

determining whether such act was privileged or forbidden.¹³ Such may in the future become the law of nations also. As that law has thus far been established, however, no inquiry is permitted into the purpose of a nation in excluding a commodity from its territories; and it is certain that no nation is bound to submit the soundness of its welfare policies to any international court or jury. The United States in an international controversy would have no burden of showing more than that its act was an exercise of privileged jurisdiction. It need not allege or prove liquor to be a noxious poison, a dangerous drug, or an agent of human degeneration. It may rest its case, as the Supreme Court did in considering the international phase of its decision, on privileged jurisdiction.

It might be suggested by one or more foreign states that the United States submit this issue to an international court. Should the latter accede to such a request, it is believed that the international court should decide in favor of the privileged jurisdiction of the United States asserted in the Amendment and the National Prohibition Act as interpreted by the Supreme Court of the United States.¹⁴

HARD CASES MAKE GOOD LAW

When a stated rule of law works injustice in a particular case; that is, would determine it contrary to "the settled convictions of the community,"¹⁵ the rule is pretty certain either to be denied outright or to be undermined by a fiction or a specious distinction. It is said that "hard cases make bad law;" but it can be said with at least as much truth that hard cases make good law. It was largely the crystallization of the rules of the common law that caused the constant appeals to the conscience of the king and his chancellor, and developed the system of law that we know as equity. Even the common law judges themselves had a "conscience." When their stated rules developed hard cases, the rules were modified by the use of fiction, by exceptions and distinctions, and even by direct overruling.

In the well-worn and "elementary" subject of consideration for a promise, it is generally laid down as beyond question that performance

¹³ *Stevens v. Kelley* (1886) 78 Me. 445, 452; *Barclay v. Abraham* (1903) 121 Iowa, 619, 96 N. W. 1080; *Tuttle v. Buck* (1909) 107 Minn. 145, 119 N. W. 946; 25 L. R. A. (N. S.) 831, note; 52 L. R. A. (N. S.) 736, note.

¹⁴ "The rule, now generally recognized," is that stated in *Patterson v. Eudora*, *supra* note 8, at p. 178, 23 Sup. Ct. at p. 824: "Indeed, the implied consent to permit them [foreign merchant ships] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose."

¹⁵ See Wheeler, C. J., in *Dwy v. Connecticut Co.* (1914) 89 Conn. 74, 99, 92 Atl. 883, 891; Young, *The Law as an Expression of Community Ideals* (1917) 27 YALE LAW JOURNAL, 1.

in accordance with a pre-existing legal duty is not legally operative as a consideration for a return promise.² This is true whether the duty was (1) the duty of a public officer,³ (2) the duty of a husband to his wife,⁴ (3) the duty of a contractor based upon his contract with the promisor,⁵ or (4) the duty of a contractor to a third person created by a contract to which the present promisor was not a party.⁶ It is in the fourth of these classes that the most serious doubt exists as to the justice and soundness of the general rule;⁷ but there is some conflict in the other classes also, and particularly in class three.

The Supreme Court of Connecticut has just held in *Sasso v. K. G. & G. Realty & Const. Co.* (1923) 98 Conn. 571, 120 Atl. 158, a case belonging in class three above, that the promise of the defendant to pay a larger sum for work already contracted for was a binding promise. The plaintiff had contracted to furnish for a named price the labor and materials for all tile work on a building being erected by the defendant. Before the time for performance, tile greatly increased in cost and was hard to get at any price. The plaintiff informed the defendant of these facts and also said "that he could not proceed with the completion of his work unless defendant would pay, in addition to the contract price, the difference between the cost of tile as originally figured . . . and the cost of tile that could now be secured." The defendant in writing promised to pay this additional sum "in order to assist you in completing your contract." As the court elsewhere expresses it, "as an inducement to the plaintiff to continue, expedite, and complete the performance of the contract, defendants agreed with plaintiff upon a modification of the original contract to the effect that the defendants would pay the plaintiff, in addition to the contract price, the difference," etc.

The court held that the new promise of the defendants was based on sufficient consideration, saying: "the plaintiff was, without fault on his part, in a position where he could not carry out his contract with the quality of tile contracted for. The defendants were confronted with an approaching breach of contract by the plaintiff. Instead of awaiting such breach and relying on an action upon the breach, they preferred to contract with the plaintiff to complete the contract with inferior tile

² Anson, *Contract* (Corbin's ed. 1919) secs. 136-144; Williston, *Contracts* (1920) ch. VI.

³ *Bridge v. Cage* (1605, C. P.) Cro. Jac. 103; *Gray v. Martino* (1918) 91 N. J. L. 462, 103 Atl. 24.

⁴ *Ryan v. Dockery* (1908) 134 Wis. 431, 114 N. W. 820.

