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CONTRACTS—1959 TENNESSEE SURVEY

PAUL J. HARTMAN*

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* * *

While the courts in Tennessee have not had occasion to decide a large number of cases in the field of contracts during the period covered by this survey, nevertheless they have been called upon to decide some very basic contracts questions.

I. IMPLIED AND QUASI CONTRACTS—FEDERAL JURISDICTION UNDER TUCKER ACT

The distinction between an implied contract (implied in fact) and a quasi contract (implied in law) was presented in a somewhat unusual fashion in the federal case of *Holbert v. United States*[1] decided by the District Court for the Eastern District of Tennessee. Whether or not a federal district court had jurisdiction over plaintiff's case turned on whether the claim was based on implied contract or on quasi contract.

One of the grounds on which the Tucker Act confers jurisdiction on federal district courts to entertain actions against the United States is where the claim is based "upon any express or implied contract with the United States."[2] The *Holbert* court was of the opinion that this provision of the Tucker Act gives jurisdiction over implied contract only and that the act does not extend that jurisdiction to actions sounding in quasi contract. In determining whether the federal district court had jurisdiction over plaintiff's claim, the pivotal point thus

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1. 167 F. Supp. 179 (E.D. Tenn. 1958). For a discussion of the distinction between "implied contract" and "quasi contract" as applied to contracts for personal service, see Hartman, *Contracts—1957 Tennessee Survey*, 10 VAND. L. REV. 1050 (1957).
2. 28 U.S.C. § 1346(a) (2) (1952). Plaintiff also sued in tort, but that ground was abandoned because the statute of limitations had run. See Holbert v. United States, 167 F. Supp. 179, 180 (E.D. Tenn. 1958).

was whether plaintiff's claim was bottomed on implied contract or quasi contract.

In the *Holbert* case, plaintiff sought to recover from the United States Government certain "E" bonds or their proceeds after the bonds had been turned over to the Government and applied on the income tax obligations of plaintiff's father. Plaintiff was an infant when the transaction took place and it was plaintiff's theory that there arose an implied contract on the part of the Government to reimburse plaintiff inasmuch as the Government wrongfully obtained the bonds. Hence, plaintiff concluded that the federal district court had jurisdiction under the Tucker Act to adjudicate plaintiff's claim.

In a somewhat abbreviated form, the relevant facts were these. Plaintiff, who was fourteen years of age when the bonds were applied to the tax debt of his father, says that when plaintiff was approximately three months of age, the property from which the bonds were ultimately derived, was given to him. This property was later condemned by the Tennessee Valley Authority and the funds derived therefrom were invested in other lands, title to which was taken by plaintiff. Eventually this land was sold and the proceeds invested in Government "E" bonds under the authority of the chancery court of Loudon County, and the bonds were ordered held by the clerk and master for plaintiff. Later, the clerk and master turned the bonds over to plaintiff's father who cashed them and turned over the proceeds to the Internal Revenue Service which applied the money to the taxes the father owed the Government. Plaintiff consented to these payments on his father's taxes. The surety on the bond for the clerk and master allegedly made settlement for wrongfully turning over the bonds to plaintiff's father.

Under these facts the federal district court held that there was no contract implied in fact on the part of the Government to return the bonds or their proceeds to plaintiff and that the court, therefore, had no jurisdiction under the Tucker Act of plaintiff's action against the Government to recover the bonds or their proceeds. The court was of the opinion that plaintiff's claim was in the nature of quasi contract (implied in law) and that the jurisdiction conferred by the Tucker Act does not extend to quasi contract claims.

Since this part of the subject of this survey of the Tennessee law is concerned only with the law of contracts, no particular comment will be made concerning that phase of the case which holds that the Tucker Act limits jurisdiction in claims against the United States to contracts implied in fact, as distinguished from quasi contractual obligations (implied in law).[3] The present comment will be con-

3. Judge Taylor cites considerable authority in support of this position. An

cerned with whether plaintiff's claim can properly be classified as one based upon a contract implied in fact.

Frequently, courts 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.[4] Quasi contract is thus not based upon agreement or promise and manifested intent to contract is not an element in its structure. Specifically, should one person confer a benefit upon another he may recover in quasi contract the reasonable value thereof if "as between the two persons it is unjust" for the recipient to retain it.[5] On the other hand, an "implied contract," frequently referred to by the courts as a contract "implied in fact," is a genuine contract (consisting of an 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.[6] In short, then, an "implied contract" differs from the express contract only in the manner of manifesting intent of the parties. In the express contract the parties manifest their intent by the use of oral or written words or other signs and symbols that by previous convention stand for words; whereas in the "implied contract" the parties manifest their intent by conduct other than words, signs or symbols.[7] Consistent with basic contract principles, an "implied contract" arises only if the party giving the performance expects to be paid, and the other party either intends to pay or should know that the party giving the performance expects to be paid.[8]

additional recent case supporting this view is Alliance Assur. Co. v. United States, 252 F.2d 529 (2d Cir. 1958).

