable who fails to inquire the terms of an auction sale. If he bids in ignorance of them he is nevertheless bound by them.[6]

Mr. Williston further adds:

> Indeed, since no contract is created until bidding begins, it necessarily follows that even though an auction sale has been advertised to be without reserve, or has been advertised to be held under other specific conditions, the auctioneer may without liability change those conditions by oral announcement at the commencement of the sale.[7]

Although the court of appeals did not find it necessary to reach the point of deciding whether the Statute of Frauds was a defense in the case at hand, it might be well to point out in passing that the auctioneer at an auction sale is the agent of both the buyer and the seller for the purpose of making and signing a memorandum to satisfy the Statute.[8] The signature of the auctioneer must, however, be made immediately or it will not be binding so temporary is his authority.[9] Between the fall of the hammer and the writing of the memorandum, the bidder may withdraw his bid or the owner of the property may revoke the auctioneer's authority.[10]

Accord and Satisfaction—Acceptance of Check Given in Satisfaction of Disputed Claim: In *Grubb v. Anderson*[11] the Supreme Court had occasion to examine the legal consequences of the acceptance of a check with an attached voucher stating that the check was in full payment of all services rendered. Plaintiff-attorney had been insisting that the defendant make further payments for services rendered. Ostensibly the parties had not agreed on a fixed amount before plaintiff began rendering his services. At the beginning of the employment plaintiff had received a check for $500. After plaintiff had made repeated insistences for further payments, defendant delivered to plaintiff another check for $500, to which an attached voucher recited that the check was "for full payment of all legal services rendered" to the parties concerned. By plaintiff's own testimony, after learning what the voucher stated, he cashed the check. When plaintiff brought suit for his services in the instant case, asking for $1000, the defense was accord and satisfaction. The Supreme Court sustained the defense and entered judgment for the defendant.

6. 1 WILLISTON, CONTRACTS 69-70 (rev. ed. 1936).
7. 1 *id.* at 70.
8. 2 *id.* § 588.
9. *Ibid.*
10. *Ibid.*
11. 281 S.W.2d 241 (Tenn. 1955).

An accord and satisfaction is a contract, and consequently must be supported by consideration.[12] Consequently, under the orthodox view neither a promise to pay, nor payment of, part of a liquidated, undisputed claim is sufficient consideration to satisfy the whole.[13] However, "an agreement whereby one party undertakes to give or perform, and the other to accept in settlement of an existing or matured claim something other than what he believes himself entitled to, is an accord. The execution of such an agreement is a satisfaction."[14] That is an ordinary contract and the essential consideration is present. In the case of an unliquidated or disputed claim the payment of a lesser sum will discharge the entire debt.[15] In such cases "the concession made by one is a good consideration for the concession made by the other."[16] The view that the acceptance of a sum less than that claimed, in satisfaction of an unliquidated or disputed claim, constitutes an accord and satisfaction quite often finds application where a debtor sends his creditor a check in payment of a disputed claim with the check containing words that it is in full payment of the claim. The claim over which the dispute arises need not be well-founded so long as the dispute is bona fide.[17]

Of course, aside from the problem of the sufficiency of consideration, there is a question of the sufficiency of the offer. The money must be offered in full satisfaction of the demand. Where payment is made by check, it seems that the offer can be sufficient when a check is given which on its face expresses that it is in full payment or settlement of the demand.[18] There must be no uncertainty as to the condi-

12. See Note, *The Legal Consequences of the Acceptance of a Check Bearing the Notation "In Full,"* 23 COLUM. L. REV. 479 (1923).

13. *E.g.*, Levine v. Blumenthal, 117 N.J.L. 23, 186 Atl. 457 (1936); 1 WILLISTON, CONTRACTS § 120 (rev. ed. 1936). Tennessee has a statute which provides that a new agreement in writing agreeing to discharge a claim for lesser sum, will discharge a liquidated, undisputed claim. TENN. CODE ANN. §§ 24-706, 707 (1956). However, a verbal agreement to take a lesser sum made without additional consideration is not binding. Winer v. Williams, 165 Tenn. 190, 54 S.W.2d 723 (1932).

