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AN ANNOTATOR'S REFLECTIONS UPON THE RESTATEMENT OF CONTRACTS

The North Carolina annotations¹ cover only 177 sections out of the total of 609 embraced in the Restatement of Contracts.² They deal with the chapters on meaning of terms, general principles, offer and acceptance, consideration, seals, joint contracts, third party beneficiaries, and assignments. No annotations were prepared to 24 sections because of their introductory and obvious character. On 44 sections, or substantially one-third of those remaining, no North Carolina law could be found. Because of confusion in the state law, it proved difficult to indicate the relationship between that law and 7 sections. On 18 sections the North Carolina law was squarely opposed to the Restatement. Sixty-

¹ (1934) 13 N. C. L. REV. 1.

² St. Paul: American Law Institute Publishers, 1932.

two sections, or nearly half of those annotated, were more or less affected by 49 separate statutes.

A word as to how these annotations were prepared. The work was not limited to taking the proposition expressed in each section into the current digests in order to ascertain whether or not the cases on that specific proposition were in accord with the Restatement. Instead,³ all of the state decisions and statutes dealing with any of the broad topics of contract law designated by the Restatement's chapter headings, *e.g.*, consideration, were distributed under the most relevant of the Restatement sections. Some of the results were merely cumulative. There were many other cases that could not even be tacked on to the Restatement. The annotator arbitrarily brought into the picture a considerable number of related factual and administrative decisions because they clothe the skeleton of general principle with living interstitial tissue. Thus one is enabled to see the contrast between the Restatement and the local law as a whole.

The established North Carolina law of contracts will not be immediately changed merely because it is opposed at some points by 18 sections of the Restatement. However, the 44 sections on which there is no state law and the 7 in relation to which the local law is in confusion should be constructively used as persuasive authority. Written over a period of eight years by a small group of nationally recognized specialists in Contract⁴ law, their drafts checked and revised by the Council⁵ and by the full membership⁶ of the American Law Institute, the

³ All cases cited in every digest in the history of the state were briefed. Professor A. C. McIntosh's *CASES ON CONTRACTS* (2nd ed., 1915, Cincinnati: W. H. Anderson Co.), largely made up of North Carolina cases, proved invaluable. An effort was made to locate every North Carolina decision in the Federal Reporters. All local cases and statutes cited by the court in each opinion were briefed. Finally, all of this was run through Shepard's Citor.

⁴ The American Law Institute's Committee on Contracts: Samuel Williston, Harvard University, Reporter; Arthur L. Corbin, Yale University, Special Adviser, and Reporter for Chapter on Remedies; Merton L. Ferson, University of Cincinnati; Dudley O. McGovney, University of California; William H. Page, University of Wisconsin; George J. Thompson, Cornell University; William E. McCurdy, Harvard University, Legal Assistant; Zechariah Chafee, Jr., Harvard University, Adviser for Sections relating to Specific Performance; Edgar N. Durfee, University of Michigan, Adviser for Sections relating to Specific Performance.

⁵ The Council of the American Law Institute in 1932: George E. Alter, Pittsburgh, Pa.; Newton D. Baker, Cleveland, Ohio; Rousseau A. Burch, Topeka, Kan.; James Byrne, New York City; Benjamin N. Cardozo, Washington, D. C.; John W. Davis, New York City; Robert G. Dodge, Boston, Mass.; Frederick F. Faville, Des Moines, Iowa; William I. Grubb, Birmingham, Alabama; William Browne Hale, Chicago, Ill.; Learned Hand, New York City; William V. Hodges, Denver, Colo.; Joseph C. Hutcheson, Jr., Houston, Texas; Daniel N. Kirby, St. Louis, Mo.; Monte M. Lemann, New Orleans, La.; Orrin K. McMurray, Berkeley, California; William D. Mitchell, Washington, D. C.; Victor Morawetz, New York City; George Welwood Murray, New York City; Emmett N. Parker, Olympia, Washington; Thomas I. Parkinson, New York City; George Wharton