⁵ *Stilk v. Myrick* (1810, C. P.) 2 Camp. 317; *Davis v. Morgan* (1903) 117 Ga. 504, 43 S. E. 732. *Contra*: *Munroe v. Perkins* (1830, Mass.) 9 Pick. 298.

⁶ *Vanderbilt v. Schreyer* (1883) 91 N. Y. 392; *McDevitt v. Stokes* (1917) 174 Ky. 515, 192 S. W. 681. *Cf.* *De Cicco v. Schweizer* (1917) 221 N. Y. 431, 117 N. E. 807. *Contra*: *Shadwell v. Shadwell* (1860) 30 L. J. C. P. 145; *Abbott v. Doane* (1895) 163 Mass. 433, 40 N. E. 197.

⁷ See Corbin, *Does a Pre-existing Duty Defeat Consideration?* (1918) 27 YALE LAW JOURNAL, 362.

costing more money . . . This constitutes a rescission or abandonment of the original contract and the making of a new contract which is based on a valid consideration, namely, the mutual promises there made by the parties."

There is no doubt that as long as a contract remains bilateral—that is, as long as the parties are still under mutual executory duties—it can be "rescinded" by mere expressions of assent thereto. An agreement of rescission, like other agreements, requires the element of consideration; but mutual consideration is to be found in the extinguishment of the legal right still possessed by each, correlative to the duty of the other. If in the instant case, therefore, the parties had agreed upon a mutual rescission—the contract still being bilateral in its character—a new agreement made thereafter would have been binding even though the builder promised to do only the very same work as before and the owner promised to pay a larger sum than before. Neither would be promising a performance that the law still required of him. To a number of courts, as in the present case, this has seemed to offer a means of avoiding, in cases of hardship, the rule that performance in accordance with a pre-existing duty is not an operative consideration.⁸ But unless the mutual rescission is distinctly antecedent in time to the new agreement,⁹ leaving both parties "in perfect freedom to refuse to enter into any further contractual relationship with each other,"¹⁰ the case falls exactly within the terms of the supposed general rule, there is no true rescission, and the distinction drawn is a distinction without a difference.¹¹

⁸ *Munroe v. Perkins*, *supra* note 5; *Schwartzreich v. Bauman-Basch, Inc.* (1918, Sup. Ct.) 105 Misc. 214, 172 N. Y. Supp. 683; *affirmed* (1921) 231 N. Y. 196, 131 N. E. 887. If the contract promises some new and different performance, that fact supplies sufficient consideration for the defendant's promise. In the instant case, a promise by the contractor to furnish a kind of tile not provided for in the original contract would operate as consideration, even though the quality of such new tile was not so good as that originally required. From the entire report, however, it seems that the defendant merely promised a larger sum for such complete or defective performance as might be found practicable.

⁹ Of course, it is a question of fact whether there was an agreement of rescission antecedent in time. See Williston, *Contracts* (1920) sec. 130a. This question can be left to the jury as it was in *Schwartzreich v. Bauman-Basch*, *supra* note 8. In such cases, if the jury thinks that the new promise ought to be enforced, they will bring in a verdict that there was a rescission antecedent in time. In a case of this sort, however, it is not desirable to leave the modification of the law to the jury, for the jury can modify the law only by consciously or unconsciously distorting the facts. See (1919) 28 YALE LAW JOURNAL, 406.

¹⁰ Mullan, J., in the *Schwartzreich* case, *supra* note 8. "Perfect freedom" here includes the legal privilege of not performing as previously agreed, as well as the power and privilege of making and accepting new offers.

¹¹ In the *Schwartzreich* case, *supra* note 8, the plaintiff had made a bilateral, written contract with the defendant to serve him for a year at \$90 per week. Just before the time set for beginning work, the defendant agreed to pay \$100 per week for the work, and the writing was torn up. The change was made

With great deference, it is believed that the facts as stated by the court in the instant case show no "rescission" of the original contract and no

because of the fact that wages in general were rapidly rising because of war conditions. In this case the New York Court of Appeals said: "Any change in an existing contract, such as the modification of the rate of compensation, or a supplemental agreement, must have a consideration to support it. In such a case the contract is continued, not ended. Where, however, an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration. Very little difference may appear in a mere change of compensation in an existing and continuing contract and a termination of one contract and the making of a new one for the same time and work, but at an increased compensation. There is, however, a marked difference in principle. Where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized, though in the main it is the same contract. . . .

"All concede that an agreement may be rescinded by mutual consent and a new agreement made thereafter on any terms to which the parties may assent. . . .

"The same effect follows in our judgment from a new contract entered into at the same time the old one is destroyed and rescinded by mutual consent. The determining factor is the rescission by consent. Provided this is the expressed and acted upon intention, the time of the rescission, whether a moment before or at the same time as the making of the new contract, is unimportant" . . .