4. In addition to the large number of cases cited in the *Holbert* opinion, see 1 WILLISTON, CONTRACTS §§ 3, 3A (3d ed. 1957); 1 CORBIN, CONTRACTS § 19 (1952).

5. RESTATEMENT, RESTITUTION § 1 (1937).

6. "'Express contract' and 'implied contract' differ only in that in an express contract parties arrive at their agreement by words, either oral or written, sealed or unsealed, while in implied contract agreement is arrived at by consideration of acts and conduct," Anderson v. Biesman & Carrick Co., 287 Ill. App. 507, 4 N.E.2d 639 (1936). "An agreement by conduct does not differ from an express agreement, except in the manner by which its existence is established," Ahern v. South Buffalo Ry. Co., 303 N.Y. 545, 104 N.E.2d 898 (1952), *aff'd*, 344 U.S. 367 (1953). "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," Peters v. Poro's Estate, 96 Vt. 95, 117 Atl. 244, 245-47 (1922). See Shelly v. Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474 (1893); 1 WILLISTON, CONTRACTS § 3A (3d ed. 1957); 1 CORBIN, CONTRACTS § 18 (1952).

7. See 1 CORBIN, CONTRACTS § 18 (1952).

8. Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592 (1923); Hill v. Waxburg Constr. Co., 347 F.2d 936 (9th Cir. 1956); 1 WILLISTON, CONTRACTS § 36 (3d ed. 1957); 1 CORBIN, CONTRACTS § 18 (1952).

Tested by these judicial criteria for determining the existence of an "implied contract," it is difficult to find that any such contract arose in the case at hand. First of all, it is difficult to find that plaintiff expected the Government to refund to plaintiff the proceeds from these bonds when they were paid to the Government. But even assuming that the requisite expectation of pay can be found by reason of fact that plaintiff was an infant when the money was wrongfully paid, can it reasonably be contended that when the Government received the money it either intended to refund the money to plaintiff or should have known that plaintiff expected the money to be refunded by the Government?[9] These payments of the money to the Internal Revenue Collector were voluntarily made to pay a tax debt of plaintiff's father. As Judge Taylor points out in the *Holbert* opinion, it cannot be assumed that when an agent of the United States Government accepted this money in discharge of the father's tax obligation, there arose an implied contract that this money would be returned to plaintiff.

The court further observed that the most favorable view of the facts from plaintiff's standpoint is that the law created an implied obligation to return the money because the plaintiff (infant son) was not of legal age and could not make a binding contract even if he so desired so as to favor his father by paying off the father's tax debt. Such a duty to pay, as the court concluded, would be an obligation implied in law (quasi contract). The Tucker Act apparently does not confer jurisdiction of a claim against the United States for quasi contractual obligations under the provision giving an action "upon any express or implied contract."

II. Statute of Frauds

The case of *Williams v. McElhaney*[10] contains a number of points of law in the field of contracts, as well as a point on the fellow-servant doctrine. This latter point is treated elsewhere in this survey[11] and will not be dealt with here. For the purpose of discussing the points of contract law involved, the facts are relatively simple. Plaintiff (Williams), a servant of defendant, recovered a tort judgment against a fellow servant, Ramsey (also known at Litton), based on Ramsey's negligence in operating a truck owned by defendant (McElhaney), the employer of both parties. No appeal was taken from this judgment. The present suit is one in contract against defendant and is based on defendant's oral promise made to plaintiff shortly after the

9. Where the Government itself tortiously appropriates property, then a promise to pay can be implied. United States v. Dickinson, 331 U.S. 745 (1947).
10. 315 S.W.2d 106 (Tenn. 1958).
11. See Roberts, *Agency—1959 Tennessee Survey*, 12 Vand. L. Rev. 1064 (1959).

injury, whereby defendant promised plaintiff to pay any judgment which plaintiff might obtain against Ramsey, if such judgment was not paid by defendant's insurance company. Defendant's promise to plaintiff allegedly was given in exchange for plaintiff's forbearance to sue defendant in tort for the injuries caused by Ramsey. Ramsey was the servant of defendant and plaintiff's injuries allegedly were inflicted while this servant was acting within the course of his employment.

Defendant demurred to plaintiff's complaint. One of the grounds of demurrer was that defendant's oral promise was unenforceable because it was within that section of the Statute of Frauds which renders unenforceable an oral promise to answer for the debt or default of another. In reversing the trial court, the Tennessee Supreme Court rejected this defense and held the defendant's oral promise actionable.

