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NEW CONTRACT BY A DEBTOR TO PAY HIS PRE-EXISTING DEBT

It is generally held that a new promise by a debtor to his creditor to pay an overdue debt in installments is not a sufficient consideration for any return promise by the creditor.¹ In jurisdictions following this rule, a new bilateral agreement between a debtor who promises to pay in installments and a creditor who promises forbearance is not valid. In *Hay v. Fortier* (1917) 102 Atl. 294, the Supreme Court of Maine fully endorses this rule, but it proceeds to hold that the new promise of the debtor becomes binding by estoppel as soon as the creditor has actually forbore in accordance with his invalid promise to forbear.

¹ See *Foakes v. Beer* (1884, H. of L.) 9 App. Cas. 605 (holding that actual payment of the installments is not a sufficient consideration for a promise of discharge); *Warren v. Hodge* (1876) 121 Mass. 106 (actual payment no consideration for a promise of forbearance); *Lynn v. Bruce* (1794, Eng. C. P.) 2 H. Bl. 317. In the present case there is no reference whatever to the payment of interest.

This decision involves three important topics in contract law: (1) offer and acceptance; (2) consideration; (3) accord executory. In appearance at least, it violates a commonly accepted rule in each of the three fields. Nevertheless, it does justice and may well be approved, though its approval may require some restatement of legal principle.

(1) It is generally asserted with great confidence that the acceptance of an offer must be exactly in the mode specified by the offeror, that the power in the offeree to create contractual relations by accepting is conferred by the offeror exclusively,² and that the courts cannot make a contract for the parties.

Courts cannot make a contract for the parties if we mean by "contract" to include the operative *acts* of the parties themselves. Nor do the courts make a contract if we mean by that term to describe some physical *document*. But the courts do, and always must, determine what are the *legal relations* that follow the operative facts. What rights, privileges, powers, or immunities now exist because of the operative facts. This is for the court to say, and it almost never depends exclusively upon the actual intentions of the parties. Those actual intentions of the two parties may not have been identical, and yet there may be a "contract."³ Constructive conditions are "implied by law" with great freedom; and the courts can always fall back upon the convenient fiction that parties are *presumed* to intend the legal consequences of their voluntary acts.

In the present case, the court expressly construes the contract to be *bilateral*, a promise to pay given for a promise to forbear. This bilateral contract is expressly said to be invalid. Then the court creates a good unilateral contract in its place, under the guise of an "estoppel." Perhaps this would be wholly unjustifiable if the debtor had offered his new promise clearly and specifically for a return promise. Very often, however, an offeree may reasonably understand that his power to accept may be exercised either by promising a specified performance or by actual performance itself. The offeror frequently leaves it at the option of the offeree to make either a unilateral or a bilateral contract.⁴ The facts in the case under discussion seem to justify such a construction.⁵

² See Arthur L. Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL 169, 199.

³ See *Mansfield v. Hodgdon* (1888) 147 Mass. 304, 17 N. E. 544; *Ayer v. Western Union Tel. Co.* (1887) 79 Me. 493, 10 Atl. 495.

⁴ Thus, it has been suggested by my colleague, Professor Henry W. Dunn, that when an order for goods is sent to a dealer it is often so worded as to empower the latter to accept either by shipping the goods or by mailing a letter containing a promise to ship them. There can be no doubt that such is a very common understanding among business men.

⁵ In *Strong v. Sheffield* (1895) 144 N. Y. 392, 39 N. E. 330, the court held

(2) A very common definition of consideration for a promise requires it to be an agreed equivalent for the promise, something for which the promise is consciously exchanged.⁶ In the present case, if the agreement was purely bilateral—as the court assumes—the agreed equivalent of the defendant's promise was the *promise* of the plaintiff. The court admits that this in itself was not a sufficient consideration. Its holding, therefore, is to the effect that a promise that is invalid for lack of consideration may be made valid by subsequent action of the promisee in reliance upon the promise. The defendant is said to be bound *by estoppel*.