Restatement occupies a position unique among law books. But will the text, comments and illustrations, unsupported by an accompanying analysis of the pertinent American cases, sound convincing to the practicing lawyer? Is the legal profession in this country trained to handle a text somewhat in the nature of the continental codes? Or is the American bench and bar too deeply imbued with the case-law system of precedent? The suggestion is ventured that instead of encouraging the writing of 48 separate local annotations, most of which will be too sketchy and barren to be of assistance, the American Law Institute might more profitably have sponsored the preparation by the authors of the Restatement of a definitive accompanying treatise-commentary. The Explanatory Notes, published at the back of the Official Draft (in part) of 1928 were helpful but they did not go far enough. What is needed is typified by the second edition of *WILLISTON ON SALES*⁷ and the newly announced *BEALE'S CONFLICT OF LAWS*.⁸ These treatises are the work of the chief draftsmen of the Sales Act and of the *RESTATEMENT OF THE CONFLICT OF LAWS*, respectively.

But what of the sections on which the state law has been found in accord? These number 84, a little less than half of the total of 177 under consideration and more than half of those annotated. Let us look at Section 84 (d) and Sections 85-90. The first, adopting the minority view in this country, removes the ban "that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration." The others utter the bold heresy that no consideration is required for promises to pay debts barred by the statute of limitations, debts barred by bankruptcy, promises to perform a duty in spite of non-performance of a condition, promises to perform a voidable duty, and promises reasonably inducing definite and substantial action in reliance. Here is frank innovation in what might at first appear to be merely a

Pepper, Philadelphia, Pa.; Atlee Pomerene, Cleveland, Ohio; Owen J. Roberts, Washington, D. C.; Elihu Root, New York City; Elihu Root, Jr., New York City; Marvin B. Rosenberry, Madison, Wis.; Arthur P. Rugg, Worcester, Mass.; Henry Upson Sims, Birmingham, Alabama; Edgar Bronson Tolman, Chicago, Ill.; Arthur J. Tuttle, Detroit, Mich.; George W. Wheeler, Bridgeport, Conn.; George W. Wickersham, New York City.

⁶ North Carolina members of the American Law Institute in 1935 are: Robert L. Smith, Albemarle; W. M. Toomer, Asheville; M. T. Van Hecke, Chapel Hill; John J. Parker, Charlotte; Charles W. Tillett, Jr., Charlotte; R. O. Everett, Durham; H. Claude Horack, Durham; Malcolm McDermott, Durham; Kenneth C. Royall, Goldsboro; Robert Moseley, Greensboro; L. R. Varser, Lumberton; Alexander B. Andrews, Raleigh; Willis Smith, Raleigh; W. P. Stacy, Raleigh; Thomas W. Davis, Wilmington; George Rountree, Wilmington; William M. Hendren, Winston-Salem; and H. G. Hudson, Winston-Salem.

⁷ New York: Baker-Voorhis, 1924.

⁸ Cincinnati: W. H. Anderson Co., 1935.

Restatement of existing law. Yet the results of the North Carolina cases, except for certain statutes, are substantially in accord with the results contemplated by the Restatement. And the refreshing candor of these new formulae is preferable to the artificial and clumsy efforts of the courts to render lip service to the old doctrine of consideration in these situations.

There are numerous instances in which the Restatement uses an analysis, a technique and a phraseology for the most part unheard of by many members of the bench and bar. Examples are in Sections 133, 150, 151, and 160, defining respectively the various types of third party beneficiaries, effective assignments, and the delegation of performance of a duty. However, the results of the local cases can be squeezed without too much mutilation into the categories set up by the Restatement. And it is hoped that it will not take long for the nice discriminations of the Restatement to supplant the homely generalizations which have heretofore been used by the lawyer and judge. Thus, should not the distinctions between donee, creditor and incidental beneficiaries ultimately render it unnecessary to cite *Gorrell v. The Water Company*⁹ as the generic basis for everything in this field? The Restatement has furnished a set of better fashioned tools.

