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Unilateral Contract of Forbearance in Pennsylvania

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definition of dogs as personal property would have necessitated a re-enactment of all the criminal statutes turning upon the definition of personal property, and expressly inserting therein a statement that dogs shall be included in the term "personal property." It is scarcely necessary to add that under the modern liberalized approach to the criminal law, this extreme strictness in construction is unreasonable, and the likelihood of the Legislature's taking the steps to amend such terms uniformly is very small indeed. Under the law as it stands, as stated in the *Exler* case and followed in the subsequent Pennsylvania decisions,⁸⁶ it appears inevitable that we shall have to work with words and phrases in criminal statutes which have one meaning here, another there, and a third in some other connection.

There remains glaringly untouched the word "kidnapping," added to the list of felonies by the amendment of the murder statute in 1923. That this crime presents special problems unique to itself will be seen at once in the fact that kidnapping at common law and by the Code of 1860 was a mere misdemeanor and became a felony in Pennsylvania only by subsequent statute.⁸⁷ The cases on kidnapping in general in the state are few and apparently of no great significance, and there are none involving the question of murder in kidnapping. Nothing, therefore, can be added here to the adequate and extensive survey of the problems in this connection by Dean W. H. Hitchler in Volume 29, Dickinson Law Review, beginning at page 63.⁸⁸

THOMAS I. MYERS

UNILATERAL CONTRACT OF FORBEARANCE IN PENNSYLVANIA

It is well settled that forbearance to exercise a right may be sufficient consideration for a promise.¹ The Restatement of the Law of Contracts² defines consideration for a promise as being (1) an act other than a promise, or (2) a *forbearance*, or (3) the creation, modification, or destruction of a legal relation, or (4) a return promise, *bargained for and given in exchange for the promise*.

⁸⁶C. v. Miller, 80 Pa. Super. 309; C. v. Fronheiser, 6 D. & C. 710; C. v. Robb, 284 Pa. 99; C. v. Foster, 111 Pa. Super. 451; C. v. Sevey, 26 D. & C. 600.

⁸⁷Act of Feb. 25, 1875, P. L. 4; Act of April 4, 1901, P. L. 65.

⁸⁸By way of supplementing Dean Hitchler's discussion of the problem of murder in kidnapping, it would appear that his assumption that the word "kidnapping" must be given its common law meaning might be misleading, in that it would appear that the word might be given a meaning acquired by statute prior to 1923. If this is the case, kidnapping as used in the Act of 1923 would be a felony, an unintentional killing in the commission of which would be murder. See *ante*, notes 16 and 30.

¹Williston on Contracts, Rev. Ed. Sec. 135, and cases there cited.

²Sec. 75.

Although there is no dispute that forbearance from doing what one is otherwise entitled to do is sufficient consideration, yet from the language of many courts there appears to be a conflict of opinion as to whether the forbearance, in order to be consideration, must be a forbearance in pursuance of an agreement to forbear.³ The question seems to be—can there be an enforceable unilateral contract to forbear, or must the contract be a bilateral one where the promise sought to be enforced has been given in return for a *promise* to forbear.

Eminent writers⁴ have stated that the better view, and one which is in compliance with the general principles of the law of contracts holds to the effect that there may be an enforceable unilateral contract to forbear. There are, however, many jurisdictions wherein the courts have refused consistently to recognize the enforceability of a unilateral contract to forbear, insisting that forbearance alone, without a promise to forbear, is not sufficient consideration to enforce another's promise.⁵

It may be suggested that there is only an apparent conflict among the courts, which conflict can be reconciled if the language of the courts be confined to the issues presented, and in reference to which the language is used. Such a reconciliation must be based on the fact that admitting that forbearance to sue may be consideration for a promise, the forbearance must be the thing bargained for and given in return for his promise. A mere naked promise, followed by a forbearance to sue which was not requested by the promisor, and for which the promise was not the inducing cause, is not enforceable.⁶ The Restatement expressly provides that the forbearance must be bargained for and given in exchange for the promise. It must be the price bargained for and paid for the promise. Thus in those cases where the court states that there must be an enforceable mutual agreement to forbear, i. e., a promise for a promise, it does not appear that the promisor had requested the promisee to forbear or that the promisee did in fact rely on the request, and the court was merely considering the effect of a mere promise, followed by actual forbearance.⁷ It is true that such a suggestion may apply to some of the cases, but it remains that in many decisions the court in its opinion has used language indicating the necessity