This is quite consistent with the prevailing notions of justice, and it is consistent also with the most common of all the definitions of consideration. When judges say that consideration must be either a detriment to the promisee or a benefit to the promisor they seldom require in terms that it must be a consciously exchanged equivalent for the promise.⁷ The cases are so very numerous where a promise has been enforced because of subsequent action by the promisee in reasonable reliance thereon that the principal case is not to be disapproved on such a ground.⁸ If the subsequent action in reliance on the promise is not properly to be included within the term "consideration," then we must recognize the existence of a new class of parol promises binding without consideration.

(3) Upon an accord executory no action lies. Such was the rule

that where the defendant's promise was offered for a return *promise* of forbearance, an actual forbearance would not make the defendant's promise binding. The offer was not properly accepted. If the intention of the parties was clear that the contract should be *bilateral* only, no doubt their intention should be carried out by the court.

⁶ See *Martin v. Meles* (1901) 179 Mass. 114, 60 N. E. 397; *Wisconsin & Mich. R. R. Co. v. Powers* (1903) 191 U. S. 379, 386; 24 Sup. Ct. 107; *Banning Co. v. California* (1915) 240 U. S. 142, 153, 36 Sup. Ct. 338; 2 Street, *Foundations of Legal Liability* (1906) 81.

⁷ This has been referred to in the next preceding number of this magazine, in a discussion of the case of *DeCicco v. Schweizer* (1917, N. Y.) 117 N. E. 807. Arthur L. Corbin, *Does A Pre-existing Duty Defeat Consideration* (1917) 27 YALE LAW JOURNAL 362.

⁸ Among such cases are the following: *Traver v. ———* (1661, K. B.) 1 Sid. 57; *Milward v. Littlewood* (1850) 5 Exch. 775; *Brooks v. Ball* (1820, N. Y. Sup. Ct.) 18 Johns. 337; *Wigan v. England, etc., Life Ass'n.* (Ch. Div.) [1909] 1 Ch. 291, 298 (*semble*; "ex post facto consideration"), *Devecmon v. Shaw* (1888) 69 Md. 199, 14 Atl. 464; *Dunton v. Dunton* (1892) 18 Vict. L. R. 114; *Shadwell v. Shadwell* (1860) 30 L. J. C. P. 145; *Ricketts v. Scothorn* (1898) 57 Neb. 51, 77 N. W. 365; *State v. Lattaner* (1916, Oh.) 113 N. E. 1045, L. R. A. 1917 B, 684 and note; *Union Bank v. Sullivan* (1915) 214 N. Y. 332, 108 N. E. 558; *DeCicco v. Schweizer* (1917, N. Y.) 117 N. E. 807; *State Bank v. Kirk* (1907) 216 Pa. 452, 65 Atl. 932; *Skordal v. Stanton* (1903) 89 Minn. 511, 95 N. W. 449. See also the very numerous cases relating to mutual subscriptions for either business or charitable purposes.

stated by Lord Chief Justice Eyre,⁹ and it continues to be repeated by courts and text-writers down to the most recent times.¹⁰

An accord is an executory agreement to discharge an existing claim in the future by a substituted performance. Usually, though not necessarily, such agreements are bilateral.¹¹ According to this definition, the agreement in the principal case was an accord executory, and yet it is enforced as a valid contract. In spite of the many *dicta* to the contrary, the decision is perfectly sound in this respect.

Probably the original reason for not enforcing executory accords was that bilateral contracts were not yet enforceable, a reason that has been of no force for several centuries. In one case it was suggested that reasons of public policy were involved. "*Interest reipublicae ut sit finis litium*: accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent."¹² An accord executory does not itself discharge and satisfy the prior claim, because it is not so agreed; nor is it "substituted" for the previous claim, for the same reason. There is no injury to the public, however, in enforcing the new agreement if there is sufficient consideration, and the present case has ample support on this point.¹³

It may be observed, in addition, that in the present case the defendant is bound by two co-existing duties. His previous duty to pay his debt as a whole has never been discharged, although it appears that an action thereon was once brought and was discontinued "without prejudice." His new duty, arising out of his new promise, is to pay in certain installments. If the installments are paid and the second duty discharged, this should also discharge and satisfy the first duty, for it is so agreed and the agreement is held to be a valid one. There were two sets of legally operative facts, one creating the original debt and the other creating the new duty to pay in installments. The legal relations resulting from these two sets of operative facts are

⁹ *Lynn v. Bruce* (1794), Eng. C. P.) 2 H. Bl. 317.

