Notre Dame Law Review

Volume 4 | Issue 7 Article 5

4-1-1929

Characterization in Religious Property Tax-Exemption: What is Religion--A Survey and a Proposed Definition and Approach

John R. Brancato

PROMISE TO DO WHAT A MAN IS BOUND TO DO

By WM. J. COYNE

It is a fundamental rule of contract law that a promise to do what one is already legally bound to do is a form of unreal consideration insufficient to support a contract.[1]

A minority rule, however, which apparently limits this doctrine should be of particular attention to Indiana lawyers.

Cases involving this question commonly arise when one party to a contract finds his agreement is more onerous than he thought it to be, and he refuses to perform unless an additional compensation is paid him. The most common case is when a building or construction contractor meets unforseen difficulties, becomes financially involved, has labor troubles, encounters a shortage of materials, or finds he has made an unsatisfactory contract in general. The contractor refuses to perform unless promised further consideration. This is often promised by the other party in a subsequent agreement, and the question is whether the contractor has furnished any consideration to sustain the new contract.

The overwhelming weight of authority both in England and America is that the second contract is void, and the contractor cannot recover the additional compensation.[2]

---

1 Anson, p. 83, Williston, Contracts, Vol. Sec. 130, 13 C. J. 35L.

2 Stilck v. Meyrick, 2 Camp. 317.
Federal: Alaska Packers' Association v. Domerico, 117 Fed. 99, 54 C. C. A. 485.
Alabama: Shriner v. Craft, (1910) 166 Ala. 146, 28 IRA (NX) 450, 139 ASR 19, 51 So. 884.
Arkansas: Feldman v. Fox, 112 Ark. 223; 164 SW 766.
California: Main Street Co. v. Los Angeles Co., 129 Cal. 301, 61 Pac. 937.
Colorado: Benford v. Yockey, 164 Pac. 725.
Dist. of Columbia: Littlepage v. Neale Publishing Co., 34 App. D. C. 257.
Georgia: Wilmingham Sash & Door Co. v. Drew, (1903) 117 Ga. 850, 45 S. E. 237.
Illinois: Goldsmith v. Gable, 140 Ill. 269, 29 NE 722, 15 LRA 294; Leafgreen v. Yablonsky, (1913) 178 Ill. Ap. 19.
Iowa: Ayres v. Chicago R. I. & P. Ry. Co., (1879), 52 Iowa 478 3 NW 522.
Kentucky: Howard v. McNeil, 25 Ky. L. Rep. 1394, 78 SW 142.
Maine: Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21.
Mass.: Parrot v. Mexican C. Ry. Co., 207 Mass. 184, 93 NE 590, 34 LRA (NX) 261 (limiting the contrary doctrine which is still the general law in Mass. See cases contra).
Michigan: Endris v. Belle Isle Ice Co., 49 Mich. 279, 13 NW 590.
Minnesota: King v. Duluty, M. & N. Ry. Co., (1895), 61 Minn, 482, 63 NW 1105; (recognizing contrary rule in case of unforseen difficulties). Morrison & Co. v. Shonczynski, 61 Minn. 482, 63 NW 1105.
Missouri: Lingenfelder v. Wainwright Brewing Co., (1890) 103 Mo. 578, 15 SW 844; Lindsly & Son v. Kansas City Viaduct & Terminal Co., (1911),

(Footnote No. 2 continued on next page.)

A few jurisdictions, however, have sustained the second contract.[3] The grounds on which it has been sustained vary. The case of *Munroe v. Perkins,* (1830) 9 Pick (Mass.) 298, 20 Am. Dec. 475, is the leading case in America in favor of the minority rule. In that case a contractor who had agreed to build a house refused to perform because of inadequacy of consideration. The parties agreed by parol that the contractor should have more if he completed the work. The Massachusetts court justified its decision on the ground that the first contract was waived and that "the plaintiff went on the faith of the new promise and finished the work. This was a sufficient consideration." The reasoning amounts to a discharge of the first contract by mutual agreement, a waiver of its benefits by the offended party, and the drawing up of an entirely new agreement in regard to the same subject matter in which the consideration is changed on one side.

