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Contracts

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CONTRACTS

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CONSENT TO BE BOUND: SERVICES RENDERED AND ACCEPTED

The case of *Thomas v. Million*[1] presented these facts: The defendant listed a house and lot for sale with the plaintiff, a real estate broker, for $16,500. The plaintiff advertised the property for sale and showed it to many prospects, including a man by the name of Cowell. After that, the defendant wrote a letter to the plaintiff, "terminating the agency contract" of the plaintiff. The defendant then sold the property to Cowell for $15,500. The plaintiff was allowed to recover $500 as a reasonable commission.

The power of an agent is generally revocable.[2] The defendant's letter would take away the plaintiff's power to sell. The broker's power, however, is not in question. The case has to do with the contract rights between the owner and the broker. The listing was essentially an offer by the defendant to pay a commission, if the plaintiff would sell the property for $16,500. The plaintiff did not accept that offer — *i.e.*, he did not sell the property for $16,500. But the plaintiff tendered services to the defendant by bringing prospective buyers to the defendant. These services could not have been taken to be gratuitious, and, when the defendant availed himself of the services, he impliedly promised to pay for them.[3] The plaintiff's claim seems to have been properly based on contract rather than on quasi contract. The defendant's promise to pay for the services can easily be implied from the facts of the case. And the plaintiff's right to recover in quasi contract would be doubtful, since he rendered his services without being under any misapprehension.

The case of *Richardson v. McGee*[4] was a suit to recover a commission due to the plaintiff according to a written contract signed by the defendant. The contract was on a printed form. In the printed part, there were provisions that the plaintiff should have the exclusive agency to sell the property for a given period and that, in the event of sale, the plaintiff should have a certain commission. The defendant could not read and did not take the precaution of having the contract read to him. It did not appear that the defendant was imposed on in any way. The Court held that the defendant was "estopped to re-

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1. 35 Tenn. App. 604, 250 S.W.2d 111 (E.S. 1952).
2. RESTATEMENT, AGENCY § 118 (1933).
3. Benedict v. Pfunder, 183 Minn. 396, 237 N.W. 2 (1931); CORBIN, CONTRACTS § 71 (1950); RESTATEMENT, CONTRACTS § 72(1)(a) (1932).
4. 193 Tenn. 500, 246 S.W.2d 572 (1952).

pudiate his contract."[5] This holding is in accordance with the weight of authority[6] and with the *Restatement of Contracts*.[7]

INTERPRETATION

Contracts have to be interpreted. That is, a meaning must be ascribed to the words, symbols and behavior of the contracting parties. The basic rule for interpreting contracts is that they should be so interpreted as to give effect to the intention of the parties.[8] To this end, account may be taken of the situation and motives of the parties.[9] A course of conduct pursued by the parties is also strong evidence of what they originally intended.[10] An intention of the parties cannot be given effect unless it has been expressed by the language used, or can be implied from that language as illuminated by the circumstances.[11] The interpretation of a written contract is generally a matter for the court, but, when evidence is needed to identify subject matter or to ascertain circumstances, interpretation may be left to the jury under proper instructions.[12]

The case of *Hardin v. Chapman*[13] held that a contract to support a person during life did not include an obligation to pay the funeral expenses of the person. A similar interpretation has been made by other courts.[14]

In *Lazarov v. Klyce*,[15] it appeared that Klyce had signed a promissory note without using words to indicate that he signed in a representative capacity. In the trial court, Klyce was allowed to testify, and the jury was allowed to find, that Klyce signed in a representative capacity. This was held to be error. Klyce could not show that he signed in a representative capacity unless that appeared in the contract itself. The writing bound Klyce personally. The Court held that it would have violated the parol evidence rule if he had been allowed to exonerate himself by oral testimony. This decision is in accord with earlier Tennessee decisions.[16]

