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Contracts: Promissory Estoppel Applied to a Commercial Transaction in California

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Ohio admits illegally obtained evidence in criminal cases.[30] California and some twenty other states[31] are committed to complete opposition to illegal searches by following the federal rule of inadmissibility.[32] These jurisdictions condemn a police search without warrant by rejecting evidence that would convict a *felon*. To allow the same sort of evidence, this time obtained by city officials, to be used to deprive a *householder* of his property is completely inconsistent and would strike a strange note.

The theory of the exclusionary rule should have full weight in *any* case involving an unauthorized search since its purpose is to prevent persons with governmental authority from infringing upon the citizens' constitutional rights.[33] The Circuit Court of Appeals in the *Little* case disposed of the problem succinctly:[34]

> It is said to us that therefore there is no prohibition against searches of private homes by government officers, unless they are searching for evidence of crime; that if they are searching for evidence of crime they must get a search warrant, but if they are searching for something else or are just searching, they need not get a search warrant; for searchers of the latter sort, we are told, homeowners must open their front doors upon demand of an officer without warrant. The argument is wholly without merit, preposterous in fact. . . .

Statutes conferring the right of entry over the occupant's objections, even if limited to reasonable hours and to occasions when the occupants are present, are unconstitutional. They violate both the letter and spirit of federal and state constitutional guaranties against unreasonable searches. Health, housing and fire inspectors are not all benevolent public servants. They too can be malicious, vindictive, vexatious, arbitrary, unreasonable. Even criminally corrupt. The police are not the only officers capable of harrassing the homeowner. The health and safety man has enormous authority under the codes and, in many instances, his hold over the occupant will even be greater than that of the police.

In our modern times hardly a voice is heard in opposition to reasonable health and safety measures. With the growth of cities and their necessary bureaucracies, there is often the tendency to attempt to do too much, to cover all the loopholes, to meet all possible situations. In our goal to protect the "public welfare" we should not lose sight of our traditional concern for individual civil liberties lest we legislate them away for all time.

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CONTRACTS: Promissory Estoppel Applied to a Commercial Transaction in California

The frequent misunderstandings and erroneous application of the familiar text book case of *Baird v. Gimble*[1] have given rise to much confusion with respect to the correct application of the doctrine of promissory estoppel. The case is generally considered to represent a limitation upon that doctrine and is interpreted as standing for the proposition that promissory estoppel has no application to a commercial

[30] State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936).

[31] People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). A list of exclusionary states is to be found in Wolf v. Colorado, 338 U.S. 25, 38 (1949). Delaware, Texas, North Carolina and California have adopted the exclusionary rule since the *Wolf* case.

[32] Weeks v. United States, 232 U.S. 383 (1914).

[33] *Ibid.*

[34] 178 F.2d at 16.

[1] 64 F.2d 344 (2d Cir. 1933).

transaction. Whether followed, criticized or merely cited, it is apparent that many writers as well as courts have construed the able opinion of Judge Learned Hand too broadly.[2]

In a well reasoned opinion, Mr. Justice Traynor of the Supreme Court of California has reached a result contrary to that of Hand in *Baird v. Gimble*. The case is *Drennan v. Star Paving Co.*,[3] and it is significant because it is the first to apply promissory estoppel specifically to an implied promise to hold an offer open with the result that the offer is irrevocable.

The facts in the case were as follows. On July 28, 1955, plaintiff, a general contractor, was preparing a bid on a school job for which bids were to be submitted before 8 p.m. that day. Late that afternoon an estimator for defendant, as was the custom of the trade, phoned in a bid for the paving work on the project. Since defendant's bid, $7,131.60, was the lowest received by plaintiff for the paving, he entered it together with defendant's name in his master cost sheet thus incorporating it into his bid on the entire project. When the bids were opened, plaintiff's proved to be lowest and he was awarded the contract. The following morning plaintiff stopped at defendant's office and met defendant's construction engineer who informed plaintiff that his firm had erred in its bid for the paving work and that it could not do the work for the price bid. Defendant refused to do the work for less than $15,000 and plaintiff, after several months search for a low bid, engaged another firm to do the work for $10,948.60.

