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CONTRACTS-EFFECT OF A STIPULATION DENYING LEGAL EFFECT IN AN EMPLOYER'S VOLUNTARY PENSION, BONUS OR DEATH BENEFIT PLAN

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CONTRACTS—EFFECT OF A STIPULATION DENYING LEGAL EFFECT IN AN EMPLOYER'S VOLUNTARY PENSION, BONUS OR DEATH BENEFIT PLAN—It has generally been supposed that where two persons go through the form of offer and acceptance but at the same time mutually agree that their undertakings shall not be legally obligatory, they are not contractually bound.[1] In fact, it has frequently been asserted that the intent to have legal obligation must appear affirmatively before

[1] See, 1 WILLISTON, CONTRACTS, § 21 (1920).

a contract can be found to exist.[2] It may be doubted whether this is so, since it is clear from the decided cases that no showing of such an intention is ever required. The intention to have a contract is invariably assumed to exist in the absence of affirmative evidence of a contrary intent. However, there is ample authority for the proposition that if it appears, either from the manifestations of intention indulged in, or from the surrounding circumstances, that the parties meant that their agreement should not receive legal sanction, they are not contractually bound. This is true although the agreement has all the other usual earmarks of a contract, namely, mutual assent and consideration. Thus it has been held that agreements made in jest,[3] family arrangements, and social engagements[4] are not contracts. Preliminary oral agreements which the parties intend to put into writing are not contracts if there is evidence to indicate that the parties contemplate that legal sanction should attach only after the writing has been drawn up and signed.[5] In fact, it has been held that an agreement, which on its face is complete and binding, but which it was understood by the parties was not to have legal effect at all, is not binding, even though it may have been entered into as a sham to deceive third persons.[6] In the English case of *Rose & Frank Co. v. J. R. Crompton & Bros.*,[7] an ordinary detailed business agreement relating to the creation of a sales agency, which was put into writing and signed and which had been acted upon by both parties for a long period of time, was held to be

[2] See, CLARK, CONTRACTS, 4th ed., § 27 (1931); ANSON, CONTRACTS, 17th ed., 4 (1929); 13 C. J. 285 (1917).

[3] Keller v. Holderman, 11 Mich. 248 (1863); McClurg v. Terry, 21 N. J. Eq. 225 (1870); Chiles v. Good, (Tex. Civ. App. 1931) 41 S. W. (2d) 738; Deitrick v. Sinnott, 189 Iowa 1002, 179 N. W. 424 (1920); Davis v. Davis, 119 Conn. 194, 175 A. 574 (1934).

[4] Balfour v. Balfour, [1919] 2 K. B. 571.

[5] Mississippi & Dominion Steamship Co. v. Swift, 86 Me. 248, 29 A. 1063 (1894); Hodges v. Sublett, 91 Ala. 588, 8 So. 800 (1890); Bitulithic Paving Co. v. Highland Park, 164 Mich. 223, 129 N. W. 46 (1910).

So also it has been said:

"It was long ago established that, notwithstanding the parties may have gone through the form of executing a formal written contract, yet if it also has been agreed, be it only by parol, that such contract was not to take effect until the happening of some other event, and such subsequent event did not happen, the written contract will not be enforced even though it had been delivered to the obligee at the time of execution." Nat. Bank of Kentucky v. Louisville Trust Co., (C. C. A. 6th, 1933) 67 F. (2d) 97 at 102.

[6] N. Y. Trust Co. v. Island Oil & Transport Corp., (C. C. A. 2d, 1929) 34 F. (2d) 655, noted in 28 MICH. L. REV. 448 (1930); also comment on admissibility of parol evidence showing that a contract in writing was executed only as a sham in 33 MICH. L. REV. 410 (1935).

[7] [1923] 2 K. B. 261, noted in 22 MICH. L. REV. 158 (1923).

without contractual effect, since the writing stipulated in terms that it was to be binding only in honor.

In spite of these decisions, there have been a number of recent cases in which it has been held that if an employer adopts a voluntary insurance, pension, or bonus plan for the benefit of his employees, under which benefits are promised, contingent upon the employee continuing in the employer's service for a stipulated period, or for some time, a contract results, though the employer makes no deduction from the employee's regular wages, and although the statement of the plan and promises furnished to the employee contains a stipulation, in terms, that the promises are gratuitous and are not to be construed to be legally enforcible.[8] That the judicial conscience has been troubled in reaching this conclusion is evident from the fact that the cases do not wholly agree in their approach to the solution of the problem involved. Some of these cases seem to have been decided on the theory that the only question involved was one of finding a sufficient consideration for the employer's promise.[9] It has apparently been assumed that if it can be demonstrated that the promise is not gratuitous, then it must necessarily impose contractual obligation. It is submitted that this is an unsound analysis. Even if consideration can be found, the fact remains that the parties have agreed that no legal obligation shall attach. This in itself, as we have already seen, is usually regarded as sufficient to deprive even an ordinary business agreement of legal effect. It is true that these "pension plan" cases do also involve a nice question of consideration, since it is frequently doubtful, to say the least, whether the promise was induced by the detriment relied upon as the basis of consideration, as is required by the orthodox doctrine of consideration.[10] In most of the voluntary pension or bonus cases that had come before the courts in the past this had been the only question involved, inas-

[8] The cases are cited in the following notes.

[9] Mabley & Carew Co. v. Borden, 129 Ohio St. 375, 195 N. E. 697 (1935) (death benefits payable to a beneficiary); Wellington v. Con P. Curran Printing Co., 216 Mo. App. 358, 268 S. W. 396 (1924) (profit sharing plan).

