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Contracts--Collective Bargaining--Consideration For Promise To Pay Cash Equivalent of Benefits

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health measures by allowing the use of water supplies as the means for the addition of beneficial substances to the body? Is the next step the addition of vitamins or poliomyelitis vaccine? And then what? Whether they realize it or not, apparently the courts in these decisions have found that the police power of municipalities is broader in scope than was previously realized.

H. R. A., Jr.

**Contracts—Collective Bargaining—Consideration for Promise to Pay Cash Equivalent of Benefits.**—Ps were employees of D pursuant to a collective bargaining agreement providing for vacation pay, accumulated sick leave, and retirement benefits. The agreement also provided that, if D's properties were ever sold, said agreement and its benefits would terminate. D proposed to sell the company, and orally promised Ps that if the sale were consummated, it would pay to them the cash equivalent of said benefits which had accrued up to the date of the sale. Ps continued working for D, at regular wages, until the sale was made, and they were continued in their same employment by D's purchaser. Ps sue to recover the promised cash value of the accumulated sick leave and retirement benefits which D had refused to pay. Held, that D's promise was unenforceable because unsupported by consideration. Nor would the doctrine of promissory estoppel apply, for justice here did not require that D's promise be enforced. The dissent maintained that there was consideration in Ps' acceptance of the promise in settlement of their rights under the agreement; in their continued service and implied promise not to seek other means of protecting their rights. **Byerly v. Duke Power Co.,** 217 F.2d 808 (4th Cir. 1954).

It is a well settled rule of law, with certain well defined exceptions, that a consideration is an essential element of a simple contract, and hence a promise is binding only if consideration is given in exchange for it. **Peoples Bldg. & Loan Ass'n v. Swaim,** 198 N.C. 14, 150 S.E. 668 (1929); **Thomas v. Mott,** 74 W. Va. 493, 82 S.E. 325 (1914). A consideration is an act or forbearance, or the creation, modification, or destruction of a legal relation, or a return promise, bargained for and given in exchange for the promise. **Restatement, Contracts** § 75 (1933), cited with approval in principal case. A consideration may involve either a legal detriment to the promisee or a legal benefit to the promisor. **Fawcett v. Fawcett,**
The dissent found consideration in Ps' acceptance of the promise in settlement of their rights under the collective bargaining contract, implying that they gave up their rights under that contract in reliance on D's promise. However, this contention seems to be begging the question. Waiver of any legal right may indeed furnish consideration, Exum v. Lynch, 188 N.C. 392, 125 S.E. 15 (1924), but according to their collective bargaining contract Ps had no absolute vested right to any of the benefits thereunder, for by the express terms of that contract, such rights or benefits would terminate in any event if the company was sold. If the promise had not been made, certainly Ps could not have legally compelled D to liquidate those benefits into lump sum payments. If then they had no vested right to these benefits under their contract of employment, it can hardly be said that they gave up any of those rights. True, these benefits would be lost upon sale of the company, but that was an express term of the collective bargaining contract. D, of course, attempted to protect Ps to some extent in those benefits in making its promise. But it cannot be seen how that promise was supported by any consideration. D requested no act or forbearance, nor did Ps promise any. D's promise was intended merely as a gift on its part, so that Ps would not lose these benefits altogether.

The dissent also states that Ps' continued service in reliance on D's promise amounted to an implied promise on their part not to seek other means of protecting their interests, and that such implied promise was sufficient consideration. The dissent compares the principal case to cited "bonus cases" where the employer promised the employees a bonus, and it was held that that promise was supported by consideration by the employees' continued service. Laying aside the bonus question for the moment, there are two principal difficulties with the position of the dissent. In the first place, nothing is consideration unless it is bargained for, and regarded as such by both parties, as the agreed exchange or quid pro quo of a promise. Wilentz v. Hendrickson, 133 N.J. Eq. 447, 33 A.2d 366 (1943); Michael v. Holland, 111 Ind. App. 34, 40 N.E.2d 362 (1942). If there were such a promise implied on the part of Ps, yet it cannot be seen that such promise was in any way bargained for by D, or regarded by it as the quid pro quo, as the
agreed exchange, for its promise, without which it would not have made the promise. At least there is nothing in the pleadings to show otherwise. The pleadings do not show that D placed any request or condition of any kind on its promise. It might well be that Ps' continued service was what D had in mind, but that is immaterial if that was not made a part of the agreement. If that was the precise reason why D made its promise, it is difficult to see why Ps' promise, if D did bargain for it, was left to mere inference and implication.