It should be observed, first, that "a new privilege or advantage to the promisee" can never make a promise binding. Of course, a raise of \$10 per week is an advantage to the employee. A promised gift is always an advantage to the promisee. But it is the *promisor* whose advantage may operate as a consideration. A promise cannot be supported by its own bootstraps. Secondly, if the "rescission" is simultaneous with the new agreement for increased compensation for the same work, there is no rescission at all. Suppose the following cases:

(1) Employer says: "I will pay you \$10 more a week." Employee: "I accept and will do the work."

(2) Employer: "I offer a rescission of the old and the substitution of a new contract for the same work at \$10 a week more." Employee: "I accept and will do the work."

(3) Employer: "I release you from your duty to work and promise you \$100 per week if you will promise to do the same work and will release me from my duty to pay you \$90 per week." Employee: "I accept, promise to do the same work, and release you from your duty."

Observe that the operative effect in all three of these is identical. Beforehand the employee was under a duty to do specified work, and the employer to pay \$90 per week. Afterwards, the employee is under the same duty to do the same work. The only change, if the new agreement is operative at all, is in the employer's duty. It is a change from 90 to 100. There is not an instant of time at which the employee is free from his duty to work. The employer's words of release are quite inoperative; they are intended to become operative only when the new contract of employment becomes operative, and so they do not become operative at all. It is just as if the employer said, "I release you; but if you accept, I do not release you;" or "I release you if you will remain under the identical duty from which I release you." As held in a mining case, *McCann v. McMillan* (1900) 129 Calif. 350, 62 Pac. 31, there is no abandonment when one goes on his claim and says: 'I abandon this claim, but I relocate it and again make claim to it.'

The plaintiff gets judgment, therefore, not because he has promised anything new or anything that he was not at the instant of the promise under an existing

new promise of any sort by the plaintiff. The plaintiff was not discharged from his contractual duty by the unexpected difficulty or expense of performance, and it does not appear that the defendants intended to free him from such duty for even a single instant of time. It is believed that to rest a decision upon an inferential "rescission" is to rest it upon a fiction, and that it would be better to rest it frankly upon the rule that performance in accordance with a pre-existing contract is legally operative as a consideration in cases of hardship or cases where the plaintiff's conduct is not morally blameworthy.¹² The instant decision can also be justified for reasons stated in the footnote below.¹³

A. L. C.

MOB-DOMINATION OF STATE COURTS AND FEDERAL REVIEW BY
HABEAS CORPUS

Do state court litigants have a federal right not to be deprived of life or liberty by mob-dominated tribunals? What are the means of enforcing the right if it exists? These questions were before the Supreme Court of the United States in the recent case of *Moore v. Dempsey* (Feb. 19, 1923) Oct. Term, 1922, No. 199. Five negroes had been convicted of murder in an Arkansas Court, and their convictions were

duty to do, not because there is a "difference in principle" between a modification and this kind of a "rescission," but because we want him to have the money that the defendant promised. To reach this result we should say in words, what we must say in effect, that on facts like these doing or promising to do what one is under an existing legal duty to do is a sufficient consideration for a promise.

¹² *King v. Duluth, M. & N. Ry. Co.* (1895) 61 Minn. 482, 63 N. W. 1105; *Linz v. Schuck* (1907) 106 Md. 220, 67 Atl. 286; Corbin, *op. cit. supra* note 7.

¹³ It appeared that the defendants had actually paid to the plaintiff, in accordance with the new promise and in order to enable him to pay cash for the tile procured by him, the entire extra cost of such tile. The defendants are now seeking to have such payments credited against the original contract price in a mechanic's lien action to collect a balance. From this it seems that the defendants should lose, irrespective of whether their new promise was valid or not. The payments made were specifically directed by the defendants as performance of the new promise and not as payments on general account. They were therefore executed gifts, even if not based on consideration, and the defendants had no power to recall them or to apply them later on other accounts. The decision is not based on this reasoning however.

If the plaintiff had definitely repudiated his contract, it might be held as in *Hong, Hoon, et al. v. Lum Wai* (1922) 26 Hawaii, 54, that such repudiation extinguished his contractual duty, substituting a secondary duty to pay damages, thus enabling the court to hold that his subsequent performance was not required by the original and still continuing contractual duty. (See comment by Professor Cook in [1923] 32 YALE LAW JOURNAL, 380; also *Shaw v. Fisher* [1920] 113 S. C. 287, 102 S. E. 325, with comment in [1921] 30 YALE LAW JOURNAL, 174, as to certain effects of a wrongful repudiation.) This would in itself be a rather surprising decision, giving an advantage to a contract repudiator and denying it to one who performs without repudiating. But no repudiation or breach by the plaintiff is relied on, and the court merely speaks of "an approaching breach."