The trial court found that defendant had made a definite bid and that plaintiff had used it in compiling his own bid for the school job. Accordingly, it entered judgment in favor of plaintiff for the difference between defendant's bid and the cost to plaintiff of having the paving done by the other firm.

Defendant appealed claiming that its offer was revocable and that it had revoked before plaintiff had accepted. Plaintiff contended that he had relied upon defendant's offer to his detriment and that defendant should respond in damages for its refusal to perform.

All other questions having been disposed of, the issue resolved itself to one of promissory estoppel. Did plaintiff's detrimental reliance on defendant's offer make the offer irrevocable?

In reaching the conclusion that the offer was irrevocable, the court relied upon the doctrine of promissory estoppel as stated in section 90 of the Restatement of Contracts. "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] Mr. Justice Traynor noted that the rule as therein stated is law in California[5] and concluded that defendant's

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[2] See Gordon v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Patent Licensing Corp. v. Olsen, 71 F. Supp. 181 (S.D. N.Y. 1947); Schafer v. Fraser, 206 Ore. 479, 290 P.2d 190 (1955); Daum Construction Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952); 28 Ill. L.R. 419 (1933); 98 U. PA. L. REV. 459 (1950).

[3] 51 Cal.2d ....., 333 P.2d 757 (1958).

[4] RESTATEMENT, CONTRACTS § 90 (1932).

[5] See Edmonds v. County of Los Angeles, 40 Cal.2d 642, 255 P.2d 772 (1953); Frebank Co. v. White, 152 Cal. App. 2d 522, 313 P.2d 633 (1957); Wade v. Markwell & Co., 118 Cal. App. 2d 410, 258 P.2d 497 (1953); West v. Hunt Foods Co., 101 Cal. App. 2d 597, 255 P.2d 978 (1951); Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1948); 18 CAL. JUR. 2d 407-408 (1953); 5 STAN. L. REV. 783 (1953).

right to revoke its offer had been precluded by the doctrine of promissory estoppel.

The making of an offer implies a subsidiary promise that it shall remain open until terminated or accepted.[6] An offer may be terminated by the passage of time.[7] Where no time is specified, the law will impute to the offeror an intent that the offer remain open for a reasonal time.[8] In a situation such as the *Drennan* case, a reasonable time would require that the plaintiff be afforded an opportunity to consider and accept the offered services.

It is upon this implied subsidiary promise which plaintiff relied in including defendant's bid in the master bid. There was no consideration given for this promise. Thus, it would normally have been revocable.[9] The question here is whether or not the offeree's justifiable reliance upon the subsidiary promise to his substantial detriment might serve as a substitute for consideration and make the promise irrevocable.

It was manifestly to defendant's advantage that plaintiff consider defendant's bid "firm" and it should have known that there was a substantial possibility that its bid would be the lowest for the paving. Defendant should have foreseen not only that the promise might induce the plaintiff to act to his detriment, but also the precise nature of plaintiff's act and its consequences. That the promise did in fact induce plaintiff to act is indicated by the evidence. Plaintiff used defendant's bid as well as its name in submitting the master bid. There was a showing of substantial difference between defendant's bid and the cost of the paving to plaintiff.

Since the master bid had been taken and in fact fully performed by plaintiff, there was no way the court could have put these parties into positions substantially similiar to those they enjoyed prior to their ill-fated negotiations. That is, they could not be returned to "status quo." Nor, as things stood, was there any relationship existing between the parties which would give plaintiff any basis for redress. It would appear that the only course by which injustice could be averted was that taken by the court. In enforcing defendant's implied subsidiary promise to hold the offer open, the court rendered defendant's purported revocation of its bid ineffective. This made plaintiff's prompt acceptance of the bid binding upon defendant. Thus the parties were put into a contractual relationship, the breach of which by defendant gave plaintiff a cause of action for damages.

Historically, promissory estoppel developed as a means to enforce gifts of interests in land, charitable subscriptions and gratuitous bailments.[10] The tendency was to limit the doctrine as closely as possible to those cases. Gradually it was extended to include other types of gratuitous or donative promises. In *Baird v. Gimble* it was argued that the doctrine should be extended to a promise given for an exchange.