The second difficulty with the statement of the dissent is that Ps were not bound to continue to work for D until the sale was consummated. There was nothing to keep them from taking other steps to protect their interests. They could quit any time. This the dissent admits. But yet it states that the fact that they did continue their service furnished the consideration. This seems fallacious. The mere fact that Ps were not bound shows that there was no contract. Unless both parties are bound, neither is bound. Mis-
kowitz v. Starobin, 181 Misc. 445, 41 N.Y.S.2d 786 (1948); Keefer v. United Elec. Coal Co., 292 Ill. App. 36, 10 N.E.2d 886 (1937). The mere fact that Ps did continue their service is not sufficient, as far as consideration is concerned, when they were not bound to do so. D requested no such action and Ps promised none. "[T]he fortuitous presence in a transaction of some possibility of detrimental... is not enough to furnish a consideration for a contract. The promisor and promisee must have dealt with it as the inducement to the promise." Borgerding v. Ginocchio, 69 Ohio App. 231, 238, 45 N.E.2d 308, 310 (1942). Such continued service was not the inducement of D's promise.

The dissent's citation of the "bonus cases" as being supported by consideration are distinguishable. Those cases concern the promise of a bonus if the employee serves a specified period of time, or until a certain work is finished. The serving of the time of finishing the work is held to constitute consideration for the bonus offer. Kerbaugh v. Gray, 212 Fed. 716 (2d Cir. 1914); George A. Fuller Co. v. Brown, 15 F.2d 672 (4th Cir. 1926); Roberts v. Mays Mills, 184 N.C. 406, 114 S.E. 530 (1922). But in the principal case, D merely made the bare promise without specifying any length of time, without conditioning its promise in any way upon anything to be done by Ps. In form the promise was absolute, not qualified by any condition precedent. Thus, the "bonus cases" would not apply to the principal case.
It would seem, therefore, that D's promise was entirely voluntary and gratuitous, unsupported by any consideration. If Ps are to recover at all, it must be on the theory of promissory estoppel. This doctrine was developed to avoid gross injustice incurred by a party's reliance on another's promise to his substantial detriment when that promise was unenforceable for lack of consideration. Thus, as this doctrine has been developed, it may take the place of a common law consideration. But obviously the doctrine should not be applied too liberally. Restatement, Contracts § 90 (1933), cited with approval in the principal case, defines the doctrine: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding, if injustice can be avoided only by enforcement of the promise."

By this definition there are four essential elements to any application of the doctrine, and if any one of the essentials is lacking the doctrine may not be applied: (1) That promisor reasonably expect his promise to induce action or forbearance on the part of the promisee; (2) That the promisee take action in reliance on the promise; i.e., that the promise must in fact induce the action or forbearance; (3) that the action or forbearance be of a substantial character; i.e., that there be a substantial detriment to the promisee from the reliance; (4) that injustice can be avoided only by enforcement of the promise. The court thought that all of these four elements were not present in the principal case so as to warrant the application of the doctrine. And there is little room to doubt that the court was correct.

Consider the four elements one at a time.

(1) This element might well be present. D might well have made its promise with the secret intent and hope that Ps would continue working, so as to more easily enable D to consummate the sale without opposition from its employees.

(2) The presence of this element is subject to some doubt. It is not clearly shown by the pleadings that Ps continued working only because of D's promise. It is not shown that it was clearly the inducing cause. It is not enough for promissory estoppel that Ps merely relied on D's promise in doing what they did. It must also be shown that they would not have continued working for D, or would have taken other steps to protect their rights, if D had not made its promise, and that they did what they did only because D did make the promise. It must be shown that the promise was the induce-
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ment. See dissenting opinion in Shadwell v. Shadwell, 30 L.J.C.P. (n.s.) 145 (1860). Such a showing is not made here. There is little reason to believe that Ps would not have continued working for D anyway, had the promise never been made. This is especially true since the purchaser offered to continue their employment after the sale.

(3) and (4) are closely tied together, so they will be considered together. The court felt that Ps did not undertake any action or forbearance of a substantial character. Their status as employees remained precisely the same after as before the promise was made. There was no change in their rights and duties under the collective bargaining agreement. They continued to receive their regular wages, and were not denied any benefits to which they became entitled. D had a right to sell if it wished. That this was in fact contemplated is evidenced by the provision in the agreement that it would terminate if a sale were made. That Ps did not seek other employment is not material on this point. They would have lost the benefits whether they continued working for D, or whether they sought employment elsewhere. Under the circumstances then, it cannot be said that Ps undertook any action or forbearance of a substantial character in reliance on D's promise. It necessarily follows that if Ps incurred no substantial detriment, there would be no injustice in not enforcing D's promise. Ps received full compensation for the time worked, and were denied no benefits they were entitled to. By their contract, they would have lost the benefits whether they had continued in D's service or not. Nor did any of them lose his job or any wages, since D's purchaser continued to employ them, without loss of time, at apparently the same wages. Therefore, by their continued service to D after the promise was made, it is not shown that they were prejudiced in any way. Consequently, at least two, and possibly three of the essentials being absent, the doctrine of promissory estoppel is inapplicable.

B. E. B.

CRIMINAL LAW—IMMUNITY FROM PROSECUTION.—After a complaint that D was permitting illegal gambling in his business establishment, the circuit court of Wood County entered an order summoning D to give evidence before a grand jury which might tend to incriminate him. The order stated that D would have "complete immunity in regard thereto as the law provides." Before