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Contracts--Consideration--Effect of Subsequent Compromise for More Money

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RECENT CASES

consortium. Eleven state courts and several federal district courts have considered the problem since 1950, and basing their verdicts on the reasoning of the Hitaffer case, have overruled contrary decisions and allowed the wife a cause of action. During this same period, seventeen states refused to follow the Hitaffer case.

The principal case is the second time the question of a wife's right to recover for the negligent interference with her right to consortium has been before the Kentucky court since the Hitaffer decision. In 1952, in LaEase v. Cincinnati, N. & C. Ry., the court, while acknowledging the Hitaffer decision, felt bound by stare decisis and denied recovery without any discussion of the actual problem involved. In the principal case, the court made a complete examination of the problem involved and the progress of the law on the subject, taking special note of the progress since 1950 and the Hitaffer case. The court in its closing paragraph summed up its findings:

In the present age the distinction between the right of a wife and of a husband to maintain the action is at odds with reason. The same may be said as to the inconsistency inherent in recognizing a wife has a cause of action for the impairment of consortium where her husband's injury was the result of an intentional or malicious wrong, but not where it is the result of negligence. Nevertheless, since there is a diversity of opinion among the courts in other jurisdictions and this court has heretofore expressly declined to depart from its earlier decision, having regard for the doctrine of stare decisis, we affirm the judgment.

It is felt that the court placed undue weight on the doctrine of stare decisis and it is urged that at its next opportunity the court bestow upon the wife this right of action for the negligent interference with her consortium.

Thomas C. Greene

CONTRACrS—CONSiDERATION—EFFECr OF SUBSEQUENT COMPROMISE FOR MORE MONEY.—The defendant advertised for subcontractor bids on various phases of a large construction project. The plaintiff, a subcontractor, submitted a bid to the defendant, and was subsequently advised that its figure would be used in defendant's bid. The de-

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17 Ibid.
18 249 S.W.2d 534 (Ky. 1952).
20 "It is as much the duty of this court to restore a right which has been erroneously withheld by judicial opinion as it is to recognize it properly in the first instance. We do indeed have a 'charge to keep', but that is not a charge to perpetuate error. . . ." Felton, Judge, in Brown v. Ga.-Tenn. Coaches, Inc., 88 Ga. App. 519, 527; 77 S.E.2d 24, 32 (1953).
fendant was awarded the general contract. This information came almost immediately to the plaintiff's attention, whereupon a recheck of its figures revealed a substantial error in calculation. The plaintiff attempted unsuccessfully to convey this information to the defendant, which first learned of the mistake, as well as plaintiff's alleged withdrawal, some thirty days later. The plaintiff, insisting it was not bound, demanded more money before it would perform. The defendant objected strenuously, and for two months "hard bargaining" ensued. Subsequently both parties entered into a written contract, the plaintiff agreeing to do the work called for in its first bid and the defendant agreeing to pay more money. The defendant insisted that it never intended to pay the plaintiff the additional amount, but only as much as necessary to get it to complete the job. This turned out to be more than the original figure. The plaintiff then sued for the remaining difference and defendant counterclaimed for the overage.

The trial court held that the plaintiff's bid had ripened into a contract, and that the defendant in entering the subsequent contract was acting solely for its own benefit. There was an abrogation of the original contract and sufficient consideration to support the subsequent one. Judgment was entered for the plaintiff. Held: Affirmed. Even though there may have been a pre-existing duty on the part of the plaintiff, the fact that the subsequent contract is a good faith compromise of each party's position makes it binding. "[W]hat happened, in substance, was a mutual surrender, by the parties, of their antithetical positions, in exchange for a new, formally executed, complete and binding contract." 1 Richards Construction Company v. Air Conditioning Company, 318 F.2d 410 (9th Cir. 1963).

The trial court, in finding that the original bid had ripened into a valid contract, followed the holding of a recent California case, Drennan v. Star Paving Company. 2 In that case, the subcontractor upon discovering a mistake, sought to withdraw its bid prior to formal acceptance, but after the general contractor had relied thereon. The court, basing its decision on promissory estoppel, 3 held the subcontractor's bid binding, and thus allowed the general contractor to recover damages resulting from the defendant's refusal to perform. 4

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1 318 F.2d 410, 414 (9th Cir. 1963).
3 Restatement, Contracts § 90 (1932) provides that "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."
4 An exception exists in these situations where the general contractor knew or as a reasonable man should have known of the subcontractor's mistake. For (Continued on next page)
Although most courts have in the past refused to apply the promissory estoppel doctrine in other than gratuitous promise-type situations, it is now more generally approved. This has been particularly true since the decision in the *Drennan* case, which has been commented upon favorable as a beneficial advancement of the role of promissory estoppel in commercial contracts.

