Contracts--Consideration for Pension Agreement

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because of the provision for a delivery in person. The case of O'Neal v. Sovereign Woodmen squarely holds that delivery to the "camp" of a fraternal insurance organization is sufficient to satisfy the requirement that delivery of the policy be to the applicant in person. However, the court was probably correct in the principal case in giving the ordinary meaning to the phase "in person". The O'Neal case should be confined to its exact facts.

It is unfortunate that the court should have based its decision so strongly upon the Snedecker case, for it may lead to the false inference that where the application provides for delivery of the policy and full payment of the first premium before liability shall attach: (1) liability will never attach upon delivery to the agent; (2) liability will never attach where the first premium has not been fully paid. Such an inference would be entirely erroneous. It must be emphasized that the principal case goes no further than to confine the rule of the McGuire case in narrow limits. In reverting to the older cases for its precedents, the court reverses a trend towards making a manual delivery of the policy to the insured unnecessary. Though somewhat unfortunate in its citation of precedents, the decision is not illogical. The fine distinction drawn between this and the McGuire case serves to reconcile to some degree the two lines of decisions in Kentucky which have caused so much confusion upon this question. Where the policy expressly requires a delivery of the policy to the insured in person, payment of the remainder of the premium will be considered as "something for the insured to do to make the insurance effective". But since the McGuire case is not overruled, where there is no express provision for delivery in person, liability may attach upon delivery to the agent and before payment of the remainder of the first premium, where the insured has expressed a readiness to pay.

Jo M. Ferguson.

CONTRACTS—CONSIDERATION FOR PENSION AGREEMENT.

Plaintiff employees of defendant company were retired from active duty with a promise that they would be carried on the company payroll at half-pay. The payments were to continue until death, according to evidence of plaintiffs, whose only duty was to be to call semi-monthly for their checks at the company's main office. After paying the pension for nearly a year, defendant discontinued it. Held: no binding contract existed to pay a life pension, since there was no valid and sufficient consideration. Plowman et al. v. Indian Refining Co., 20 F. Sup. 1 (E. D. Ill., 1937).

The court rejected plaintiffs' theory that the past service afforded sufficient consideration, either of itself or as creating a "moral obligation" or a sense of "appreciation" which could support the employer's
promise. The past services, the court pointed out, were without reference to the promise, and not given in exchange for or in reliance on the promise. And neither moral obligation nor the motive of the promisor can supply the want of "legal" consideration. The duty of calling for the check semi-monthly was likewise rejected as consideration, because it was only a condition imposed for obtaining a gratuity.

As a purely legal question the answer was obvious, in this case, as the court remarked. The decision is supported by the overwhelming weight of authority. The opinion is interesting, however, in the court's recognition of the social desirability of workers' pensions paid by the industry, and a possible dissatisfaction on the part of the court.


1 Williston, Contracts, Sec. 148: "The law in most of the United States, as in England, has rejected the principle of moral consideration." Even if this were not true, the principle case seems hardly to fall into any of the once accepted types of moral consideration. The suggestion that one has a strong moral obligation to pay a pension to his former employees would probably meet with considerable opposition in the courts even at this late date, despite the recent advances of the social security concept.

2 Shear v. Harrington, 266 S. W. 554 (Tex. Civ. App., 1924) (Offer based on "kindly feeling and generous impulse growing out of recognition of long and faithful services was based on motive and not on consideration, and cannot be enforced in court.") 1 Williston, Contracts, Sec. 111: "... if there be no legal consideration, no motive such as ... a desire to do justice ... will support a promise.

4 Williston, Contracts, Sec. 112. Kirksey v. Kirksey, 8 Ala. 131 (1845), is a leading case in the United States. The "duty" in the principal case of calling for the checks was clearly a condition for a gratuity, not consideration, as witnessed by the fact that in some instances the checks were mailed to the plaintiffs. Cf. Langer v. Superior Steel Co., 105 Pa. Super. 579, 161 Atl. 571 (1932) (where a promise to pay a pension on condition that employee did not engage in competition and "remained loyal" was held enforceable. Consideration in this case was of the peppercorn variety and the court had to search to find that. To buttress the holding the court threw in the doctrine of promissory estoppel for good measure. In the average case of retirement of a worn-out and superannuated employee an expressed consideration that he not engage in competition would be in the nature of a fictitious, if not imaginary, consideration; remaining loyal is entirely subjective; and promissory estoppel would seldom be applicable).

5 Williston, Contracts, Sec. 142. Kirksey v. Kirksey, 8 Ala. 131 (1845), is a leading case in the United States. The "duty" in the principal case of calling for the checks was clearly a condition for a gratuity, not consideration, as witnessed by the fact that in some instances the checks were mailed to the plaintiffs. Cf. Langer v. Superior Steel Co., 105 Pa. Super. 579, 161 Atl. 571 (1932) (where a promise to pay a pension on condition that employee did not engage in competition and "remained loyal" was held enforceable. Consideration in this case was of the peppercorn variety and the court had to search to find that. To buttress the holding the court threw in the doctrine of promissory estoppel for good measure. In the average case of retirement of a worn-out and superannuated employee an expressed consideration that he not engage in competition would be in the nature of a fictitious, if not imaginary, consideration; remaining loyal is entirely subjective; and promissory estoppel would seldom be applicable).
with the result of the case. For no matter how desirable pensions in industry may be, they will never be legally enforceable in the absence of statute or stipulation in an employment contract (both of which are at present almost non-existent in industry generally) so long as we must satisfy the requirement of consideration to make a valid contract.6