5. *Id.* at 505, 246 S.W.2d at 574.
6. 1 WILLISTON, CONTRACTS § 35 (Rev. ed. 1936).
7. RESTATEMENT, CONTRACTS § 71 (1932).
8. Nashville v. Lawrence, 153 Tenn. 606, 284 S.W. 882, 47 A.L.R. 1266 (1926).
9. Scott v. McReynolds, 255 S.W.2d 401 (Tenn. App. M.S. 1952).
10. Campbell v. American Limestone Co., 109 F. Supp. 741 (E.D. Tenn. 1951).
11. Couch v. Couch, 35 Tenn. App. 464, 248 S.W.2d 327 (E.S. 1951)
12. Carter County v. Street, 252 S.W.2d 803 (Tenn. App. E.S. 1952).
13. 255 S.W.2d 707 (Tenn. App. E.S. 1952).
14. Morris v. Fain, 165 Ga. 879, 142 S.E. 119 (1928); *In re* Brandes, 145 Iowa 743, 122 N.W. 954 (1909); Skeen v. Parsons, 94 W. Va. 584, 119 S.E. 681 (1923).
15. 255 S.W.2d 11 (Tenn. 1953). See the comment on this case in the Evidence section of the Procedure and Evidence article and the Parol Evidence section of the Bills and Notes article.
16. Cruse v. Jones, 71 Tenn. 66 (1879); Kain v. Humes, 37 Tenn. 610 (1858); Steele v. McElroy, 33 Tenn. 341 (1853); Jordon v. Trice, 14 Tenn. 479 (1834).

CONTRACT FOR BENEFIT OF THIRD PARTY

In the case of *United States v. Inorganics, Inc.*,[17] the facts were these: Inorganics conveyed a piece of land to Johnstone. Later, an income tax assessment was made against Inorganics. It was not a lien on the land conveyed to Johnstone. Still later, Johnstone conveyed the land to Spengler. Johnstone was not bound to pay the tax assessment, but his attorneys were aware of the assessment, and, by way of excessive caution, the grantee, Spengler, was required to assume the tax assessment. Spengler made another conveyance of the land, and his grantee also assumed the tax assessment. The United States sought to recover against Spengler and his grantee on the theory that the United States was third party beneficiary of a promise made by Spengler to Johnstone and that the United States bore a similar relationship to Spengler's grantee. The United States was not allowed to recover. It was said in the opinion that the United States should fail because there was no consideration for the respective promises made by Spengler and his grantee. But query! "[B]efore the owner would execute a deed the grantee was required to assume responsibility for payment of a tax liability."[18] The owner, thus required, did execute the deed. Was that not consideration for whatever promises the grantee made in exchange for the execution? The court pointed out that "Charity is emphatically disavowed."[19] That may be so, but it does not mean that there was no consideration for Spengler's promise. In the cases where grantees promise to pay mortgagees, there is not usually any charitable motive. The conveyances, however, afford consideration for the promises.[20]

Because Johnstone was not bound to pay the tax assessment, the United States was a donee-beneficiary in each one of the contracts that were made by Johnstone and Spengler. That presents a question apart from the question of consideration. While a creditor-beneficiary can recover in almost all American jurisdictions,[21] there is some difference of opinion among the courts as to whether a donee-beneficiary can recover.[22] The question has arisen in a good many cases where grantees of land assumed to pay mortgage debts which the grantors were not personally bound to pay. A majority of the courts,[23] including the Tennessee Supreme Court, and the *Restatement of Contracts*[24] take the

17. 109 F. Supp. 576 (E.D. Tenn. 1952). While this is a federal case, the law of Tennessee should be applied under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). The court seemed to take it for granted that the Tennessee law applied.
18. 109 F. Supp. at 579.
19. *Ibid.*
20. The Home v. Selling, 91 Ore. 428, 179 Pac. 261, 21 A.L.R. 403 (1919).
21. RESTATEMENT, CONTRACTS § 136 (1932).
22. 1 WILLISTON, CONTRACTS § 35 (Rev. ed. 1936).
23. *Ibid.*
24. RESTATEMENT, CONTRACTS § 135 (1932).