This defense is based on the second provision of the Statute of Frauds as found in section 23-201 of the *Tennessee Code*, which provides that:

> No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . 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.[12]

Comparison will show that this provision of the *Tennessee Code* is essentially the same as that originally enacted by the British Parliament in 1677 and commonly known as the fourth section of the Statute of Frauds.[13] This section of the Statute of Frauds has been re-enacted in whole or in part, in one form or another, in nearly all the American states.[14] The three terms "debt, default, or miscarriage" have been held to include all legal obligations under which a person can come, contractual or noncontractual, requiring a money payment or any other kind of performance.[15] The terms are broad enough to cover claims and obligations sounding in tort.[16] While the third person (Ramsey here) must at some time be under a legal duty of performance to the promisee (plaintiff here), a duty that will be discharged by the performance of the new promisor (defendant here), nevertheless that legal duty need not be unconditional or immediate.[17]

12. TENN. CODE ANN. § 23-201 (1956). For an earlier comment on this section of the statute, see Hartman, *Contracts—1956 Tennessee Survey*, 9 VAND. L. REV. 956 (1956).
13. 29 Charles 2, c. 3 (1677).
14. See 2 WILLISTON, CONTRACTS §§ 448-50 (rev. ed. 1936).
15. See 2 CORBIN, CONTRACTS § 347 (1950).
16. *Id.* §§ 347, 349.
17. *Id.* § 349.

Moreover, that legal duty may be created prior to the promise in question, simultaneously with it, or subsequently.[18]

As the *Williams* case indicates, however, in a rather imprecisely expressed opinion, this provision of the Statute of Frauds is not a defense if the object of the promisor (defendant here) is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of some *third* person (Ramsey).[19] This is known as the "leading object" rule or "main purpose" doctrine. Although it is not universally accepted by the courts, and not free from criticism, the rule is widely recognized.[20] Where adopted, this view will, of course, prevent the Statute of Frauds from being a defense in many cases, even though the promised performance was intended and will actually operate to terminate another's duty to the creditor (plaintiff here). Although at times it may involve a difficult question of fact in determining whether the promise was made to subserve some interest or purpose of the promisor sufficient to remove the case from the defense of the statute, nevertheless the "leading object" rule does seem to have a sound, logical and practical basis. As Professor Corbin points out, there is a difference between cases where the promisor makes his promise for the benefit and accommodation of another and cases where he makes it for his own benefit and concern.[21] Thus, under this rule, the Statute of Frauds will be no defense if the promisor has bargained for a consideration that is beneficial to himself and that constitutes his primary object of desire.[22]

18. *Ibid.*
19. *Id.* § 366.
20. The "leading object" rule, sometimes also called the "main purpose" doctrine, has been applied in a vast number of cases. *E.g.*, Miller v. Pound, 226 Iowa 628, 284 N.W. 449 (1939); Curtis Mfg. & Asbestos Co. v. W. D. Bates Constr. Co., 98 N.H. 48, 94 A.2d 550 (1953); Eilersten v. Weber, 198 Ore. 1, 255 P.2d 150 (1953); Grammar v. Builders Brick & Stone Co., 277 S.W.2d 185 (Tex. Civ. App. 1955); *In re* Williams' Estate, 230 Wis. 344, 283 N.W. 805 (1939). Mr. Corbin approves of this rule. See 2 CORBIN, CONTRACTS § 366 (1950). While the principle is widely recognized by the courts, there is little consistency among them in its application. Mr. Simpson criticizes the rule as vague and lacking in predictability. See SIMPSON, SURETYSHIP § 38 (1950). The principle was perhaps recognized in Tennessee many years ago. See Randle v. Harris, 14 Tenn. 508 (1834).
21. See 2 CORBIN, CONTRACTS § 366 (1950). On the question of what sort of benefit or advantage coming to the promisor will take the case out of the statute by this "leading object" or "main purpose" doctrine, and thus destroy the defense of the Statute of Frauds, see 2 WILLISTON, CONTRACTS §§ 366-82 (1950); RESTATEMENT, CONTRACTS § 184 (1932); SIMPSON, SURETYSHIP § 38 (1950); ARANT, SURETYSHIP § 36 (1931). The court may consider the benefit to the promisor too remote or too slight to remove the promise from the Statute of Frauds. Thus, the promise of a stockholder, officer or director of a corporation to discharge the obligations of the corporation usually is not taken out of the statute by this doctrine. See Searight, Thornton & Co. v. Payne, 2 Tenn. Ch. 175 (1874); 2 CORBIN, CONTRACTS § 372 (1950); SIMPSON, SURETYSHIP § 38 at 143 (1950); Annot., 35 A.L.R. 2d 906 (1954).
22. See 2 CORBIN, CONTRACTS § 368 (1950).

Applying these principles to the *Williams* case, it can be seen that the defendant had a substantial pecuniary interest or purpose of his own to subserve in making his promise to plaintiff, although the effect also would be to discharge the obligation of Ramsey to plaintiff. Defendant allegedly admitted his liability to plaintiff for injuries growing out of the negligence of Ramsey, who was defendant's servant, acting within the course of his employment. Defendant promised to pay any judgment plaintiff might get against Ramsey in exchange for plaintiff's forbearance to bring suit against defendant, who "did not want to be sued or forced to attend court as he was a very busy man having large interests to take care of which occupied all of his time."[23] Moreover, a jury conceivably might bring in a much larger verdict against plaintiff-employer than it would against the employee Ramsey. It thus seems clear that the defendant was bargaining with plaintiff for a consideration that was very beneficial to defendant and constituted his primary object of desire. Thus, as the *Williams* court quite properly held, the Statute of Frauds should be no defense.