14. Reilly v. Barrett, 220 N.Y. 170, 172-73, 115 N.E. 453, 454 (1917).

15. Brackin v. Owens Horse and Mule Co., 195 Ala. 579, 71 So. 97 (1916); Kall v. W. G. Block Co., 319 Ill. 339, 150 N.E. 254 (1926); Alcorn v. Arthur, 230 Ky. 509, 20 S.W.2d 276 (1929); Hull v. Johnson, 22 R.I. 66, 46 Atl. 182 (1900); Continental Ins. Co. v. Weinstein, 37 Tenn. App. 596, 267 S.W.2d 521 (M.S. 1953). The dispute may not be as to the amount, but as to how a claim should be paid. Gottlieb v. Charles Scribner's Sons, 232 Ala. 33, 166 So. 685 (1936).

16. Hand Lumber Co. v. Hall, 147 Ala. 561, 564, 41 So. 78, 79 (1906).

17. It is generally held that if the claim, though asserted, is not honestly believed to be at least doubtful, the release of the claim is not sufficient consideration. Schram v. Dederick, 42 F. Supp. 525 (E.D. Mich. 1941); Berger v. Lane, 190 Cal. 443, 213 P.45 (1923); Moise Bros., Inc. v. Jamison, 89 Colo. 278, 1 P.2d 925 (1931); 1 WILLISTON, CONTRACTS § 135 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 76 (b) (1932).

18. Barham v. Bank, 94 Ark. 158, 126 S.W. 394 (1910) ("payment in full to date"); Kall v. W. G. Block Co., 319 Ill. 339, 150 N.E. 254 (1926) ("for labor to date"); Beck Electric Constr. Co. v. National Contracting Co., 143 Minn.

tion intended. That is to say, the offer must be such that the party to whom it is made is bound to understand that if he takes the check, he takes it subject to the condition that it does constitute payment in full.[19]

If the claim is disputed or unliquidated and the tender of the check in settlement gives the creditor notice that it must be accepted in full satisfaction, then the retention and use by the creditor of the check constitutes an accord and satisfaction, discharging the claim. Even though the creditor strikes out the words on the check before cashing it,[20] or even if he immediately notifies the debtor that he accepts the check only in part payment, nevertheless the retention and use of the check constitutes an accord and satisfaction.[21] Nor can the creditor be relieved of the results of his acceptance of the check after he has once used it although he tender the proceeds thereof at the time suit is brought for the balance.[22]

In the case at hand the claim clearly was unliquidated and the cashing of the check marked for full payment of all legal services rendered seems clearly to constitute an accord and satisfaction, thereby discharging the claim.

Statute of Frauds—Promise to Answer for Debt of Another: In *Yarbrough v. Viar*[23] the Tennessee Court of Appeals was confronted with the applicability to a transaction of that section of the Statute of Frauds which provides that no action shall be brought to charge the defendant upon any oral promise to answer for the debt, default, or miscarriage of another.[24] From the unsatisfactory record it appears

190, 173 N.W. 413 (1919) ("in full for painting"); Bartley v. Pictorial Review Co., 188 Mo. App. 639, 176 S.W. 489 (1915) ("payee hereby acknowledges receipt in full settlement of account"); Gribble v. Raymond Van Proag Supply Co., 124 App. Div. 829, 109 N.Y. Supp. 242 (1st Dep't 1908) ("payment in full for commissions"); Continental Ins. Co. v. Weinstein, 37 Tenn. App. 596, 267 S.W.2d (M.S. 1953) ("in full payment of all claims").

19. "Proof must be clear and unequivocal that the observance of the conditions was insisted upon, and must not admit of the inference that the debtor intended that his creditor might keep the money tendered, in case he did not assent to the condition upon which it was offered." Canton Union Coal Co. v. Parlin & Orendorff Co., 117 Ill. App. 622, 625, *aff'd*, 215 Ill. 244, 74 N.E. 143 (1905). "It cannot be too strongly stated that with us an accord and satisfaction can never be implied from language of doubtful meaning; . . . Hence, when a substantial doubt arises, there can be no such implication, the usual rule applies, and the payment will be treated as on account only." Lovekin v. Fairbanks, Morse & Co., 282 Pa. 100, 127 Atl. 450, 451 (1925).