view that a donee-beneficiary should be able to recover. In *Title Guaranty and Trust Co. v. Bushnell*,[25] it appeared that a grantee of land assumed to pay a mortgage debt for which his grantor was not bound. The grantee was held bound by his promise. The Court, in the instant case, distinguished the *Bushnell* case on the ground that the promisor, in that case, retained — *i.e.*, omitted to pay — part of the purchase price.[26] Was not the payment of this tax assessment, in the principal case, a part of the purchase price demanded by the grantor-promisee? It would seem that a part of the purchase price was held back in both cases.

There was, in this case, no lack of mutual assent, consideration or any of the other factors it takes to make a contract. Both parties were, however, under the false impression that Johnstone might owe the tax assessment. That mistake prompted them to make the provision they made for its payment. It would seem, therefore, that the contract might be voidable on the ground of mutual mistake.[27]

Dependency: Breach: Rescission

The case of *Young v. Jones*[28] had to do with a sale by Dr. Jones, a veterinarian, of his practice to Dr. Young. Stated more in detail, Dr. Jones did "sell, transfer and deliver" to Dr. Young his business and good will together with his instruments and equipment. Dr. Jones also promised that he would not engage in the practice of veterinary medicine and surgery in Johnson City and Washington County "as long as this contract is not breached." Dr. Young gave in payment a promissory note, payable in installments, for about nine thousand dollars. Dr. Young brought a bill in equity, asking to have a cancellation of the balance due on the note he had given, on the ground that Dr. Jones had reengaged in the practice of veterinary surgery in the forbidden area. The Court, relying on an earlier case,[29] held that Dr. Young continued to be liable on the note. The result reached by the Court may be sound, but the reasoning applied in reaching that result is different from the reasoning that would generally be applied to the facts.

The Court took the view "that the contract in the instant case was 'severable' and that performance by either party was not subject to performance by the other as a condition precedent."[30] The fact that Dr. Jones reengaged in the practice was not, therefore, taken to preclude him from recovering on Dr. Young's promise to pay. By "sever-

25. 143 Tenn. 681, 228 S.W. 699 (1920).
26. 109 F. Supp. at 580.
27. Restatement, Contracts, § 144, comment *b* (1932).
28. 255 S.W.2d 703 (Tenn. App. E.S. 1952).
29. Bradford & Carson v. Montgomery Furn. Co., 115 Tenn. 610, 92 S.W. 1104 (1905).
30. 255 S.W.2d at 706.

able" the Court might mean "divisible." Or it might mean that the consideration for Dr. Young's promise to pay was in part Dr. Jones' transferring of his practice and in part his promise to stay out of practice. Let us give thought to each of the two possible meanings.

A divisible contract, as defined by Professor Williston,[31] is one "under which the whole performance is divided into two sets of partial performances, each part of each set being the agreed exchange for a corresponding part of the set of performances to be rendered by the other promisor." A typical instance of a divisible contract would be this: A farmer contracts with a stablekeeper that the farmer will deliver loads of straw to the stablekeeper over a period of months at the rate of one load per week, and the stablekeeper agrees to pay to the farmer so much per load as the straw is delivered. Courts have sometimes found it difficult to determine whether a particular contract was entire or divisible. But a contract cannot be divisible unless items to be rendered are separately priced by the parties to the contract. The cases that have caused difficulty are cases where the contract specified the rate of payment at so much a pound, or a foot or a month. Such a contract is divisible or entire according to the intention of the parties. In the case of *Young v. Jones*, however, there was no separate pricing by the parties of the instruments, equipment, good will and Dr. Jones' promise to refrain from practicing. It would seem that the contract was necessarily entire — *i.e.*, indivisible.