¹⁰ See Hunt, *Accord and Satisfaction* (1912) secs. 3, 7, 54; Martin, *Accord and Satisfaction* (1914) 1 Corpus Juris, sec. 23; *Bell v. Pitman* (1911) 143 Ky. 521, 136 S. W. 1026.

¹¹ The following is an example of a *unilateral* accord: A owes B \$1000. A now promises B to convey Blackacre to X in future satisfaction of the debt, in return for B's present payment of \$50 cash and B's assent that the conveyance to X shall be a satisfaction. This agreement creates a duty in A and none in B, and is therefore unilateral. It further creates a *power* in A to extinguish in the future his debt of \$1000 by conveying Blackacre to X. This power is not revocable by B, for a consideration has been given for it (*viz.* A's promise to convey Blackacre), and its exercise requires no act whatever on the part of B.

¹² *Lynn v. Bruce*, *supra*, note 1.

¹³ *Crowther v. Farrer* (1850) 15 Q. B. 677; *Nash v. Armstrong* (1861) 10 C. B. N. S. 259; *Schweider v. Lang* (1882) 29 Minn. 254, 13 N. W. 33; *Hunt v. Brown* (1888) 146 Mass. 253, 15 N. E. 587; *Bryant v. Gale* (1832) 5 Vt. 416.

also separate and independent, even though the defendant may have the power of discharging them all by making a single payment.

A. L. C.

BOYCOTTS OF "NON-UNION MATERIALS"

In spite of the notion which still lingers in the minds of some judges and lawyers that courts do not "make" law but merely "find" it,¹ the reshaping by judicial legislation of our law governing the relations of capital and labor goes steadily on. An excellent illustration of this is found in the case of *Bossert v. Dhuy* (1917, N. Y.) 117 N. E. 582. It was there held that the members of a carpenters' union have a privilege² not only to refuse to work on materials manufactured in non-union shops, but also to send notices of their intention to do so to owners, architects, builders and contractors. More specifically in a suit brought by a manufacturer who employed non-union labor, the court refused to enjoin the officers and agents of the union from: (1) taking steps to compel the members to observe the rules of the union prohibiting them from working on materials made in the plaintiff's shops; (2) sending circulars to the plaintiff's prospective customers requesting them in making contracts to provide for the employment of union men and the use of union-made materials exclusively, with the suggestion that in this way labor troubles would be avoided; (3) inducing workmen in other trades to quit work on any building because non-union men were there employed in installing materials coming from non-union shops.³

A careful reading of the opinion (written by Chase, J.) reveals that even yet our judges do not realize fully that in many cases they are in fact legislating. The decision in the principal case purports to be based upon earlier cases, especially that of *National Protective Association v. Cumming*.⁴ In that case it was decided that the members of one union are, as respects members of a rival union, privileged to strike or threaten to strike in order to procure the discharge of the members of the rival union and secure a monopoly of the positions

¹ See the letter of a former Superior Court judge of San Francisco in the *New Republic*, January 12, 1918, p. 313: "Surely if there are no statutes or precedents in a matter the court must decide the law as the law was some time previously."

² *Privilege* is here used in a technical sense, to signify *absence of duty* to refrain from the acts in question. In this sense its correlative is "*no-right*"; its opposite, *duty*. See (1914) 23 *YALE LAW JOURNAL*, 16, 30.

³ The opinion emphasizes that "no malice, fraud, violence, coercion, intimidation, or defamation" was used in carrying out the plans of the union, and that the union did not single plaintiff out for the purpose of injuring him, or call upon the public generally to boycott the plaintiff's materials and cease dealing with the plaintiff.

⁴ (1902) 170 N. Y., 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648.