20. Beck Electric Constr. Co. v. National Contracting Co., 143 Minn. 190, 173 N.W. 413 (1919); Toledo Edison Co. v. Roberts, 50 Ohio App. 74, 197 N.E. 500 (1934); Gribble v. Raymond Van Proag Supply Co., 124 App. Div. 829, 109 N.Y. Supp. 242 (1st Dep't 1908). *Cf:* Nassoiy v. Tomlimson, 148 N.Y. 326, 42 N.E. 715 (1896) (real estate broker, protesting, cashed check for commissions).

21. Barham v. Bank, 94 Ark. 158, 126 S.W. 394 (1910).

22. Shahan v. Bayer Vehicle Co., 179 Iowa 923, 162 N.W. 221 (1917).

23. 282 S.W.2d 367 (Tenn. App. W.S. 1954).

24. Specifically the statute provides: "No action shall be brought:

". . . .

"(2) Whereby to charge the defendant upon any special promise to answer

that the defendant agreed to "stand for" or "stand good" for a store account of a third party. The goods apparently were originally charged to the third party. To establish that defendant was "primarily liable" on the debt, rather than merely a surety, plaintiff contended that even though the goods were charged to the third party this was merely for convenience and to distinguish the goods sold to defendant for his own use. The court held the defendant's oral promise was within the Statute of Frauds provision rendering unenforceable an oral promise to answer for the debts of a third party. In so holding the court reversed the lower court's judgment which had allowed recovery on the promise. In the opinion of the court of appeals the evidence was not sufficient to establish "primary liability" against defendant. The court thought that the warrant starting the suit in a justice of the peace court was conclusive that the indebtedness was due primarily from the third party. The warrant summoning defendant to answer the complaint stated that the claim against defendant was a "debt due by" the third parties and "secured by" the defendant.

As the case at hand illustrates, it is often said that an oral promise to answer for debts of another is within the Statute of Frauds and therefore unenforceable if the promise is "collateral," but not so if the promise is "original" or "primary."[25] Sometimes it is supposed that these terms afford a test for determining the application of the Statute of Frauds.[26] Actually, the use of such terms only describes a result reached and does not furnish a trustworthy criterion for determining how the result is reached.[27]

Since the original reasons for the enactment of the Statute of Frauds have ceased to exist,[28] it is arguable that the Statute has no place in our legal system at the present time.[29] Perhaps in reflecting this atti-

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for the debt, default, or miscarriage of another;

". . . .

"Unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized." TENN. CODE ANN. § 23-201 (1956). This section of the statute stems from the English Statute of Frauds as enacted in 1677, 29 CHARLES 2, c. 3. See 2 CORBIN, CONTRACTS § 275 (1950).

25. 2 CORBIN, CONTRACTS § 348 (1950); 2 WILLISTON, CONTRACTS § 465 (rev. ed. 1936); ARANT, SURETYSHIP § 36 (1931).

26. 2 CORBIN, CONTRACTS § 348 (1950).

27. *Ibid.*

28. At the time of the original enactment of the Statute in the 17th century neither party to an action, nor the husband or wife of a party, nor any person who had any interest in the result of the litigation could testify as a witness. See 6 HOLDSWORTH'S HISTORY OF THE ENGLISH LAW 388 (1927).

29. 6 HOLDSWORTH'S HISTORY OF ENGLISH LAW 390, 396 (1927). Since the disqualification of parties as witnesses has been removed, the protection of the Statute of Frauds is much less needed. Moreover, the operation of the Statute may enable a man to break a promise with impunity, simply because he did not write it down with sufficient formality.

tude courts have withdrawn from the operation of the Statute some of the cases that appear to be within its letter.[30] Thus, it has generally been held that a promise is not within the Statute if the promisor himself is a debtor, even when his performance satisfied a debt or obligation of another; it is a payment of his own debt.[31] Not a few courts have gone farther and have held that where the object of the promisor is to secure some benefit for himself or subserve some purpose of his own, his promise is not within the Statute.[32] Mr. Corbin, an eminent authority in the field, lays down what the writer believes is the clearest and most accurate test of whether an oral promise is within the purview of the Statute. After observing that the application of the Statute should not be made to depend upon the forms of words used by the promisor, Mr. Corbin concludes:

> If the consideration moves directly to another person, for which that person becomes indebted to the promisee, and if that person is bound to exonerate the promisor, as the promisee knows, the relationship is that of creditor, principal debtor, and surety, and it is the sort of case intended to be included within the statute of frauds. Wherever the relation between the two obligors is that of principal and surety and this fact is known to the creditor, the case is within the statute.[33]

Tested by this criterion, the defendant's promise in the case at hand seems to fall within the Statute and consequently is not enforceable.

Inducing Breach of Contract—Availability to Defendant of Defense of Statute of Frauds Which Could be Used by Parties to Contract: In *Evans v. Mayberry*[34] the Tennessee Supreme Court had before it a question on the operation of the Statute of Frauds as to third parties who have no connections with the oral contract. Specifically, the court had to decide whether the unenforceability of a contract because of the Statute of Frauds can be used as a defense by a third person who is sued for wrongfully inducing a breach of that contract. The case was an action by a purchaser against the defendant for wrongfully inducing the vendor to avoid an oral contract for the sale of land to the purchaser-plaintiff. The sales contract was treated as unenforceable because of the Statute of Frauds. Over the plaintiff's objection that the Statute of Frauds was available only to the actual parties to the contract, the court held that since the oral contract of sale was

30. ARANT, SURETYSHIP § 36, at 105 (1931).
31. *Id.* § 35; SIMPSON, SURETYSHIP § 38 (1950).
32. Davis v. Patrick, 141 U.S. 479 (1891); Emerson v. Slater, 63 U.S. (22 How.) 28, 43 (1859). See 2 CORBIN, CONTRACTS § 366 (1950), approving of this approach, which he calls the "leading object" rule. See SIMPSON, SURETYSHIP § 38 (1950), criticizing this approach ("main purpose rule") as vague and lacking in predictability.
33. 2 CORBIN, CONTRACTS 247 (1950). For an elaboration of his approach to various situations, see 2 *id.* §§ 366-95.
34. 278 S.W.2d 691 (Tenn. 1955), *rehearing denied,* 279 S.W.2d 705 (Tenn. 1955).

voidable under the Statute of Frauds the third party (defendant) could not be liable for inducing its avoidance.

The court concedes that it is following a minority view in holding that a third party can escape liability for inducing a breach of contract by virtue of the fact that the contract was unenforceable between the parties to the contract because of the Statute of Frauds. Quoting from the Texas case of *Davidson v. Oakes*[35] the Tennessee Supreme Court in the *Evans* case concludes that "'if the party to such oral agreement would not be liable for noncompliance therewith, it is legally incomprehensible that another person would be liable for procuring him not to perform.'" The Tennessee court then declares that "It must be conceded that it would be most difficult to assail, on a logical basis, this reasoning upon which the minority view is predicated." Assuming for the sake of discussion that this last declaration is true, in a case subsequent to *Davidson v. Oakes* the Texas court torpedoed the *Davidson v. Oakes* doctrine in *Yarber v. Iglehart.*[36] Specifically, in the *Yarber* case the Texas court held that one who wrongfully causes the breach of a contract between two others is liable for his tort even though the contract was oral and within the Statute of Frauds. Texas thus joined the view, recognized by the Tennessee court as the majority, that even though a contract is unenforceable by reason of the Statute of Frauds, nevertheless it is no defense to one who is charged with having tortiously prevented its performance.[37]

It is almost universally said that the unenforceability of a contract within the Statute of Frauds can be taken advantage of only by parties to the contract and those in privity with them.[38] The rule is stated in the following manner in the *Restatement of Contracts:* "Only a party to a contract or the successor of a party or one to whom the rights of a party are transferred can assert that the contract, because of noncompliance with the Statute, has not the same effect as if its requirements were satisfied."[39] There are numerous legal relationships showing the applicability of this well-established proposition of law that third parties cannot take advantage of the Statute of Frauds, in addition to the great weight of authority which holds that the unenforceability of a contract because of the Statute of Frauds is no defense to a third person who tortiously induced a breach of the

35. 60 Tex. Civ. App. 269, 128 S.W. 944 (1910).