Was the contract "severable" because the consideration for Dr. Young's promise to pay was partly the transfer by Dr. Jones of his business and partly the promise he made that he would stay out of practice in the vicinity? Some old cases took the view that promises were not dependent unless the whole consideration on each side consisted of promises.[32] But this is no longer a requirement for dependency. It has become merely a factor to consider in making out whether a promisee has substantially performed his own duty under the contract.[33] It would seem that the promises of Doctors Jones and Young were dependent. The result reached by the Court, however, is probably right. Dr. Jones rendered such a large part of the consideration he was to give, when he turned over his practice to Dr. Young, that he may well be credited with substantial performance.

Dr. Young in his bill asserted that Dr. Jones' reentry into practice was a material breach of contract and that it entitled Dr. Young to be relieved from further liability on the note. The Court apparently took the view that Dr. Young sought a rescission of the contract.[34] The re-

31. 3 WILLISTON, CONTRACTS § 860A (Rev. ed. 1936).

32. Boone v. Eyre, 1 H. Bl. 273, 126 Eng. Rep. 160 (1777).

33. CORBIN, CONTRACTS § 660 (1951); RESTATEMENT, CONTRACTS §§ 275(c), 289 (1932).

34. 255 S.W.2d at 706.

quest of Dr. Young to be relieved of liability on the note might have been on either one of two theories. It might have been on the theory that he could, and that he desired to, rescind the contract. Or it might have been on the theory that he desired to keep the contract in effect but to excuse himself from performing by reason of Dr. Jones' breach. It may be noted incidentally that rescission was not the most advantageous remedy for Dr. Young to seek, even if Dr. Jones' breach was material and justified rescission. A rescission would undo the whole contract. It would take away Dr. Young's rights under the contract as well as his liability. An alternative and wiser course would have been for him to excuse himself from performing by reason of Dr. Jones' breach and, at the same time, retain his claim for the damages that he suffered from Dr. Jones' reentry into practice. The language of the bill filed by Dr. Young perhaps justified the Court in taking it to be a request for rescission of the contract. On that assumption, the decree had to go against the plaintiff, because he had made no offer to return what had come to him under the bargain. Since the purpose of rescission is to restore the parties to their original positions, Dr. Young would have to return what he got, so far as he could, before he would be allowed to rescind.[35]

But suppose that the bill filed by Dr. Young could have been interpreted as a request, not to rescind the contract, but rather that he be excused from performing because Dr. Jones had reentered the practice. That would have given the case a different aspect. There would have been no need for Dr. Young to return what he got, as in a rescission. The bill would have amounted to an assertion that the promises were dependent and that Dr. Jones, owing to his reentry into practice, had not substantially performed his obligation. Taking this view of Dr. Young's bill, the question boils down to whether Dr. Jones had materially broken his obligation by going into practice again. That question the Court did not decide. In the Court's view of the facts (severable contract, no dependency), it was not necessary to decide whether Dr. Jones' breach was material.

A good many factors must be considered in combination to determine whether a party has substantially performed his obligation so as to enable him to hold the opposite party on the contract. These factors are enumerated in the *Restatement of Contracts*.[36]

The Court observed that because Dr. Jones' promise not to compete was to run for the rest of his life and Dr. Young's promise to pay was not to be performed fully for five years, "immediate performance by neither was expected, nor was performance of one dependent upon

35. Baird v. McDaniel Printing Co., 25 Tenn. App. 144, 153 S.W.2d 135 (M.S. 1941); 5 WILLISTON, CONTRACTS § 1460 (Rev. ed. 1937); RESTATEMENT, CONTRACTS § 349 (1932).