[10] See 1 WILLISTON, CONTRACTS, §§ 100, 112 (1920), and Holmes, J., in Wisconsin & Mich. Ry. v. Powers, 191 U. S. 379 at 386, 24 S. Ct. 107 (1903), where he said:

> "In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment, or that the detriment induces the promise if the other half is wanting."

much as the plans which were examined in those cases did not contain a stipulation of non-enforcibility.[11] In so far as the instant cases hold that consideration can be found, they are not exceptional. This has been the usual, though not the uniform, holding.[12] In this type of case courts are inclined to adopt the promissory estoppel substitute for orthodox consideration, as is commonly done in the charitable subscription cases.[13] No fault is to be found with this holding, since consideration is at best a rather arbitrary requirement. However, before a court decides that an agreement is binding, which the parties themselves agree shall not be legally enforcible, some compelling reasons for reaching this conclusion should exist.

A recent Michigan case,[14] decided by a majority vote of the court, has reached a similar conclusion through a process of interpretation. The writer of the majority opinion said in effect that if the stipulation denying legal effect to the plan, which apparently came near the end of the instrument, were to be construed as meaning that the whole plan was to be without legal effect, then it would conflict with those provisions under which benefits were promised in unqualified terms and also with those in which the right was specifically reserved to make alterations and changes in the plan at the discretion of the promisor. On this assumption, the court said, it would have to be held that the stipulation was of no effect because of the rule that the first of two conflicting clauses in an instrument shall be received and the second rejected. However, said the court, this rule is to be applied only if the two provisions cannot be harmonized. The court thought they could be harmonized and made consistent by holding that the stipulation denying legal effect related only to those benefits which had not yet accrued and therefore it did not affect liability for benefits which had accrued prior to the repudiation of the promise made.

It is submitted that this analysis is faulty in that it is based upon an unwarranted assumption of repugnancy. It is difficult to comprehend how it can be said that the two parts of the instrument were repugnant or inconsistent in any sense. If it could properly be assumed that the fact of making a promise in unqualified terms itself manifests

[11] For collections of such cases see 44 L. R. A. (N. S.) 1214 (1913); 28 A. L. R. 331 (1924); 96 A. L. R. 1093 (1935).

[12] Recent cases holding such promises to be gratuitous and unenforcible are Meyerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94 (1927), and Wyatt v. Kreglinger and Ferman, [1933] 1 K. B. 793 at 803.

[13] See Allegheny College v. Nat. Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927), with comment in 27 MICH. L. REV. 88 (1928).

[14] Psutka v. Michigan Alkali Co., 274 Mich. 318, 264 N. W. 385 (1936) (pension and death benefit plan). See also Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 A. 205 (1933) (death benefits payable to a beneficiary), accord.

an intention to assume legal obligation the assumption might be warranted. However, the mere fact that a party does promise in unqualified terms does not in itself manifest an intention that the promise shall be legally obligatory. Factual undertaking and legal obligation are two wholly distinct things and the one does not necessarily follow because of the other. It is true the law will impose obligation in the normal case in the absence of evidence of a contrary intention, but, as has already been pointed out, this is so not because it is necessarily supposed that this was the actual intention of the parties, but because it is a rule of law that a promise is binding unless there is affirmative evidence of the intention not to be bound. Moreover, the fact that the employer in other parts of the plan, out of an abundance of caution, reserved a discretion in relation to special features of the plan, thus giving the employee double notice that a binding obligation was not intended, does not make repugnant a general reservation of discretion as to the whole plan.

The argument that such a clause is repugnant and is therefore to be rejected was made in the English case of *Rose & Frank Co. v. J. R. Crompton & Bros.*, but was unanimously rejected by the court of appeal. That court held that it was the dominant clause and not in any sense repugnant.[15]

Probably these courts have been astute to find superficially plausible reasons for holding the employer liable because they have felt that it is inequitable and unfair that the employee should have his expectation defeated after he has relied upon the employer's promise and has perhaps continued in his employ when he might not otherwise have done so. It is obviously not a complete answer to this point of view to say that the employee had no right to rely on the promise since he was informed that it was not legally obligatory. The fact is that the employee, because of his economically weak position, is at a disadvantage and does not under modern conditions deal with the employer on an equal basis in the normal case.

In spite of this circumstance, it may be doubted whether the result reached is in furtherance of what is today generally recognized as

[15] See note 7, supra. As is well said by Scrutton, L. J., [1923] 2 K. B. 261 at 287 ff.: "Before this heroic method is adopted of finding out what the parties meant by assuming that they did not mean part of what they have said, it must be clearly impossible to harmonize the whole of the language they have used. Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. . . . If they clearly express such an intention I can see no reason in public policy why effect should not be given to their intention."

sound social policy, namely, that employers provide some form of economic security for their employees. It may be that this mode of dealing with such voluntary plans may prove to be another case of killing the goose that laid the golden egg. It is probable that experience will show that once an employer has announced such a plan he does not repudiate it in the absence of compelling financial reasons, even if he is legally free to do so. On the other hand, an employer who has in mind such a plan, and who is informed that once he announces it he will be irrevocably bound to all those who have acted in reliance upon it, will not be likely to promulgate it at all. If he makes benefit payments he will make them without announcing them in advance. Such a situation will inevitably tend to reduce the amount of such voluntary benefits conferred, for the simple reason that human beings are much more likely in an optimistic moment to promise benefits in advance and then carry out the promise because of the fear of social opprobrium than they are to make a decision to pay benefits out of money in hand. Until compulsory plans are worked out and enforced, it may therefore be a sounder social policy to encourage the promulgation of such plans and to rely upon moral rather than legal pressure to bring about their specific performance.

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