36. 264 S.W.2d 474 (Tex. Civ. App. 1954). In a petition to rehear the *Evans* case, the Texas development was brought to the attention of the Tennessee Court; nevertheless, the Tennessee Court adhered to its previous position and denied the petition. See note 34 *supra.*

37. See 2 CORBIN, CONTRACTS § 289 (1950), which contains a large collection of cases supporting the rule. See also, 2 WILLISTON, CONTRACTS § 530 (rev. ed. 1936), and supporting cases to same effect. See Annots. 84 A.L.R. 43 (1933), 26 A.L.R.2d 1227 (1952).

38. *Ibid.*

39. RESTATEMENT, CONTRACTS § 218 (1932).

contract.[40] Only a few illustrative situations will be set forth. Thus, a party in possession of land under an oral contract can maintain trespass or trover for tortious injuries, and it is immaterial that there has been no such part performance as would make the oral contract unenforceable as between the parties to the contract.[41] Although a contract of a principal obligor is unenforceable against him because of the Statute of Frauds, nevertheless that is no defense to one who became surety for his performance.[42] Nor may a defendant show in mitigation of damages that a subcontract for which the plaintiff is claiming loss of profits was oral.[43] In a proceeding by a city to condemn land in possession of a lessee under an oral lease, the lessee was entitled to compensation for his interest, even though the lease might not be enforceable against the lessor.[44] Two parties executed a written contract under which one would have been entitled to taxable income. Subsequently, they made an oral agreement modifying the written contract so that there would be no taxable income. It was held that the government, as a third party, could not take advantage of the Statute of Frauds, and that the taxability of income must be determined in accordance with the oral agreement even though it was within the Statute of Frauds.[45] Although a contract for the sale of land made by an agent for his principal would not be enforceable for want of sufficient memorandum in writing; nevertheless, that did not prevent the agent from getting judgment for his commission if the purchaser which he produced was ready, willing and able to perform his oral contract with the vendor.[46] The invalidity under the Statute of Frauds of a lease cannot be shown by one who is not a party to the lease.[47] Moreover, Tennessee goes along with the well-established view that creditors cannot successfully attack the validity of a contract made by their debtor with a third party on the ground that the requirements of the Statute of Frauds have not been satisfied with respect to their debtor's contract with the third party.[48]

The Tennessee court in its *Evans* opinion placed reliance on *Watts*

40. See note 37 *supra*.
41. Stapp v. Madera Canal & Irrigation Co., 34 Cal. App. 41, 166 Pac. 823 (1917); Waynesboro Planing Mill v. Perkins Mfg. Co., 35 Ga. App. 767, 134 S.E. 831 (1926); Rutherford Nat'l Bank v. H. R. Bogle & Co., 114 N.J. Eq. 571, 169 Atl. 180 (Ch. 1933); Virginian Ry. v. Jeffries' Adm'r, 110 Va. 471, 66 S.E. 731 (1909); Draper v. Wilson, 143 Wis. 510, 128 N.W. 66 (1910).
42. First Presbyterian Church v. Swanson, 100 Ill. App. 39 (1901); Wilton Mfg. Co. v. Machinery & Metals Sales Co., 174 N.Y. Supp. 766 (N.Y. City Ct. 1919); Backus v. Feeks, 71 Wash. 508, 129 Pac. 86 (1913).
43. Edwards Mfg. Co. v. Bradford Co., 294 Fed. 176 (2d Cir. 1923).
44. Miles v. Wichita, 175 Kan. 723, 267 P.2d 943 (1954).
45. Charlotte Union Bus Station, Inc. v. Commissioner, 209 F.2d 586 (4th Cir. 1954).
46. Neuland v. Millison, 188 Md. 594, 53 A.2d 568 (1947).
47. Colvin v. Payne, 218 Ala. 341, 118 So. 578 (1928).
48. See Culwell v. Culwell, 23 Tenn. App. 389, 133 S.W.2d 1009 (M.S. 1939); 2 CORBIN, CONTRACTS § 290 (1950).

