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Contracts - Consideration - Promissory Estoppel

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sirable citizens conferred a more speculative but nevertheless demonstrable benefit upon the public.[15] The same may be said of the regulation of women's hours of employment.[16] Compared to these statutes, the benefit conferred upon the public generally by the fluoridation of water supplies seems remote and conjectural to the writer. It also seems that the means employed by the city to achieve its purpose in the instant case have a somewhat broader sweep than the statutes involved in these decisions. The remedy in the sterilization case was narrowly tailored to fit only those persons who, upon proper medical examination, had been found to contribute to the evil sought to be eradicated. No other member of the public was sterilized. Regulation of women's hours of work was similarly directed at the source of the evil, women's contracts of employment, to which employers were necessarily parties. In the field of compulsory vaccination, the entire public is subjected to vaccination, but every member of the public is a potential carrier of disease. The fluoridation measure in the instant case, while aimed at the prevention of dental caries in children, subjected not only children to the treatment, but other members of the public who in no way contributed to the evil. Nevertheless, the Louisiana Supreme Court did not find the measure arbitrary, oppressive, or unreasonable. It is interesting to note that the legislation in the instant case was not challenged specifically as an invasion of freedom of religion.

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CONTRACTS—CONSIDERATION—PROMISSORY ESTOPPEL

Plaintiff employees of defendant bus company were covered by a collective bargaining agreement providing for vacation pay and sick leave with pay, and also by a company-sponsored retirement plan. Under these programs, sick leave and retirement benefits accumulated from year to year. Defendant, in accordance with its plan to sell its buses and other equipment, appeared before the City Council of High Point, North Carolina, to obtain approval of the sale. In the presence of plaintiffs' representatives, defendant's attorney verbally promised[1] to pay plaintiffs an

15. Buck v. Bell, 274 U.S. 200 (1927).
16. Muller v. Oregon, 208 U.S. 412 (1908).
1. Defendant contended that no promise was made at all, but the court assumed for purposes of the opinion that the promise was made.

amount equal to the unused sick leave and retirement benefits accrued to the date of sale, which the company was not bound to pay. The trial court, in a summary judgment, denied recovery of the amounts promised. On appeal, *held*, affirmed. Defendant's promise was unenforceable. There was no consideration for the promise, and the facts did not justify application of the doctrine of promissory estoppel. *Byerly v. Duke Power Co.*, 217 F.2d 803 (4th Cir. 1954).

The common law rule is that a promise, to be enforceable, must be supported by consideration.[2] Consideration is an act, a promise or a forbearance bargained for and given in exchange for a promise.[3] Courts often look to the immediate purpose or motive of the promise to determine if the requirement of bargain is satisfied.[4] If a promise is made to induce action or forbearance, the promisor may be bound although the person to whom the promise is made need not be.[5] For example, employers' promises of pensions,[6] bonuses,[7] and death benefits[8] made to employees to induce their continued service, which have induced that service, have been held enforceable because the elements of

2. RESTATEMENT, CONTRACTS § 19 (1932); 1 CORBIN, CONTRACTS 349 (1950); 1 WILLISTON, CONTRACTS § 99 (rev. ed. 1938).

3. RESTATEMENT, CONTRACTS § 75 (1932).

4. Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903); Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 Atl. 205 (1933); Martin v. Meles, 179 Mass. 114, 60 N.E. 397 (1901); Mabley & Carew Co. v. Borden, 129 Ohio St. 375, 195 N.E. 697 (1935); Twohy v. Harris, 194 Va. 69, 72 S.E.2d 329 (1952); 1 WILLISTON, CONTRACTS 452, § 130B (rev. ed. 1938). Motive, in the sense of the object to be attained, can often be identified with consideration. 1 CORBIN, CONTRACTS 364 (1950). Justice Holmes wrote that consideration must be the "conventional motive or inducement of the promise." HOLMES, THE COMMON LAW 293 (1881). Corbin, a Reporter on the Contracts Restatement, believes that its provisions amount to the same thing, for "if something is 'bargained for' by the promisor, it is evidently his 'conventional motive or inducement.'" 1 CORBIN, CONTRACTS 366 (1950).

5. 1 CORBIN, CONTRACTS § 152 (1950); 1 WILLISTON, CONTRACTS § 141 (rev. ed. 1938).

6. Wallace v. North Ohio Traction and Light Co., 57 Ohio App. 203, 13 N.E.2d 139 (1937); Sigman v. Rudolph Wurlitzer Co., 57 Ohio App. 4, 11 N.E.2d 878 (1937); Texas & N.O.R.R. v. Jones, 103 S.W.2d 1043 (Tex. Civ. App. 1937); Schofield v. Zion's Co-op. Mercantile Institution, 85 Utah 281, 39 P.2d 342, 96 A.L.R. 1083 (1934).

7. Wellington v. Con P. Curran Printing Co., 268 S.W. 396 (Mo. App. 1925); Roberts v. Mays Mills, 184 N.C. 406, 114 S.E. 530, 28 A.L.R. 338 (1922); Hercules Powder v. Brookfield, 189 Va. 531, 53 S.E.2d 804 (1949); Scott v. J. F. Duthie & Co., 125 Wash. 470, 216 Pac. 853, 28 A.L.R. 328 (1923); Long v. Forbes, 58 Wyo. 533, 136 P.2d 242, 158 A.L.R. 224 (1943).