The pensions, in this type of case, are essentially a gift, and if they were paid in a lump sum there would be no question of their validity. No basis in principle exists for a distinction that will not allow an employer to make a promise to pay a pension in monthly installments which would be equally enforceable.7

In a commercial and industrial age, as Pound has pointed out, promises form the greater part of wealth.8 It might be advisable then, in an age of wealth based largely on promises, to revise and extend principles of law set out in an age of wealth based principally on goods. And the requirement of consideration, once accepted almost without question as essential to the idea of contract, might be discarded altogether. The great systems of law other than our own function without anything that resembles consideration,9 and even in Anglo-American jurisprudence numerous exceptions exist where the idea of consideration is dispensed with altogether.10

It would seem desirable that as long as one party wishes to enter into an agreement with another party to be legally bound to that party to do something or give something which is not against public policy age ... the industry wherein the diligent worker labors for many years should bear the cost of his living in some degree of comfort through his declining years.”

“In jurisdictions in which the seal retains its common law effectiveness, it would be theoretically possible to establish an enforceable pension agreement under a specialty, but the seal has been largely abolished in the United States.

"Cf., Pound, Consideration in Equity (1919), 13 Ill. L. R. 667, 692. ‘... there is a vital difference between 'I give you' and 'I hold in trust for you', one accomplishing nothing and the other doing its work completely ... this situation may well put us on inquiry whether and how long such a condition, in that part of our legal system which touches credit and commerce and our whole structure most immediately is to be endured.”

"An important part of everyone's substance consists of advantages which others have promised to provide for or render to him.” Pound, Introduction to the Philosophy of Law (1922), 236.

"The most recent civil codes—those of Brazil, Germany, Japan, and Switzerland—omit all reference to the requirement of a causa or a consideration for the validity of contracts.” Lorenzen, Cause and Consideration in the Law of Contracts (1919), 28 Yale L. J. 621, 642. "A cause or motive for the contract is required in the French Code, but as a spirit of liberality or the 'satisfaction of a sentiment of generosity' is sufficient cause the requirement amounts simply to an inhibition of agreements based on illegality, mistake, or fraud.” Williston, Contracts, Sec. 4. The same is true of the codes based on the French—such as those of the Spanish speaking nations and of Italy.11 Hulvey, The Doctrine of Consideration (1937), 42 Com. L. J. 184; Goble, Trends in the Theories of Contracts in the United States (1937), 11 Tul. L. R. 412.
and involves no fraud or mistake then the law should give the agreement legal effect. Consideration for a promise is valuable evidence that the parties intended to make an agreement to which the law should give effect, but it is only one sort of evidence and is not always proof of the real intent of the parties. From time to time cases will arise, such as this voluntary old age pension contract, where one who made a promise, intending to be legally bound by it, is able to escape from it at will by operation of the consideration rule.

The desirability and utility of the consideration rule in contracts has been questioned frequently in the writings of legal theorists. This criticism has been given a limited effect by the adoption of the Uniform Written Obligations Act by the legislatures of several states. As yet, however, the judicial feeling against the doctrine expresses itself only in making additional exceptions to the general rule that there can be no binding contract without consideration.

PAUL OBERST.

HOMICIDE—BURDEN OF PROOF WHEN DEFENSE IS INSANITY.

Defendant was charged with murder in the first degree for killing his wife and child. The defense was insanity. Held: where the defendant pleads insanity and introduces evidence on the matter, the burden is on the state to prove beyond a reasonable doubt that the defendant is sane. Noelke v. State, ..... Ind. ..... , 15 N. E. (2d) 950 (1938).

In the past few years there has been an increased use of the defense of insanity in criminal cases and out of these cases at least three rules have arisen. Such a rule places the entire burden of proving that the defendant is sane upon the state. The Massachusetts's courts, while subscribing to the rule that the state must prove the defendant sane, relieve part of the burden of the rule by saying that the presumption that all men

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10 "I take it that the ancient notion about want of consideration was for the sake of evidence only." Lord Mansfield in Pillans v. VanMierop, 3 Burr. 1653 (1765) (Discredited as historically inaccurate by Holdsworth in Modern History of Consideration (1922), 2 B. U. L. Rev. 174, 190; but approved as a principle at 208.) "It can only properly be treated, not as a test, but as an indication; an indication, but an indication only, amongst many others, that the parties entering into a transaction had in contemplation their legal relations to each other." Markby, Elements of Law (6th ed., 1905), 315. "There can be little doubt however, that our law has shown itself too scrupulous in this matter (danger of giving legal effect to unconsidered promises and levities of speech); in other legal systems no such precaution is known, and its absence seems to lead to no ill results." Salmond, Jurisprudence (7th ed., 1924), 374.

15 Wigmore, Evidence (2d ed., 1923), Section 2051.

25 Wigmore, Evidence (2d ed., 1923), Section 2051.