(Footnote No. 2 concluded.)
152 Mo. App. 221, 133 SW 389 (semble).
Nebraska: Esterly Harvesting Co. v. Pringle, 41 Nebr. 265, 59 NW 804.
New Jersey: Natalizzio v. Valentino, 71 NJL 500, 59 Atl. 8.
New York: McGovern v. N. Y., 234 NY 377, 138 NE 26, 25 A. L. R. 1442; Casterton v. McIntire, (1893) 3 Misc. 380, 23 N. Y. Supp. 301.
North Carolina: Festerman v. Parker, (1894) 32 N. C. (10 Fred L.) 474.
Ohio: Snyder v. Schardt, (1917) 29 Ohio C. C. 714.
Oregon: Haskins v. Powder Land & Irrigation Co., (1913) 90 Oregon 217, 176 Pac. 125.
Pennsylvania: Moyer v. Kirby, (1869) 2 Pearson 64; Dockell v. Old Forge, (1913) 240 Pa. 98, 87 Atl. 421.
So. Carolina: Nesbitt v. Louisville C. & C. R. Co., (1844) 29 S. C. L. (2 Speers) 697; Colcock v. Louisville, C. & C. Ry. Co., (1845), 32 S. C. L. 329.
Tennessee: Hanks v. Barron Bros., (1895) 95 Tenn. 276, 32 SW 195.
Texas: Jones v Risky, (1895) 91 Tex. 1, 32 SW 1027; Brown v. McGregor, (1898) 45 SW 923.
Vermont: Morrison v. Heath, (1839), 11 Vt. 610 (semble); Creamery Package Mfg. Co. v. Russell, (1911) 84 Vt. 80, 32 LRA (NS) 135, 78 Atl. 718.
West Virginia: Vance v. Elleson, 76 W. Va. 592, 85 SE 776.
Hawaii: Magoon v. Marks, 11 Hawaii, 764.
3 U. S.: U. S. v. Cook. (1922) 257 US 523, 66 L. Ed. 350, 42 S. C. R. 200 (semble); U. S. Steel Co. v. Casey, (1920) 262 Fed. 889.
Connecticut: Sasso v. K. G. & G. Realty & Construction Co. (1923) 98 Conn. 571, 120 Atl. 158.
Illinois: Bishop v. Busse, (1873) 69 Ill. 403; Cook v. Murphy, (1873) 70 Ill. 96.
Indiana: Coyner v. Lynde, (1858) 10 Indiana 282.
Kentucky: King Co. v. Louisville & N. R. Co., (1908) 131 Ky. 46, 114 SW 308.
Maryland: Linz v. Schuck, (1907) 106 Md. 220, 11 LRA (NS) 789, 124 ASR 481, 67 Atl. 286, 14 Am. Cas. 495.
Mass.: Munroe v. Perkins, (1830) 9 Pick. 298, 20 Am. Dec. 475.
Michigan: Scanlon v. Northwood, (1907) 147 Mich. 139, 110 NW 493.
New Jersey: Osborne v. O'Reilly, (1887) 42 N. J. Eq. 467, 9 Atl. 209.
New York: Meech v. Buffalo, (1864) 29 N. Y. 198; Reisler v. Silbermintz, (1904) 99 App. Div. 131, 90 N. Y. Supp. 967.
Minnesota: King v. Duluth Ry. Co., 61 Minn. 482, 63 NW 1105.
No. Dakota: Goar v. Green, 6 N. Dak. 48, 68 NW 318.
Texas: Galveston v. Galveston City R. Co., (1877) 46 Tex. 435.
Washington: Evans v. Oregon & W. Ry. Co., (1910) 58 Wash. 429, 25 LRA (NS) 455, 108 Pac. 1095; McGillvrae v. Bremerto, (1916) 90 Wash. 394, 156 Pac. 23.
Wisconsin: Grant Marble Co. v. Abbot, (1910) 142 Wisc. 279, 124 NW 264.