Only in a few places does the Restatement betray an awareness of the possibility that legislation might endanger its symmetry. It would be a tacit misrepresentation, however, if one were permitted to infer that all of the 49 statutes mentioned in the first paragraph have undermined the 62 sections of the Restatement affected. Rather, the relations between Restatement and statutes fall into three main groups. Illustrative of one is an Act of 1875 contradictory of the Restatement's conception of consideration in contracts to accept less than the amount due. Illustrative of the second group are the statutes which add to the Restatement's requirements that of a writing for promises to pay debts barred by the statute of limitations or by bankruptcy. And illustrative of the third group is the statute giving laborers and materialmen a right of action on bonds furnished by contractors erecting public works. In each case, the Restatement drops from sight as the problem shifts from the common law of contracts to the meaning of the statute.

The Act relating to agreements to accept less than the sum due in satisfaction of the whole was faithfully applied by the courts for some years after its passage as a legislative attempt to repeal a part of the common law rule of consideration. But since 1915 the court has assumed that the statute would not operate unless the claim were dis-

⁹ See the N. C. Ann. to Section 133 (a) of the Restatement under the heading, *Water Company Cases* (1934) 13 N. C. L. REV. 1, 96.

puted. Two pages of annotations, appended to Section 76 (a), were needed to trace the history of the construction of this statute. The original purpose of the statute has been lost sight of. So, too, has the fact that payment of less in case of a disputed claim was sufficient at common law. Perhaps the statute was being used to facilitate sharp practice in the cases of bills paid by check.

The situation respecting contractors' bonds is this: Laborers and materialmen engaged upon public buildings have not been protected by the mechanics' lien laws. Unfortunately, many of them went unpaid. If bonds were required by the public authorities letting the contract, they were often designed merely to save the municipality harmless, *i.e.*, they were to indemnify the owners against loss and did not purport to run to the benefit of laborers or materialmen. Occasionally the bond was so conditioned. But, the laborers and materialmen not being represented at the bargaining table, this rarely happened. The result was that in 1913 and 1915 statutes were enacted to require a contractors' bond running to the benefit of these particular creditors on every municipal building or street construction job. They were given a statutory right of action on every such bond. The trouble was that the only sanction or enforcement provision was one making it a misdemeanor for the appropriate official to fail to obtain such a bond. And the court held that if, in violation of the statute, the bond actually taken were one merely of indemnity against loss by the municipality, the laborers and materialmen were not entitled to sue thereon and could not hold the municipal officers civilly responsible. Nor was this limitation of liability void as contrary to the public policy expressed by the statute. In 1923, however, the statute was amended so as to make evasion impossible. Under it a contractor's bond upon a municipal public works job is conclusively presumed to have been given pursuant to the statute, whether so drawn or not, and the statute is made a term of every bond. Contrast the significance of the evolution of this statute with the provision of Section 133 of the Restatement, "where performance of a promise in a contract will benefit a person other than the promisee, that person is . . . a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary."

The Restatement of Contracts is not a statement nor even a catalogue of the many different forces that are making contract law.¹⁰

¹⁰ For other criticisms of the Restatement of Contracts see Clark, (1933) 42 YALE L. J. 643; Havighurst, (1933) 27 ILL. L. REV. 910; Patterson, (1933) 33 COL. L. REV. 397; Pollock, (1933) 47 HARV. L. REV. 363.

It will not be of importance in the field of business strategy where contracts are drafted amid the conflict of almost always unequal bargaining powers. As a solving device for new cases on the advancing frontier of contract litigation, its cryptic postulates are too remote. Rather, the important value of the Restatement, limited though that may be in an experimental world, consists in its systematic clarification of conventional legalistic categories. It is the anatomy of the established judge-made law of contracts. Perhaps it will only preserve a body of elementary rules already somewhat outmoded. Perhaps its proffer of a reconstructed foundation of basic principle for the guidance of a bewildered legal profession is but illusory. For that bewilderment may not be due so much to the current welter of hasty, ill-considered and *ad hoc* opinions and laws as to the incapacity of concepts such as those set forth in the Restatement to provide a solution for the prevailing legal problems of today. The Restatement will not enlarge the horizon of the legal mind, but its use will equip that mind with a more accurate picture of the doctrinal background.

M. T. VAN HECKE.