³For cases holding that no return promise to forbear is necessary, see: *Strong v. Sheffield*, 144 N. Y. S. 392, 39 N.E. 330; *Niles-Bement Pond Company v. Ury*, 103 N. Y. S. 226; *Jamison-Semple Co. v. Richard*, 138 N. Y. S. 401; *In re All Star Feature Corp.*, 232 Fed. 1004; *Newton v. Carson* 80 Kas. 309; *King v. Upton*, 4 Me. 387. For cases holding that a return promise is necessary see: *Shupe v. Galbraith*, 32 Pa. 10; *Shaw v. Phebrick*, 129 Me. 259, 151 A. 423; *Mecomey v. Stanley*, 8 Cush. 85 (Mass.); *Saunders v. Bank of Mecklenburg*, 112 Va. 443, 71 S.E. 714; *Crane v. Hempstead*, 126 Ark. 587, 191 S. W. 234; *Hoffman v. Mayand*, 35 C. C. A. 256, 93 Fed. 171.

⁴*Williston*, Sec. 136; *Anson*, Contracts, P. 202;

⁵See 74 A.L.R. 293.

⁶*Queal and Co. v. Peterson*, 138 Iowa 514, 116 N.W. 593; *First National Bank v. Na Kdimen*, 111 Ark. 223, 163 S.W. 785; *Beeber v. Beck*, 6 Pa. 198; *Skadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Shaw v. Philbrick*, *supra*.

⁷Restatement of Contracts, sec. 55 states that "if an act or forbearance is requested by the offeror or as the consideration for a unilateral contract, the act or forbearance must be given with the intent of accepting the offer."

of an agreement to forbear in reference to a situation in which there was evidence of a request to forbear, either express or implied, and a forbearance in reliance upon the request.

Let us assume then that there is one line of decisions which requires only an actual forbearance given in reliance upon the request of the promisor, and another line of decisions which requires an agreement to forbear in order that the promise in return for which the forbearance is given be enforceable. Is there any justification for the latter view? Upon principle it appears that there is none. The courts which hold the latter view have attempted to justify their decisions upon the ground that unless there is a return promise to forbear, the one forbearing is at no time bound to forbear, and if one is not bound, neither is bound for want of mutuality.⁸ But to reach such a conclusion is in effect to assert that there can be no unilateral contract. In every unilateral contract there is a want of mutuality since the promisee is not bound to perform the requested act or forbearance. Williston states that "the courts which follow this rule fail to recognize the validity of a unilateral contract and assume the necessity of mutuality of obligations in every contract, whereas such mutuality never exists in a unilateral contract."⁹

Our own Pennsylvania courts have long recognized the validity of unilateral contracts. In one case it was stated,¹⁰ "if a party promises another a definite or reasonable reward if he will do a particular thing, the party promised is not bound to do it; yet if he does it without more, he entitles himself to the reward. The offer is accepted only by the performance of the condition of it; but when it is done, the contract is mutual as well as complete." To recognize the validity of unilateral contracts generally, but at the same time fail to find valid a unilateral contract of forbearance, is an inconsistency for which there is no sound basis.

Turning now to the Pennsylvania cases where the courts have indicated the necessity of an agreement to forbear, can the language of the courts be reconciled?

In *Shupe v. Galbraith*,¹¹ the court stated in clear, unequivocal language and directly held that there must be an agreement to forbear. There the defendant promised that if stay of execution for six months be granted to another, he would go bail. This promise was communicated to the plaintiff, who in reliance forbore execution. As to the enforceability of the defendant's promise, the court said: "Actual forbearance is not enough. It must be in pursuance of a mutual agreement to forbear, the consideration being a promise for a promise. . . . The plaintiff was in no sense bound, and consequently there was no consideration for the promise by the defendant." This decision cannot be reconciled in any way.

⁸*Shupe v. Galbraith*, 32 Pa. 10. *Mecomey v. Stanley*, 8 Cush. 85 (Mass.).

⁹Williston, sec. 136 N 4, Rev. Ed.; *Albany National Bank v. Dodge*, 41 Wyo. 286, 285 Pac. 790.

¹⁰*Weaver v. Wood*, 9 Pa. 220.

¹¹32 Pa. 10.

Here were all the elements of a valid unilateral contract, i. e., a forbearance bargained for and given in exchange for a promise to go bail. The promise of the defendant, communicated to the plaintiff, requested the forbearance and was its inducing cause. Yet the court clearly states that no valid contract existed unless the one forbearing, even though at the instance of the promisor, had agreed to forbear by giving a promise in return. However, in view of the holdings of other Pennsylvania cases, this case should not be controlling.¹² In numerous other decisions the court has suggested that such a unilateral contract may be enforceable.