The other ground commonly given for sustaining such a second contract is that the offending party had a right to subject himself to liability in damages rather than performing his obligation. The subsequent promise to perform, and, thus, the surrender of his right to pay damages has been upheld as sufficient "legal detriment" to constitute consideration for the second contract.

The case of *Coyner v. Lynde,* (1858), 10 Indiana 282, apparently relies upon both of these arguments. It cites *Munroe v. Perkins,* as a precedent for its decision and expressly states the argument of the surrender to pay damages. In this case the defendant discovered that the price at which he had agreed to construct a road bed for the plaintiff was grossly inadequate and he determined to abandon his contract. The plaintiff promised the defendant that if he would continue the work, the plaintiff would release to him the commission he had been promised for giving the contract to the defendant (who was a subcontractor). The court held that "it was a question for the jury whether the old contract had been abandoned", and the jury found that it had been. If the old contract had been abandoned, then the new one was valid for the reasons, supra.

Prof. Knowlton in his annotations to Anson on Contracts[4] distinguishes such cases as *Coyner v. Lynde* from the general rule on the ground that they represent a form of substituted agreements which discharges the first contract. He says these cases "at first sight seem to be in conflict" with those representing the general rule. Professor Williston,[5] however, recognizes this line of cases as contrary to the general rule. It is virtually impossible to reconcile *Munroe v. Perkins* and *Coyner v. Lynde* with those cases cited in accord with the well known rule that a promise to do what one is already legally bound to do is not a real consideration.

The case of *Coyner v. Lynde* apparently has never been overruled. Several Indiana cases following *Reynolds v. Nugent,* 25 Indiana 328, recognize the general rule in regard to consideration, but all of them can be distinguished from *Coyner v. Lynde* on the fact that in them the first contract was not held to have

4 Anson, "Contracts", Knowlton's Edition, page 107.
5 Williston, "Contracts", Volume 1, page 276.

been abandoned. Indiana is at present apparently committed to this minority doctrine.

The editor of American Law Reports in 25 ALR 1451 says: "Whatever view may be taken in general regarding the validity of a promise to pay a building contractor additional compensation if he will complete the contract, the courts ordinarily, as will be seen from the cases, have sustained the subsequent promise if it rests upon some equitable ground, such as mistake or unanticipated difficulties". The editor's statement seems to be the strongest to be found in support of the minority view. None of those states which have hitherto adhered to the strict general rule have been converted by the rasoning of the minority, even in the case of unanticipated difficulties. "True, a rather recent decision, that of *Sasso v. K. G. & G. Realty and Construction Co.,* (1923), 98 Conn. 570, 120 Atl. 158, adheres to the minority view with the same reasoning as that of *Coyner v. Lynde,* that the original contract was abandoned and a new one substituted in its place. But Connecticut was already committed to the minority doctrine in *Connelly v. Devoe,* 37 Conn. 576.

On the other hand, Massachusetts, the founder of the minority rule, has limited it somewhat in *Parrot v. Mexican Central R. R. Co.,* 207 Mass. 184, 93 NE 59, 34 LRA (NS) 261, saying: "the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it".

The minority rule is without question unsound. Professor Williston attacks the reasoning in support of it in his work on Contracts, Volume 1, page 277. He attacks the first theory, that a promisor has an option to perform or pay damages by saying (in effect) that by paying damages the contractor does not perform his legal duty and consequently suffers no 'legal detriment'. Moreover, even if the surrender of the contractor's right to pay damages were a sufficient 'legal detriment', to constitute a consideration, then the second contract would still give the contractor the option to perform or to pay practically the same damages as he would have paid under the first contract. The refined 'legal detriment', therefore, runs around in a vicious circle. Willison attacks the second justification of the minority rule, that

---

6 Williston, Contracts, Vol. 1, page 279.

the first contract has been rescinded by mutual agreement, by saying that "the agreement for recission does not do away with the necessity for consideration". It can scarcely be said that "promissory estoppel is a substitute for consideration either in creating or discharging obligations."[7]

7 Williston, Contracts, Vol. 2, page 1336.