III. CONSIDERATION—FORBEARANCE TO SUE

In the *Williams*[24] case the defendant also resisted payment on the ground that plaintiff had furnished no consideration for defendant's promise on which plaintiff sued. It will be recalled that plaintiff, a servant of defendant, had been injured by another of defendant's servants (Ramsey) while Ramsey was acting in the course of his employment. In exchange for plaintiff's forbearance to sue defendant in tort for the injury caused by defendant's servant, defendant had promised to pay plaintiff any judgment which plaintiff might obtain against Ramsey, the tortfeasor servant of defendant.

The sufficiency of the consideration furnished by plaintiff for defendant's promise to pay this claim was tested by defendant's demurrer to plaintiff's complaint which alleged the foregoing as facts. Again, the Tennessee Supreme Court reversed the trial court and overruled the demurrer, holding that the complaint did allege a sufficient consideration given by plaintiff to support defendant's promise.

This facet of the *Williams* case introduces a typical situation in which consideration has frequently been important, namely, the forbearance, or promise of forbearance, of suit on an asserted claim. More specifically, as applied to the case under consideration, under what circumstances will the forbearance to sue (or promise to for-

23. Williams v. McElhaney, 315 S.W.2d 106, 109 (Tenn. 1958).
24. Williams v. McElhaney, *supra* note 23.

bear) on a claim constitute sufficient consideration for a promise given in settlement of the claim?

At the outset, of course, the forbearance or promise of forbearance of suit must have been bargained for by the other party to the transaction (the party who is being sued on his promise), else the requisite consideration cannot be found in the forbearance. That is to say, unless the forbearance (or promise to forbear) is given in exchange for the other party's promise, there is no consideration in the orthodox sense. There must, therefore, be a bargained-for forbearance or promise to forbear in order for that to constitute orthodox consideration which will support and thus render enforceable a promise by way of settlement.[25] As set forth in the *Williams* opinion, the allegations in the complaint on this aspect of the case appear somewhat inept but apparently sufficient to withstand an attack by demurrer.

Having gotten across the stile of the bargain aspect of forbearance to press a claim (or promise to forbear), there then arises the question of how meritorious, from a legal standpoint, the originally asserted claim must be in order for the forbearance to sue on it to constitute sufficient consideration for the promise of the other party. Must the originally asserted claim be one that was, in fact, legally enforceable in order for the forbearance (or promise to forbear) to constitute a consideration sufficient to support the promise of another? Or would claimant's forbearance to sue be a sufficient consideration if claimant *reasonably* believed he had a legally enforceable claim, even though it turned out that the asserted claim was not a legally enforceable one? Or would the forbearance constitute a sufficient consideration if claimant *honestly* (but perhaps not *reasonably*) believed his claim was valid? Or suppose the claimant does not assert his claim in good faith, will his forbearance constitute a consideration sufficient to support a promise to pay given in exchange for the forbearance or promise to forbear? Here the judicial guide lines are not very clear. Of course, if the asserted claim was valid, then claimant's forbearance to press it would constitute a sufficient consideration for the other party's promise to pay by way of settlement.[26]

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25. The promisee's failure to assert any claim at the outset has been held to preclude his so-called forbearance from being a sufficient consideration for the promise sued on. Harris v. Morgensen, 31 Wash. 2d 228, 196 P.2d 317 (1948); Springstead v. Nees, 125 App. Div. 230, 109 N.Y.S. 148 (1908). This, of course, is but a particular application of the generally accepted doctrine that consideration must actually be bargained for as the exchange for the promise. See RESTATEMENT, CONTRACTS § 75 (1932); 1 WILLISTON, CONTRACTS §§ 100, 135 (3d ed. 1957); 1 CORBIN, CONTRACTS § 116 (1950), pointing out that certain promises may be enforceable without a bargain and without any orthodox consideration. *E.g.*, RESTATEMENT, CONTRACTS § 90 (1932) (the so-called "promissory estoppel" section).

26. See 1 CORBIN, CONTRACTS §§ 139, 140 (1950).

On the other side of the shield, forbearance to bring a suit on a claim known to be ill-founded and made in bad faith is not a sufficient consideration to support the promise of another.[27] This rule is based on the grounds of public policy. As Professor Corbin incisively expresses this pragmatic reason: "The reason for this is that, if it were recognized as sufficient, ill-founded claims would be infinitely increased in number and the offense that is known as blackmail would become a profitable racket."[28] Hence all the courts seem to agree that the originally asserted claim must be made in good faith in order for forbearance to press that claim to constitute a consideration sufficient to support another's promise.