36. RESTATEMENT, CONTRACTS § 275 (1932).

performance by the other of these parts of the contract."[37] The long and uneven periods allowed for full performance of the respective promises did not prevent the promises from being dependent. There could be a material breach of either promise before the time set for its full performance.[38] Dr. Jones' breach may not have been material. But it would seem that the question should have been decided, and, if it was material, Dr. Young should have had his note cancelled. Whether Dr. Jones' breach was material or not, Dr. Young should be able to recover damages for the loss he suffered from Dr. Jones' competing practice.[39] That, however, was not involved in the Court's decision. Dr. Young did not ask for damages, and so, naturally, none were awarded.

ACCORD AND SATISFACTION

The facts in the case of *B. Mifflin Hood Co. v. Lichter*[40] were these: The plaintiff sold and delivered to the defendant a large number of cement building blocks. The price to be paid for the blocks was definite. The defendant, however, claimed to have a credit, owing to alleged defects in some of the blocks and to delays in deliveries. In this situation, the defendant sent to the plaintiff vouchers and checks. On the vouchers there were listed the invoices for blocks supplied and, also, the claims of the defendant for the defects and for the delays in delivering the blocks. On the checks was the printed legend: "Acceptance and endorsement of this check is acknowledgment of settlement in full of items listed on voucher attached bearing same date." The checks were accepted and indorsed by the plaintiff, but the plaintiff wrote to the defendant, saying that it did not consider the checks as payment in full. The court held that the plaintiff was not precluded from suing for an alleged balance in its favor.

The court based its holding on two grounds. One ground was that the giving and accepting of the checks did not, in spite of the legend, indicate an intention of the parties to make complete settlement of the account. The weight of authority is that the indorsing and cashing of a check by the creditor, when it has been sent with such a legend, constitutes an agreement by him to surrender the claim.[41]

The second ground given by the court for its holding was that the seller's claim for blocks sold was a liquidated amount, and so the check would not effect an accord and satisfaction. This second ground proceeds from a supposed need that consideration be given in order to

37. 255 S.W.2d at 706.
38. RESTATEMENT, CONTRACTS § 312 (1932).
39. Cf. Bradford & Carson v. Montgomery Furn. Co., 115 Tenn. 610, 92 S.W. 1104 (1905).
40. 106 F. Supp. 220 (E.D. Tenn. 1950), *aff'd*, 198 F.2d 472 (6th Cir. 1952). The court correctly assumed that Tennessee law applied.
41. CORBIN, CONTRACTS § 89 (1950); 6 WILLISTON, CONTRACTS § 1854 (Rev. ed. 1938).

make valid a discharge given by a creditor to his debtor. And a debtor who pays only an amount that is due, liquidated and undisputed suffers no detriment that he was free to omit. He gives no consideration.

There is such a rule, according to a majority of the courts.[42] It originated in a later misinterpretation of a case that was decided before there was any doctrine of consideration.[43] The rule hinders the settlement of claims. It is often advantageous to both a debtor and his creditor to settle for what the debtor can pay, even if the debt is liquidated and undisputed. But this rule puts a damper on such settlements. The rule is decried by courts.[44] It, moreover, is illogical for this reason: Consideration is a requirement for making contracts, but it is not a requirement for making other legal transactions. The surrender by a creditor of his claim is not the making of a contract. It is not an attempt to create an obligation on either party. When the debtor pays any amount and the creditor gives up his claim, the transaction is an exchange. It is apparent, when an exchange is analyzed, that either performance could be rendered without consideration. However, the illogical and obstructive rule has lived on in the courts with curious persistence. Some states, including Tennessee, have downed the rule by legislation.[45] The Tennessee Code section reads: "All receipts, releases, and discharges in writing, whether of a debt of record or a contract under seal, or otherwise, shall have effect according to the intention of the parties thereto."[46] This would seem to make a discharge in writing effective, even if the debtor did nothing that he was free to omit.

In *B. Mifflin Hood Co. v. Lichter,* the court cited the Tennessee statute but apparently assumed that it does not apply unless the parties have compromised a disputed or unliquidated claim. Such a compromise would, of course, afford consideration. But the statute would be altogether superfluous and ineffective if it did not dispense with the consideration requirement.