v. Warner[49] to support the proposition that the unenforceability of a contract by reason of the Statute of Frauds is a defense to a third party who is sued for inducing a breach of the contract. It is sufficient to remove that case as a controlling authority to point out that one of the parties to the contract had already successfully interposed the Statute of Frauds and had avoided the contract. So, Justice Green concluded that no judgment for inducing a breach of contract could be entered against the defendant "for interference with an unenforceable repudiated contract." After repudiation of the contract, concluded Justice Green, there were no legal rights under such a contract which could be infringed.

Fair Trade Law—Third Person Who is Not Party to Agreement Within the Protection of the Act—Consideration for the Contract: In *Seagram Distillers Co. v. Corenswet*[50] the Tennessee Supreme Court had occasion to consider whether there was present the requisite consideration to support a contract in connection with the Tennessee Fair Trade Law. Complainant-distillery sued to enjoin the defendant-liquor retailers from selling liquor below the prices fixed in fair trade agreement between complainant and other retail liquor dealers. Defendants were not parties to the fair trade agreement but they knew of the existence of the agreement. Complainant contended, however, that defendants' conduct did constitute a violation of the Fair Trade Law even though defendants were not parties to the agreement. Among other defenses interposed by defendants was that the agreement between complainant and other dealers, made pursuant to the Fair Trade Law, was without consideration and not binding. In overruling all of the defenses interposed, the Supreme Court held that defendants' conduct was a violation of the Fair Trade Law although defendants were not parties to the agreement with the complainant-distillery. The Act so provides.[51] Moreover, the court found that the agreement was supported by the necessary consideration. The consideration was said to lay in the mutual benefit to the parties to the contract.

While the contract is not set forth in the opinion, it seems safe to assume that the complainant-distillery and the dealer, who was a party

49. 151 Tenn. 421, 269 S.W. 913 (1925).

50. 281 S.W.2d 657 (Tenn. 1955).

51. After clearing the way for parties to enter price fixing agreements with respect to trade-mark or branded commodities, Tenn. Code Ann. § 69-203 (1956), the Fair Trade Law goes on to provide: "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of § 69-203, whether the person so advertising, offering for sale or selling is or *is not a party to such contract,* is unfair competition and is actionable at the suit of any person damaged thereby." TENN. CODE ANN. § 69-204 (1956). (Emphasis added.) A non-contracting dealer was held to be within the scope of the Law in Frankfort Distillers Corp. v. Liberto, 190 Tenn. 478, 230 S.W.2d 971 (1950), which also upheld the constitutionality of the Law.

to the agreement, each made some promises. Presumably the distillery must have promised to supply certain amounts of liquors to the dealer; and the dealer, on the other hand, must have promised not only to sell, but not to sell below certain specified prices. The court purported to find the requisite consideration in the mutual benefit to the parties to the agreement. Likewise, consideration presumably could have been found, using the orthodox approach of detriment to the promisee. A leading authority in the field, Mr. Williston, with reference to consideration in bilateral contracts says: "Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void are sufficient consideration for one another."[52] "Benefit" and "detriment" have a technical meaning. Neither the benefit to the promisor nor the detriment to the promisee need be actual.[53] In describing or defining the concept of detriment, Mr. Williston says:

> Detriment, therefore, as used in testing the sufficiency of consideration means legal detriment as distinguished from detriment in fact. It means giving up something which immediately prior thereto the promisee was privileged to keep or doing or refraining from something which then he was privileged not to do or refrain from doing.[54]

Thus, when the liquor dealer promised to sell distiller's products, and promised not to sell below a specified price, that would be a legal detriment and would constitute consideration sufficient to support the promise of the distiller to sell. Conversely, the promise of the distiller to sell to the dealer would be a legal detriment constituting a consideration sufficient to support the dealer's promises. Both parties would thus incur a legal detriment by agreeing to circumscribe or limit their course of future conduct.