But there is a great penumbra where the original claim is asserted in good faith. Under what circumstances can the forbearance to press such claims constitute consideration?

One extreme view (likely a minority) takes the position that the forbearance is no consideration unless the originally asserted claim was, in fact, *valid*, as determined by the court in the action on the promise given in exchange for the forbearance or promise of forbearance.[29] Thus, when there is a suit on a promise given in exchange for a forbearance (or promise to forbear), the court is called upon to overhaul every settlement thus made if it remains executory. If it turns out that the court concludes that the originally asserted claim was not legally valid, then the forbearance to press the claim was not sufficient consideration and the resulting settlement is not legally binding. It hardly needs to be added that this view does not encourage settlements.

There is much authority to the effect that if the claimant *reasonably* believed in the validity of his originally asserted claim, then forbearance to sue would constitute consideration, even though it later developed that his asserted claim was not legally enforceable. Under this view the forbearance will not constitute consideration unless the claimant had some *reasonable* ground for belief in the validity of his claim.[30] Whether the belief is "reasonable" might well depend upon

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27. Snyder v. Cearfoss, 187 Md. 635, 51 A.2d 264 (1947); Mackin v. Dwyer, 205 Mass. 472, 91 N.E. 893 (1910); Montgomery v. Greiner, 117 Minn. 416, 136 N.W. 9 (1912); House v. Callicott, 83 Miss. 506, 35 So. 761 (1904); Falgiatore v. Falgiatore, 378 Pa. 586, 107 A.2d 864 (1954). See 1 CORBIN, CONTRACTS § 140 (1950); RESTATEMENT, CONTRACTS § 76(b) (1932); 1 WILLISTON, CONTRACTS § 135 (3d ed. 1957).

28. 1 CORBIN, CONTRACTS § 140 at 434-35 (1950).

29. Several cases seem to take this view. Gunning v. Royal, 59 Miss. 45, 42 Am. Rep. 350 (1881). But see McGehee v. McGehee, 85 So. 2d 799 (Miss. 1956). Steber v. Combs, 121 W. Va. 509, 5 S.E.2d 429 (1939). This represents the earlier English rule. Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899).

30. This test is substantially approved in many cases, yet it is not always clear by what standard of reasonableness, whether that of the reasonable

whether one takes the layman's or the lawyer's view of the situation. Not many courts of this persuasion seem to concern themselves with this refinement of the situation.

Other courts find the requisite consideration if the claimant had an *honest* belief in his claim without regard to whether the claimant had any *reasonable* basis for his claim.[31] The "honest belief" in the originally asserted claim is thought to be a sufficient prophylactic against blackmail even though the claim was later found to have been groundless *in fact*, and the promise will be enforced if given in exchange for a forbearance (or promise to forbear) to press an asserted claim. This view might be said to put a premium on ignorance. Consequently, in a good many jurisdictions making the test the *honesty* of the claimant, the courts add the additional requirement that the invalidity of the claim must not be entirely obvious.[32] Thus, even the courts of this view seem to require something bordering on the reasonableness of the claim.

The *Restatement of Contracts* has expressly chosen a double-barrelled test for determining whether forbearance constitutes consideration. It combines the subjective requisite of an "honest belief" that the claim is bona fide with the objective requisite that there must be a "reasonable" basis for thinking the claim is valid.[33]

It is difficult, if not impossible, to determine from the *Williams* opinion which of the foregoing views, if any, the court adopted in determining whether plaintiff's forbearance to sue constituted consideration for defendant's promise to pay plaintiff's claim against Ramsey. The court simply summarily states that the case of *DeBord v. Brown*[34] and cases cited illustrate that under the allegations of plaintiff's bill of complaint there is sufficient consideration. The *DeBord* opinion sheds but little additional light on the question of consideration. At one place the *DeBord* opinion quotes from another

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layman or of the reasonable lawyer, the belief in the claim is to be judged. Warner v. Warner, 124 Conn. 625, 1 A.2d 911 (1938); Ralston v. Mathew, 173 Kan. 550, 250 P.2d 841 (1952); Forsythe v. Rexroat, 234 Ky. 173, 27 S.W.2d 695 (1930); Lombardo v. Gasparini Excavating Co., 385 Pa. 388, 123 A.2d 663 (1956). See 1 WILLISTON, CONTRACTS § 135B (3d ed. 1957).

31. Wingerd v. Foley, 155 Kan. 566, 127 P.2d 524 (1942); Ruckel v. Baston, 252 S.W.2d 432 (Ky. 1952); Blount v. Dillaway, 199 Mass. 330, 85 N.E. 477 (1908); Layer v. Layer, 184 Mich. 663, 151 N.W. 759 (1915); DiIorio v. DiBazio, 21 R.I. 208, 42 Atl. 1114 (1899). See Annot., 139 A.L.R. 854 (1939); 1 WILLISTON, CONTRACTS § 135B (3d ed. 1957), collecting many cases and stating that this view represents the weight of authority.