In an earlier case, *Clarke v. Russell*,¹³ Justice Gibson stated that there may be a valid unilateral contract. The court said: "There must be a bona fide forbearance at the defendant's instance and request. . . . But it is not essential that the plaintiff should have bound himself to forbear or stay proceedings on the original security so as to give an action for breach of promise. . . . Actual forbearance at the instance of the defendant may be sufficient on the principle that a single spark of benefit received on the foot of the promise is valid consideration. . . . But in the actual state of our law on the subject, being without a statute of frauds for the protection of third persons elsewhere, policy dictates that there be clear and satisfactory proof that the request was in fact the exciting cause." Here the court, although it did not find the promise enforceable, did so only because there was no extrinsic circumstance to show that the plaintiff's forbearance had been in reliance on the promise.

In a similar situation the court stated in *Snyder v. Leibengood*¹⁴ "the facts that no execution was issued and that the defendant was possessed of and sues upon the paper are not by any means conclusive of the question whether the plaintiff had forborne at the instance of the defendant or accepted his proposal." In *Cobb v. Page*,¹⁵ the facts briefly stated were as follows: A debtor failed and absconded. The father of the debtor requested a person to inform his son's creditors not to sue and they would get their pay. The plaintiff, a creditor, failed to sue the son and now sues the father on his promise. It appeared, however, that the plaintiff had not been informed of the promise until immediately before the suit by him against the father. The court held that the promise was not enforceable since the forbearance was not given in exchange for and in reliance upon the promise. The court said, "It does not appear that indulgence of the creditor was given or even thought of. It cannot be inferred from the mere fact that he has not sued."

¹²The Shupe case has never been cited for its exact holding in any later Pennsylvania case, a fact which may indicate the court's reluctance to reiterate its strict requirement of a promise for a promise.

¹³3 Watts 213.

¹⁴4 Pa. 305.

¹⁵17 Pa. 469

In *Schroyer v. Thompson*,¹⁶ where sureties alleged release from liability on their contract because of an agreement between principals varying its terms, the court held that there was no binding agreement between the principals. The court said "while it has been said that actual forbearance at the instance of a defendant may also be sufficient, yet in such case the burden is upon the one relying thereon to show by clear and satisfactory proof that the request to forbear was in fact the inducing cause of the act of forbearance." Here then the court necessarily recognizes the possibility of a valid unilateral contract when it held that there was no contract only because it did not appear that there was a request which induced the forbearance. "The record fails to show," said the court, "the delay of four years in collecting the interest was pursuant to a request or promise made by the payee maker."

In *Clyde's Estate*,¹⁷ where a bank forbore a suit to preserve its creditor's lien in return for a promise to give the bank a mortgage as security for its note, the court stated "the forbearance of the bank from bringing the action was ample consideration for the mortgage." But this, too, is not a holding that forbearance without a promise to forbear is sufficient since the bank had actually given its promise.

From these cases it appears that the Pennsylvania courts have not definitely excluded the possible existence of a valid unilateral contract of forbearance to exercise a legal right. Yet from the fact that in no case have they enforced the promise to pay where no promise to forbear was given in return, there is a strong indication that the courts are reluctant to recognize the validity of such a unilateral contract. The court has continually stated that there must be "clear and satisfactory proof," that forbearance occurred in reliance upon and was induced by the promise which requested the forbearance, and in each case the court failed to find this proof. It may be concluded, then, that in Pennsylvania, the enforceability of a contract in which the consideration given by one party is forbearance in exercising a right against another is extremely doubtful unless it take the form of a bilateral contract where the promise is given in return for another.

If this be the situation, what is the remedy of the promisee who has relied upon a promise and by his forbearance has suffered a detriment, and fails to show that his forbearance was in pursuance of an agreement to forbear? The answer may lie in promissory estoppel.

In *Saunders v. Galbraith*,¹⁸ the court invoked the doctrine of promissory estoppel and thus rendered the promise enforceable. The facts were briefly: The plaintiff had a claim against Galbraith's estate. The decedent's widow made a written promise to the plaintiff to pay the claim, requesting him to withhold his

¹⁶262 Pa. 282, 105 A. 274.

¹⁷329 Pa. 552.