Upon accepting the finding of the trial court that a valid contract had been formed, the pre-existing duty doctrine presents itself. Was there sufficient consideration to support the subsequent contract, in view of the generally accepted rule that a "subsequent contract to perform a pre-existing duty for more money is *nudum pactum*"?

The general contractor argued as follows: the plaintiffs bid did in fact ripen into a binding contract. This imposed a duty upon the subcontractor to perform certain work. In the subsequent contract, the plaintiff promised to do no more than this very same work. Therefore, under the pre-existing duty rule, as exemplified in the classic case of *Alaska Packers Association v. Domenico*, there was no consideration for the subsequent contract and it was thus void.

Considering the wide acceptance of the pre-existing duty rule, the court could justifiably have stopped here by accepting the defendant's position, but it declined, insisting that to do so would be unduly harsh and technical. Having found evidence of a good faith dispute, the court seized upon this to satisfy the necessary consideration to support the subsequent contract. The court said:

A settlement of that dispute involves the giving up of new considerations by both parties. By proposing and signing the new contract, [defendant's agent] . . . manifested to [plaintiff] . . . a giving up of [defendant's] . . . position that there was already a binding contract . . . At the same time, [plaintiff] . . . gave up its position that it was not under any duty . . . by reason of the mistake . . . and became bound by a contract that was not subject to these defects. This was sufficient consideration. . . .

It seems difficult, however, to visualize the giving up of anything sufficient to constitute legal consideration on the part of the plaintiff

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(Footnote continued from preceding page)

discussion of unilateral mistake as grounds for recission see Simpson, Contracts 82 (1954).


6 1A Corbin, Contracts §§ 194-95 (1963).


8 1 Williston, Contracts § 130 (3d ed. 1957).

9 Alaska Packers' Ass'n v. Domenico, 117 Fed. 99 (9th Cir. 1902). The agreement to pay additional compensation for services which libelants were legally bound to render under the old contract, was void for want of consideration.

manifested in the new agreement. Application of this argument to one in the defendant's position seems, on the other hand, quite reasonable. It gave up a position on which it could have brought suit and in fact obtained damages. But the "consideration" furnished by the plaintiff, that is, giving up its position that it was under no duty to perform (which in fact as found by the lower court it was bound by its original bid), appears to constitute an exception to the pre-existing duty doctrine.11

It has often been said by the more liberal writers that any agreement entered into in good faith should be enforced.12 It could also be said that equity generally favors good faith compromises.13 Even so, should we here accept this solution in the light of the possible results? The court obviously put a great deal of weight on the evidence of "hard bargaining" to establish a good faith dispute from which to extract the necessary consideration for the subsequent contract. This means that if the general contractor had acquiesced in the plaintiff's first bid for more money rather than having relied on his natural inclinations to reduce his loss exposure to a minimum, he could have limited his liability to plaintiff's original bid under the doctrine of the Drennan and Alaska Packers' cases. This hardly seems satisfactory.

The net effect of the principal case is a softening of the pre-existing duty doctrine and a shifting of the burden of loss back to the general contractor. This directly opposes the sound logic expressed by the court in the Drennan case that "as between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it."14

Sidney Clay Kinkead, Jr.

CONSTITUTIONAL LAW—SUNDAY CLOSING LAW—VOID FOR VAGUENESS.—The defendant was convicted of violating a Sunday closing statute for operating a department store. The statute1 excepted from the effect of the Sunday closing law nine specific activities and "work of necessity." On appeal the defendant contended the exception clause, par-

1 See also 1 Corbin, Contracts § 140 (1963).
12 1A Corbin, Contracts § 187 (1963).
13 Ibid.
14 Drennan v. Star Paving Co., supra note 2, at 413, 33 P.2d at 761. Kentucky has no case precisely in point with the principal case although fairly recent cases indicate that its courts might be induced to follow this court's solution. See Hall v. Fuller, 352 S.W.2d 559 (Ky. 1961); Ruckel v. Baston, 252 S.W.2d 492 (Ky. 1952).