32. See 1 WILLISTON, CONTRACTS § 135B (3d ed. 1957).

33. RESTATEMENT, CONTRACTS § 76 (b) (1932). *Accord*, Fiege v. Boehm, 210 Md. 352, 123 A.2d 316 (1956) which seems to stretch that test to the limit under the facts, because the claim on which plaintiff forbore ostensibly was groundless in fact; yet the promise to pay was enforced. See also Warren Tank Car. Co. v. Dodson, 330 Pa. 128, 199 Atl. 139 (1938).

34. 188 Tenn. 160, 217 S.W.2d 772 (1949).

case to the effect that an agreement to forbear suing to enforce a "well-founded claim" is valid consideration for a promise.[35] But again the *DeBord* opinion quotes from still another case to the effect that "any benefit to one and detriment to the other may be a sufficient consideration."[36] Giving that language a literal interpretation, it seems to suggest that even a bad faith forbearance would constitute consideration, for it is a legal "benefit" to a promisor and a legal "detriment" to the promisee for the promisee to forbear pressing even groundless litigation and this is true even if the promisee-claimant is acting in bad faith.[37] Reading the entire *Williams* opinion, it can be inferred without too much difficulty that plaintiff reasonably and honestly believed he had a cause of action against defendant. It is unfortunate that the *Williams* court did not meet the issue squarely and furnish some trustworthy guidance to the legal profession on this frequently occurring situation on which there clearly is a wide diversity of views.[38]

IV. Conditions Precedent

The court of appeals case of *Patterson v. Anderson Motor Co.*[39] raises some interesting points of law regarding conditions that the contracting parties annex to their contract. One point concerns the duty of a contracting party with respect to bringing about the happening of conditions. The other point concerns the application of the "parol evidence rule" in proving conditions to the formation of a contract where the contract is reduced to writing.

A. Duty to Facilitate Occurrence of Condition

Complainants (Patterson and T. M. Allen) sued to recover $2,000 deposited with defendants in connection with a contract in which complainant undertook to purchase a motor company from defendants for $20,000. The written sales contract provided that the $2,000 earnest money was deposited with defendants to secure the performance of the sales agreement and that the earnest

35. DeBord v. Brown, 188 Tenn. 160, 164, 217 S.W.2d 772, 774 (1949).

36. *Id.* at 165, 217 S.W.2d at 774.

37. See 1 Corbin, Contracts § 140 at 434 (1950). A Tennessee case of some years ago quotes both the "honest belief" test and the "reasonable belief" test in finding that the forbearance did constitute a sufficient consideration, but unfortunately the court made no decision as to which test it used as the basis of its decision. Danheiser v. Germania Sav. Bank & Trust Co., 137 Tenn. 650, 658-59, 194 S.W. 1094, 1096 (1917).

38. Another defense which defendant interposed in the *Williams* case was the one year statute of limitations for tort actions. The court quite properly made short shrift of that defense by the pertinent observation that plaintiff's cause of action was a suit *in contract* where the statute of limitations is six years. Since six years had not elapsed, plaintiff's action was not barred.

39. 319 S.W.2d 492 (Tenn. App. W.S. 1958).

money should be "forfeited" to defendants if the complainants failed, for any reason other than those conditions listed in the written agreement, to perform. The pertinent conditions in the written agreement provided that the enforcement of the sales agreement was conditioned upon (1) complainant's getting a franchise for the sale of Mercury automobiles from the Ford Motor Company; and (2) the approval of the Ford Motor Company of the sale by one of the complainants (T. M. Allen) of his interest in an automobile dealership in Olive Branch, Mississippi, to his partner, W. H. Allen.

It also seems clear that defendants and complainants had agreed that complainants would buy the motor company from defendants only if complainant Allen could sell his interest in his automobile dealership. The record shows that Allen testified that as defendants' attorney was drafting the written sales agreement, he (Allen) made it clear that the "whole thing is hinged on my partner buying my interest in our dealership in Olive Branch, because if he can't buy it or can't get the money to buy it, I can't go."[40] That was not disputed as defendants offered no proof. That condition never was incorporated into the written agreement, the only related matter being the proviso that the purchase was "conditioned upon the approval of the Ford Motor Company of the sale of . . . (complainant) Allen, of his interest in his partnership . . . at Olive Branch . . . to his partner . . . ."[41]

Complainant Allen was not able to sell his interest in his Olive Branch dealership to his partner because his partner was unable to raise the funds to consummate the transaction. Because of the failure of complainant Allen to sell his Olive Branch dealership interest, no application for the Mercury agency was ever made; and, of course, no application for approval of the sale of complainant's Olive Branch dealership was ever made to the Ford Motor Company. Hence, neither of the two conditions precedent for the performance of the contract of sale between complainants and defendants, as contained in the formal document, ever occurred. It is to be remembered that the sales agreement recited that complainants were not to "forfeit" the earnest money if they failed to perform because of the non-happening of the foregoing two conditions. Taking the position that they were excused from performance of their contract with defendants, complainants sought to recover the $2,000 deposited as earnest money.