Without indicating any quarrel with the result reached by the court, there is one expression in the opinion that warrants adverse comment. Quoting from the New Jersey case of *Houbigant Sales Corp. v. Woods Cut Rate Store*,[55] the Tennessee court said: "Speaking further to the question of 'consideration', as necessary to support an agreement, the court [N.J.] said: 'It is not necessary that there be any counter promise by the owner or producer to the retailer. . . .' "[56] It is most difficult to comprehend how there can be a contract, unless the court is thinking of an unlikely unilateral contract, without there being a "counter promise." By very definition a bilateral contract is one where each party

52. 1 WILLISTON, CONTRACTS 347 (rev. ed. 1936).
53. 1 *id.* §§ 102A, 103G, 104.
54. 1 *id.* at 327.
55. 123 N. J. Eq. 40, 196 Atl. 683 (Ch. 1937).
56. 281 S.W.2d at 660.

promises some performance.[57] Without a promise by both parties to a bilateral contract, there can be no contract at all. And by very definition of consideration in bilateral contracts there must be "mutual promises in each of which the promisor undertakes some act of forbearance . . . ."[58] What about the requirement of "mutuality of obligation" in a bilateral contract if there is no "counter promise" for the promise of the other party to the agreement?[59]

Recovery by Gambler of Money Confiscated in Crap Game: In *Shirley v. Slate*[60] the Supreme Court of Tennessee had an occasion to pass upon the status of a gambling transaction in Tennessee. In the *Shirley* case a petition was filed to recover money seized by a sheriff in a crap game. In denying recovery, the court held that the power of the the court could not be invoked for recovery of money which the participant had won and which had been seized by the sheriff during a raid and turned over the county court clerk. Tennessee visits severe consequences on gambling or wagering transactions. By statute it is provided that "all contracts founded, in whole or in part, on a gambling or wagering consideration, shall be void to the extent of such consideration."[61] To buttress further the policy of discouraging such transactions, another statute provides that "no money, or property of any kind, won by any species or mode of gambling, shall be recovered by action."[62] The final touch to discourage suits to enforce a gambling contract is provided in still a third statutory provision to the effect that "any person who institutes an action for money or property, claimed under a contract founded on a gambling consideration, shall forfeit one hundred dollars, recoverable in any court having cognizance; one-half [of the forfeiture] to him who shall sue therefore, the other half to the county in which action is brought."[63]

On the other side of the coin, a statute provides that "any person who has paid any money, or delivered anything of value, lost upon any game or wager, may recover such money, thing, or its value, by action commenced within ninety days from the time of such payment or delivery."[64] While this last statute is hardly applicable to the case at hand, nevertheless some of the language of the court seems to indicate that the court is scarcely cognizant of its existence. Referring to the situation where a suit is brought in connection with a gambling

57. 1 WILLISTON, CONTRACTS § 13 (rev. ed. 1936).
58. 1 *id.* at 347.
59. "Mutuality of obligation should be used solely to express the idea that each party is under a legal duty to the other; each has made a promise and each is an obligor." 1 CORBIN, CONTRACTS 498 (1950).
60. 280 S.W.2d 915 (Tenn. 1955). For the liability of a stakeholder, see 18 TENN. L. REV. 219 (1944).
61. TENN. CODE ANN. § 23-1701 (1956).
62. *Id.* § 23-1702.
63. *Id.* § 23-1703.
64. *Id.* § 23-1704. An action may also be maintained for the use of the

transaction, the court concludes that "courts of law and equity will refuse to aid either party in such contract because they are both equally culpable and the courts will leave them where it finds them, without giving aid to either party."[65]

As a result of Tennessee's policy against gambling, as expressed by her statutes, it seems likely that a negotiable instrument executed for a gambling transaction would be void.[66] In short, gambling would be a real defense, good even as against a holder in due course.

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family, *id.* § 23-1705, or by creditors of the losing party, *id.* § 23-1706.

65. 280 S.W.2d at 916.

66. See Winecoff Operating Co. v. Pioneer Bank, 179 Tenn. 306, 165 S.W.2d 585 (1942).