In deciding the *Baird* case, Judge Learned Hand first dismissed the contention that plaintiff's use of defendant's bid in its compilation of the general bid could

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[6] 1 WILLISTON, CONTRACTS § 25, at 57 (3d ed. 1958); *id.* § 50; RESTATEMENT, CONTRACTS § 35 (1932). See 1 WILLISTON, CONTRACTS § 61 (3d ed. 1958).

[7] RESTATEMENT, CONTRACTS § 35 (1)(b) (1932).

[8] McKay v. Rochester & Lake Ontario Water Service Corp., 272 N.Y. 528, 4 N.E. 2d 432 (1936); 12 CAL. JUR. 2d *Contracts* § 20 (1953); 1 CORBIN, CONTRACTS § 36 (1950); 1 WILLISTON, CONTRACTS § 54 (3d ed. 1958).

[9] RESTATEMENT, CONTRACTS § 35 (1)(e) (1932).

[10] U.PA.L.REV. 459 (1950).

constitute acceptance.[11] He then considered the argument that promissory estoppel should apply to the offer to supply at the bid price. He reasoned that an offer for an exchange is not meant to become enforceable until the stipulated consideration has been received. The parties presuppose that each promise or performance is the inducement for the other. Hand concluded that, "to extend [the doctrine of promissory estoppel to an offer for an exchange] would be to hold the offeror regardless of the stipuated condition of his offer." Thus Hand would limit the doctrine to donative promises.

In his third point Hand considered and rejected the possibility that an option had been raised. But he pointed out that if the bid could be so construed as to include the offer of an option, "the doctrine of 'promissory estoppel' might apply, the plaintiff having acted in reliance upon it, . . . As to that, however, we need not declare ourselves." In this way, Hand left open the question of the applicability of promissory estoppel to a gratuitous subsidiary promise to hold an offer open after correctly pointing out that the cases were against it.[12]

The *Drennan* case agrees with *Baird* that the doctrine of promissory estoppel should not apply to a promise given for an exchange and that it can apply to a promise to keep the offer open. But here Traynor differed with Hand and held that the doctrine should apply whether or not the cases were against it.[13]

The result in this case is supported by analogy with the cases decided according to section 45 of the Restatement of Contracts. Section 45 provides that if an offer for a unilateral contract is made and part of the bargained for consideration is performed or tendered in response thereto, the offeror is bound on a contract the duty of immediate performance of which is conditional on the full consideration being performed or tendered within the time stated by the offer or, no time stated, within a reasonable time.[14] Here, also, no contract is formed by part performance in reliance on the offeror's promise. Rather, the offeree's "option" to accept by full performance is made irrevocable. The subsidiary promise not to revoke has been made binding by the offeree's detrimental reliance thereon.

The doctrine as applied in *Drennan* should give substance and meaning to so called "firm" offers and should afford protection for those who, by the very nature of their business must be able to rely upon such offers. The construction industry offers an excellent example of a business in which very often one must have a reliable "firm offer" a considerable time before he is in position to accept it.

Mr. Justice Traynor noted that "the general contractor is not free to delay acceptance after the bid has been awarded nor to reopen negotiations with the subcontractor and still claim a continuing right to accept the original offer."[15] This and the strict language of section 90 should sufficiently limit the doctrine to protect from abuse sub-contractors and others whose dealings will come within its scope under the rule laid down in the *Drennan* case.

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[11] The *Baird* and *Drennan* cases are not distinguishable on their facts. Plaintiff in *Baird* was a general contractor and defendant a sub-contractor in the same respective positions as Drennan and the Star Paving Co.

[12] Corbett v. Cronkhite, 239 Ill. 9, 87 N.E. 874 (1909); Sharpless v. Kirk Gas & Smelting Co., 128 Kan. 722, 280 Pac. 788 (1929); Bancroft v. Martin, 144 Mass. 384, 109 So. 859 (1926); Texas Co. v. Dunn, 219 S.W. 300 (Tex. Civ. App. 1920).

[13] See Gordon v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941), and Northwestern Engineering Co. v. Ellerman, 69 S.D. 408, 10 N.W.2d 879 (1943).

[14] RESTATEMENT, CONTRACTS § 45, comment b (1932); RESTATEMENT IN THE COURTS, CONTRACTS § 45 (perm. ed. 1945).

[15] Daum Construction Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952).