8. Robinson v. Standard Oil Co. of La., 180 So. 237 (La. App. 1938); Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 Atl. 205 (1933); Mabley & Carew Co. v. Borden, 129 Ohio St. 375, 195 N.E. 697 (1935); McLemore v. Western Union Telegraph Co., 88 Ore. 228, 171 Pac. 390 (1918); Moore v. Postal Telegraph-Cable Co., 202 S.C. 225, 24 S.E.2d 361 (1943).

bargain and consideration were present.[9] Such promises are enforceable although the employees are free to leave the employment at any time and are otherwise paid for their services. The employees' forbearance from exercising their privilege of leaving the employment furnishes the consideration.[10] One exception to the rule requiring consideration[11] is the doctrine of reliance on a promise, or promissory estoppel. Under this doctrine a gratuitous promise, otherwise unenforceable, is rendered enforceable (1) if the promisee acts or forbears acting in a definite and substantial manner in reliance on the promise, and (2) if injustice can be avoided only by enforcing the promise.[12] One court has held an employer's promise of a bonus enforceable because the promisee relied on it to his detriment;[13] in most such situations, however, a bargain may be found.[14]

In the instant case, plaintiffs contended that the employer's promise was accepted as a settlement of their rights under the collective bargaining agreement and that therefore the requirements of a bargain had been met. The court held that the promise could not have been made in settlement of their rights, because under the collective bargaining agreement plaintiffs had no claim to the unused sick leave and retirement benefits which were promised. It further stated that plaintiffs gave no promise, act, or forbearance which could be construed as having been given in exchange for defendant's promise, since their employee status remained the same and they suffered no loss of wages or other benefits owed them. One judge, dissenting, believed that defendant made the promise to induce cooperation by plaintiffs until consummation of the sale and would have found consideration in plaintiffs' continued service.[15] Plaintiffs also contended that in absence of consideration the doctrine of promissory estoppel should be applied, alleging that they continued to work for defendant and refrained from opposing the sale, in reliance on the promise. The court rejected plaintiffs' argument, pointing

9. See 1 CORBIN, CONTRACTS § 153 (1950); 1 WILLISTON, CONTRACTS § 130B (rev. ed. 1938).

10. Roberts v. May Mills, 184 N.C. 406, 114 S.E. 530, 28 A.L.R. 338 (1922); Scott v. J. F. Duthie & Co., 125 Wash. 470, 216 Pac. 853, 28 A.L.R. 328 (1923); Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N.W. 769, 44 L.R.A.(N.S.) 1214 (1912).

11. RESTATEMENT, CONTRACTS § 85 (1932).

12. *Id.* § 90. In nearly every case where the other requirements for the doctrine are satisfied, justice will always require enforcement of the promise. 1 CORBIN, CONTRACTS 657 (1950).

13. Kerbaugh v. Gray, 212 Fed. 716 (4th Cir. 1914).

14. 1 CORBIN, CONTRACTS 680 (1950).

15. 217 F.2d 803, 808-09 (2d Cir. 1954).

out, first, that the plaintiffs had been paid in full for their services; second, that they were not bound to continue in service, not having promised to do so; and third, that no injustice would result from holding the promise unenforceable.

The question of whether consideration was present in the instant case depends upon the purpose underlying the promise. Defendant may have been bargaining for plaintiffs to forbear opposing the sale, or the promise may have been made in a spirit of liberality. If the promise was made to induce plaintiffs not to strike or otherwise oppose the sale, their forbearance would then be the consideration bargained for and given in exchange. If the promise was made in a spirit of liberality, the fact that the plaintiffs did not oppose the sale might indicate that the substantial reliance necessary for invoking the doctrine of promissory estoppel was present. Whether the plaintiffs would have so acted even if the promise had not been made is a speculation on which the courts should not enter.[16] The fact that they were paid for their services should not have rendered the promise unenforceable.[17] If the court refused to find substantial reliance because plaintiffs were not bound to remain in defendant's employ, it seems to have overlooked the fact that forbearance from terminating one's employment could well constitute such reliance. There is a possibility that plaintiffs did refrain from striking to enforce their claim to the cumulated benefits, in reliance on the promise. If they did, such forbearance would be definite and substantial, and injustice would seem to have resulted from the court's refusal to enforce the promise. If, as the court in the instant case assumed, the promise was actually made, it is submitted that the case was incorrectly decided.[18] As noted by the dissent, the court might well have concluded that the promise was made to induce forbearance on the part of the plaintiff employees.[19] If not, the court might still have applied the theory of promissory estoppel as grounds for awarding plaintiff recovery of the promised benefits.

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16. Martin v. Meles, 179 Mass. 114, 60 N.E. 397 (1901); DeCicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807, 1918E L.R.A. 1004 (1917).

17. See 1 CORBIN, CONTRACTS § 153 (1950); 1 WILLISTON, CONTRACTS § 130B (rev. ed. 1938).

18. See note 1 *supra*.

19. 217 F.2d 803, 809 (4th Cir. 1954).