Although neither condition had happened, nevertheless, the chancellor held that complainants had forfeited the earnest money and dismissed complainant's suit to recover it. The chancellor reasoned

40. *Id.* at 495.
41. *Id.* at 496.

that the failure of complainants to apply for the Mercury franchise entitled defendants to the same rights as if the application had been made and the franchise granted. With respect to the condition which made the sales contract dependent upon approval by the Ford Motor Company of the sale of complainant Allen's Olive Branch dealership, the chancellor also held that complainants' failure to consummate the Olive Branch dealership sale likewise entitled defendants to the same rights as if the sale had been made and approved by Ford. Hence, the chancellor concluded that complainants had forfeited the deposit and defendants could keep the money.

The court of appeals reversed the chancellor and permitted complainants to recover the $2,000 deposit. The court was of the opinion that the condition which required the approval by the Ford Motor Company of the sale of the Olive Branch dealership included, by necessary implication, the further condition that there must be such a sale before it could be submitted for approval to Ford. The court further held that the parol testimony of complainant Allen was properly admissible to show that the enforcement of the sales agreement between complainants and defendants was dependent upon the sale of the Olive Branch dealership. Such parol evidence was admissible, thought the court, to clear up ambiguity in the written sales agreement. The court of appeals also reversed the chancellor on his interpretation of the condition that provided that the sale agreement was enforceable only if complainants procured a Mercury dealership. The court disagreed with the chancellor's conclusion that the failure of complainant to apply for the Mercury dealership gave the defendants the same rights as if complainant had applied for and had received this dealership. Since the court of appeals could find no evidence that complainant did not act in good faith in not applying for the Mercury dealership, then the results found by the chancellor did not follow.

The first problem that is presented in the *Patterson* case concerns the effect of conditions in a contract. A condition, as the *Restatement of Contracts*[42] 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 the promise unless the condition has occurred or has been excused.[43] Unless, therefore, the conditions precedent to the enforcement of the sales contract between complainants and defendants occurred or

42. RESTATEMENT, CONTRACTS § 250, comment *a* (1932).

43. See 3 CORBIN, CONTRACTS § 628 (1951); 3 WILLISTON, CONTRACTS §§ 675-76 (rev. ed. 1936).

were excused, then no duty of performance by complainants arose.[44] If no duty of performance arose, then defendants were not entitled to the $2,000 deposit as liquidated damages for breach of contract by complainants, for the simple reason that complainants did not breach any contract. In the language of the contract itself, complainants did not "forfeit" the deposit.

Clearly, neither of the express conditions occurred. The Mercury agency was not obtained, and, of course, there was no approval by the Ford Motor Company of the sale of complainant Allen's Olive Branch dealership. Were these conditions excused? The answer to that question depends upon whether these conditions remained unfulfilled because of any fault upon the part of the complainants. If a promisor (complainants here) is the cause of the failure of performance of the conditions upon which his own liability depends, he cannot take advantage of the failure.[45] The condition would be excused and he cannot set up the nonperformance of the condition as a defense.

The court of appeals quite properly found, it seems, that the failure of the performance of the conditions was not caused by the complainants.[46] The court found as a fact that complainants acted in good faith, especially when the court considered the parol evidence of complainant Allen that the performance of the sales agreement between complainants and defendants was dependent upon Allen's being able to sell his dealership in Olive Branch. He was not able to make that sale, he testified, because the prospective buyer was unable to raise the funds to consummate the transaction.

B. Proof of Condition by Parol Evidence

The next problem presented in the *Patterson* case is whether parol evidence of complainant Allen was properly admitted. The condition that the formation of the sales contract between complainants and defendants was dependent upon complainant Allen's ability to sell his Olive Branch dealership was not incorporated into the written sales contract. The only related matter covered by the sales contract was the proviso that the purchase was conditioned upon the approval by the Ford Motor Company of the sale of complainant Allen's interest in this Olive Branch dealership. The court of appeals held that Allen's parol testimony was admissible to clear up the ambiguity in the written document. That, of course, is one well established

44. See 3 WILLISTON, CONTRACTS §§ 666-66A (rev. ed. 1936).

45. Amies v. Wesnofske, 255 N.Y. 156, 174 N.E. 436 (1931); RESTATEMENT, CONTRACTS § 295 (1932); 3 WILLISTON, CONTRACTS § 677 (rev. ed. 1936).