¹⁸178 N.E. 34, 40 Ohio App. 155, 80 Univ. of Penna. Law Rev. 594.

claim. In reliance upon this promise the plaintiff made no claim against the estate within the period provided by law. Later, barred by law from recovering against the estate, he sued the widow upon her promise. The widow set forth the defense that since there was no promise to forbear, the forbearance was not consideration for her promise. However, the court held that though there was no consideration for the promise, yet the promise was enforceable since the plaintiff relied on it to his detriment. Adopting the rule of the Restatement of the Law of Contracts, the court stated: "The facts of the case at bar come squarely within the terms of the section referred to. Mrs. Galbraith's promise was reasonably expected to, and did induce the plaintiff to forbear asserting its claim against the estate at a time when such assertion could have been effective. If her promise, so acted upon by the plaintiff, is not enforced, the plaintiff has lost its right to realize from the estate on an admittedly just claim, and this unjust loss can be avoided only by the enforcement of the defendant's promise."

It must be observed, however, that all the elements necessary for the proper application of promissory estoppel were present in this case. The Restatement states the rule as follows: "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."¹⁹ Breaking this rule into its component parts, we find that in order that a promise, not binding for lack of consideration, be enforceable, it is necessary to show: (1) that action or forbearance was induced thereby; (2) that the action or forbearance was definite and substantial, and (3) that such action or forbearance must have been reasonably expected by the promisor, and (4) that injustice can be avoided only by enforcement of the promise. Thus it is not in every case where a promise was made without consideration for it, and one relies upon the promise, that such promise will be enforceable. "But if a detriment of a definite and substantial character has been incurred, the court may enforce the promise."²⁰

The Supreme Court of Pennsylvania, in its recent case of *Fried v. Fisher*,²¹ adopted the rule of section 90 of the Restatement with full and unequivocal approval, and applied it to an appropriate situation. The doctrine of promissory estoppel, however, had been invoked in Pennsylvania in earlier cases,²² and this recent decision of the Supreme Court definitely makes it a part of the law of Pennsylvania. It is interesting to note that our courts have paid strict attention to the rule's requirements and have not applied it loosely. In *New Eureka*

¹⁹Sec. 90.

²⁰*Langer v. Superior Steel Corporation*, 105 Pa. Super. Ct. 584, 161 A 571.

²¹328 Pa. 497, 196 A. 39, 115 A.L.R. 147, 86 Univ. of Penna. Law Rev. 670.

²²*Harris v. Brown*, 202 Pa. 16, 51 A. 586; *Park Steel Co. v. Allegheny Valley R. R. Co.*, 213 Pa. 322, 62 A. 920; *Cameron v. Townsend*, 286 Pa. 393, 133 A. 632; *Langer v. Superior Steel Co.*, supra.; *Trexler's Estate*, 27 Pa. Dist. and Co. 4.

Amusement Company v. Rosinsky,²³ the rule was discussed, but was not applied to render the promise enforceable. In that case, a lessee of a theatre under a lease for five years was unable to pay rent. Upon explanation to the lessor that he was making efforts to place the theatre upon a paying basis, the lessor stated that he would go along with lessee. The court held that this was not sufficient to establish an agreement by the lessor to waive payment of the rent until such time as the theatre showed gross receipts sufficient to pay rent. As to the application of restatement rule to this situation the court stated:

"It will be observed that action or forbearance must be of a definite and substantial character, and the promise will be enforced only if injustice cannot be avoided. . . . The continuance of operation of the theatre for another month under the same condition as has existed for two previous months, and the borrowing of money, indefinite in amount, cannot be regarded as such action or forbearance of a definite and substantial character as is contemplated by the rule laid down in the restatement."

In *Fried v. Fisher*,²⁴ the court said, "All the safeguarding features thrown around the doctrine of promissory estoppel to prevent its too loose application—that the promise be one likely to induce action, that such action be of a definite and substantial character, that the circumstances be such that injustice can be avoided only by the enforcement of the promise—are here present."

CONCLUSION

The fact that forbearance to exercise a right against another may be consideration for a promise is unquestionable. If forbearance is consideration, it may be given in the form of a bilateral contract, or a unilateral contract, and in either case, the promise for which it is given in return will not be unenforceable for lack of consideration, or as some courts have stated, for want of mutuality. But, in Pennsylvania, in spite of the long recognition of the validity of unilateral contracts in general, the courts have never enforced a unilateral contract of forbearance to sue, and have indicated a reluctance to recognize them. This is an inconsistency which should be corrected. If the promisee in a unilateral contract of forbearance to sue fails to show that his forbearance is consideration for the promise, he may invoke the doctrine of promissory estoppel if the elements are present, and thus render the promise enforceable. **FREDERICK E. BATRUS.**

²³126 Pa. Super. Ct. 445, 191 A. 412.

²⁴*Supra*.