In the principal case the price of the blocks was definite and fixed, but there was disagreement between the parties with regard to a set-off or counterclaim that was made by the debtor for defects in the blocks and delays in their delivery. The court held that, in this situation, pay-

42. 1 WILLISTON, CONTRACTS § 120 (Rev. ed. 1936).

43. AMES, LECTURES ON LEGAL HISTORY 329 (1913); Ames, *Two Theories of Consideration,* 12 HARV. L. REV. 515, 521 (1899).

44. "The history of judicial decisions upon the subject, has shown a constant effort to escape from its absurdity and injustice." Harper v. Graham, 20 Ohio 105, 115 (1851). "The history of the rule, which had its origin in early English cases, is replete with opinions of learned judges condemning it for its want of logic, reason, and fairness and with specious reasons for restricting its application." Schwartz v. California Claim Service, Ltd., 52 Cal. App.2d 47, 125 P.2d 883, 887 (1942).

45. CAL. CIVIL CODE §§ 1524, 1541 (1949); TENN. CODE ANN. § 9741 (Williams 1934).

46. TENN. CODE ANN. § 9741 (Williams 1934).

ment for the blocks was payment of a liquidated amount and so was not consideration.[47] There is considerable authority to the effect that such an account should not be deemed liquidated.[48] It would seem to be of no importance in such cases whether the amount to be paid can be called liquidated or not. Getting down to the question of consideration, there is none when a debtor pays all or a part of what he admittedly owes.

The most important criticism of this decision is that it upholds the illogical and obstructive doctrine that a creditor cannot discharge his debtor unless the debtor gives consideration, although it must be admitted that this doctrine is upheld by many courts.[49] A further criticism of the case is that it does not give effect to the Tennessee statute which seems to dispense with the need for consideration when the discharge is in writing.

IMPOSSIBILITY

The case of *Clinchfield Stone Co. v. Stone*[50] reaffirmed a well-established doctrine that "where a person by his contract or agreement charges himself with an obligation possible to be performed, he must perform it, and he will not be excused therefrom because of unforeseen difficulties, unusual or unexpected expense, or because it is unprofitable or impracticable."[51]

PUBLIC POLICY: RESTRAINT OF TRADE

In *Scott v. McReynolds*,[52] these facts appeared: Scott and McReynolds had been partners in a retail business in Nashville, selling butane-propane gas and appliances. They made a partnership dissolution contract, and as a part thereof McReynolds agreed that he would not thereafter engage in the retail business of selling butane-propane gas or appliances within a fifty mile radius of Nashville, with some areas excepted. The agreement was held to be valid. The decision seems to be in accord with the great weight of authority.[53] The gist of the entire contract was that Scott should retain the good will of the old business, and the restraint agreed to was no greater in extent than the good will it was designed to protect.

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47. 106 F. Supp. at 231.
48. Tanner v. Merrill, 108 Mich. 58, 65 N.W. 664 (1895); Jordan v. Great Northern Ry., 80 Minn. 405, 83 N.W. 391 (1900).
49. For a more detailed discussion, see FERSON, BASIS OF CONTRACTS 153 *et seq.* (1949).
50. 254 S.W.2d 8 (Tenn. App. E.S. 1952).
51. *Id.* at 14. See also Dubois v. Gentry, 182 Tenn. 103, 184 S.W.2d 369 (1945); Green v. Smith, 44 Tenn. 436 (1867); Lowry v. Naff, 44 Tenn. 370 (1867); Bryan v. Spurgin, 37 Tenn. 681 (1858); Stees v. Leonard, 20 Minn. 494 (1874); RESTATEMENT, CONTRACTS § 467 (1932).
52. 255 S.W.2d 401 (Tenn. App. M.S. 1952).
53. CORBIN, CONTRACTS §§ 1385-1387 (1951); RESTATEMENT, CONTRACTS § 516(d) (1932).