46. Where a broker's commission is conditioned upon the consumation 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).

instance where parol evidence can be used, since it does not contradict the written document.[47]

Likewise, there appears to be another ground for holding that Allen's parol evidence was admissible. Parol evidence is admissible to show that a document purporting to be a contract was not to be one except upon the happening of a condition.[48] According to Allen's undisputed testimony, that was the situation in the case at hand. His parol evidence showed that the written sales agreement was not to become a contract except upon the condition that he was able to sell his dealership in Olive Branch. Hence, this parol evidence would be proper for the purpose of showing that the written document never became a contract, since the condition precedent to its formation did not happen.

Apparently, therefore, complainants had not "forfeited" the deposit by breaching the contract for two reasons. In the first place, neither of the conditions precedent to the enforcement of the contract had occurred, nor had they been excused through any fault on the part of complainants. In the second place, the parol evidence of complainant Allen showed that actually no contract had ever come into existence because the condition precedent to the formation of the contract had not occurred; to-wit, Allen had not been able to sell his business. Since there had been no breach of contract by complainants, then as the court of appeals held, there was no valid basis upon which defendants could retain the $2,000 deposited with them by way of liquidated damages. To have allowed defendants to retain the deposit would have been a clear case of unjust enrichment.

V. Liquidated Damages

In the *Patterson* case, the court of appeals permitted complainants to recover the $2,000 deposit on a wholly independent ground. The court thought that that sum could not be regarded as proper liquidated damages. Since the deposit ostensibly was to be used as liquidated damages in the event complainants breached the contract, the court was of the opinion that the deposit should be treated as a "penalty," because the sum was not considered reasonable under the circumstances. Having found that the deposit was a penalty, the

47. Parol evidence is always admissible to explain or clarify ambiguous terms of a writing. See, *e.g.*, Meader v. Allen, 110 Iowa 588, 81 N.W. 799 (1900); Faulkner v. Ramsey, 178 Tenn. 370, 158 S.W.2d 710 (1942); Wheelwright v. Pure Milk Ass'n, 208 Wis. 40, 240 N.W. 769 (1932).

48. Harper v. French, 29 Cal. App. 2d 214, 84 P.2d 216 (1938); Sherry v. Marsh, 256 App. Div. 219, 9 N.Y.S.2d 494 (1939); Blackstad Mercantile Co. v. Parker, 163 N.C. 275, 79 S.E. 606 (1913); Brady v. Isler, 77 Tenn. 346 (1882); 3 Corbin, Contracts § 577 (1951); Morgan, Basic Problems of Evidence 346-48 (1954); Restatement, Contracts § 241 (1932); 3 Williston, Contracts § 634 (rev. ed. 1936).

court refused to enforce it. Defendants had put on no proof and there was no evidence, thought the court, upon which it could be established that $2,000 was a reasonable sum to be allowed as liquidated damages.

If a party to a contract agrees to pay a certain sum of money if he commits a breach, or to forfeit a sum of money deposited with the other party, the amount agreed to be paid or forfeited may be held to be "liquidated damages" or may be "penalty." If it is determined that the amount was fixed in good faith as an estimate by the parties of the probable injury to be suffered from a breach, then it will be denominated "liquidated damages" and the agreement will be enforced; but if the court decides that the clause was not such a preestimate, but was fixed merely as a deterrent to prevent a breach, it will be termed a "penalty" and the agreement will not be enforced.[49] The agreed damages must not be disproportionate to the probable loss, else the agreement will be regarded as a penalty and will not be enforced.[50] This disproportion must be judged as of the time of making the contract, and if it was reasonable when the contract was made, the liquidated damage clause is enforceable if the contract is breached regardless of what turns out later.[51]

Liquidated damages, of course, are allowed only when there is a breach of contract. In the *Patterson* case, as we have just seen, there was *no breach;* hence it is most difficult to agree with the court of appeals that "it is at least conceivable that had Defendants elected to put on proof, they might have established as a fact that $2,000 was a reasonable sum to be allowed as liquidated damages."[52]

49. Quaile & Co. v. William Kelley Milling Co., 184 Ark. 717, 43 S.W.2d 369 (1931); Bauer v. Sawyer, 8 Ill. App. 2d 351, 134 N.E.2d 329 (1956); Commissioner of Ins. v. Massachusetts Acc. Co., 310 Mass. 769, 39 N.E.2d 759 (1942). The use of the word "forfeit" does not invalidate an otherwise valid liquidated damages clause. Ross v. Loescher, 152 Mich. 386, 116 N.W. 193 (1908); City of Nashville v. Nashville Traction Co., 142 Tenn. 475, 220 S.W. 1087 (1920); McCormick, Damages § 146 (1935).

50. See 5 Corbin, Contracts § 1059 (1951); McCormick, Damages § 149 (1935).

51. See McCormick, Damages § 150 (1935). There is a strict minority view that holds that the stipulated damages must not exceed the standard damages. Seeman v. Biemann, 108 Wis. 386, 84 N.W. 490 (1900).

52. Patterson v. Anderson Motor Co., 319 S.W.2d 492, 501 (Tenn. App. W.S. 1958).