Freedom of Contract and the Second Restatement

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Professor Corbin was a special advisor for the original *Restatement of Contracts* and a reporter for part of it. As a consultant for the second *Restatement* he produced a critical review of the original which has been the basis for much of the work on the revision. It seems appropriate, therefore, to offer a progress report on the second *Restatement*, as I did in another issue of the *Journal* dedicated to Professor Corbin.¹

The revision is hardly complete, but enough of it has been written and reviewed by the Institute² to justify confidence that much of the reporting of contract law in the second *Restatement* will continue along the lines of the changes completed thus far. The principal revisions have continued to be stylistic rather than substantive,³ but the stylistic changes reflect fundamental shifts in the modes of thought which dominated the drafting of the original *Restatement*; increased attention has been given to the purpose and function of the stated rules, to statutory developments and their effect on judicial decisions, and to providing qualifications required in a context of accelerating social change for what would otherwise seem to be immutable rules. The *Restatement*, however, retains the humility appropriate to an unofficial product of private scholarship and has not assumed the role of seeking to reform well settled but unjust rules.⁴

Perhaps the most noticeable shift thus far is the increased respect accorded to freedom of contract—to the power of the contracting parties to control the rights and duties they create. This shift appears in black letter through the use of qualifying phrases such as “unless otherwise agreed” or “unless a contrary intention is manifested.”⁵ The shift is made even more apparent in the expanded comments, which explain the bases of the black letter rules and give notice of statutory and decisional variations.

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1. Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302 (1964).

2. RESTATEMENT (SECOND) OF CONTRACTS (Tent. Draft No. 2, 1965) (tentatively approved in 1965) [hereinafter cited as REST. 2D]; *id.* (Tent. Draft No. 3, 1967) (tentatively approved through § 164 in 1967); *id.* (Tent. Draft No. 4, 1968) (not reached at the 1968 annual meeting of the American Law Institute).

3. 41 ALI PROCEEDINGS 527 (1964).

4. *E.g.*, REST. 2D, § 48, comment *a* (Tent. Draft No. 1, 1964) (termination of offer by death); *id.* § 112, comment *b* (Tent. Draft No. 2, 1965) (presumption of joint obligation).

5. *E.g.*, REST. 2D § 98 (Tent. Draft No. 2, 1965).

This shift should not be exaggerated. The early chapters of the *Restatement* which are discussed here and in my previous article⁶ deal with the basic power of contracting parties to create rights and duties by making promises. Invalidating causes are largely left to later chapters which have yet to be either revised or reported on. In addition, the Statute of Frauds chapter elaborates on the statutory restrictions, now nearly three centuries old, which limit the enforcement of unwritten promises. Other restrictions on freedom of contract are referred to in the comments.⁷ To some extent, in fact, the changes in the *Restatement* are in the direction of being more candid in stating the limitations on freedom of contract.

Thus, it is clear that the reporter and the advisors realize that "freedom of contract" is not the ringing phrase it once was.⁸ The revision makes clearer the tension that exists between the doctrines of freedom of contract and elemental fairness of the transaction; the bases for enforcement set forth in Section 90 (detrimental reliance), Section 89A (promise for benefit received), and Section 89B (firm offer), emphasize the discretion that courts have to assure that injustice is prevented. But the fact remains that freedom of contract is explicit as a major feature of the second *Restatement*: "The governing principle in the typical case is that bargains are enforceable unless some other principle conflicts."⁹ Much of the rest is rationalization of the basic principle and commentary.

My previous article in the *Journal* discussed the changes in the *Restatement* regarding offer and acceptance:¹⁰ the discussion there emphasized the notion of voluntary agreement,¹¹ which has been clarified in the revision. Here, in discussing the changes that have been made in the rules and comments concerning consideration and situations involving more than two parties, I shall continue my commentary on the extent to which freedom of contract is emphasized in the revised *Restatement*.

I. Consideration

A. Bargains

"Bargain" is defined in terms of "an agreement to exchange."¹² With stated exceptions, "the formation of a contract requires a bargain in

6. Braucher, *supra* note 1.

7. See, e.g., REST. 2D, Introductory Note & § 5A, comments *b*, *c* (Tent. Draft No. 1, 1964).

8. See H. HAVIGHURST, *THE NATURE OF PRIVATE CONTRACT* 95 (1961).

9. REST. 2D § 19, comment *b* (Tent. Draft No. 1, 1964).

10. Braucher, *supra* note 1.

11. *Id.* 307.

12. REST. 2D § 4 (Tent. Draft No. 2, 1965).

which there is a manifestation of mutual assent to the exchange and a consideration."¹³ To constitute "consideration," performance or a return promise must be "bargained for," that is, "sought by the promisor in exchange for his promise and . . . given by the promisee in exchange for that promise."¹⁴ Except for certain instances noted in the *Restatement* "any performance which is bargained for is consideration,"¹⁵ and "a promise which is bargained for is consideration if, but only if, the promised performance would be consideration."¹⁶

These basic provisions on consideration are in substance the same as those in the original *Restatement*: the changes are mainly stylistic and terminological. In the original *Restatement* "consideration" referred simply to the element of bargain or exchange; consideration which satisfied the legal requirement was called "sufficient consideration." Generations of law students and others found it confusing that the law required a "sufficient" consideration yet did not sanction an inquiry into the "adequacy" or relative value of the consideration.¹⁷ This confusion is avoided in the second *Restatement* by using "consideration" to refer to what the original *Restatement* called "sufficient consideration." In accordance with common usage, both before and since the original *Restatement*,¹⁸ failure to meet the consideration requirement is then called "want" or "lack" or "absence" of consideration, rather than "insufficiency" of consideration. A second change, also in the interest of clarity, is made in the definition of "consideration" by spelling out the "relation of reciprocal conventional inducement . . . between consideration and promise":¹⁹ the original *Restatement* had referred to acts "bargained for and given in exchange for the promise."²⁰ This provision was undoubtedly intended to mean "bargained for [by the promisor in exchange for his promise] and given [by the promisee] in exchange for the promise"; but the elliptical form of statement produced confusion or misunderstanding, and the notion is cast in a more precise form in the second *Restatement*.²¹

The rationalization of these basic provisions in the comments empha-

13. *Id.* § 19.

14. *Id.* § 75.

15. *Id.* § 76.

16. *Id.* § 77.

17. *RESTATEMENT OF CONTRACTS* § 81 (1932).

18. See, e.g., *UNIFORM COMMERCIAL CODE* § 3-306(c) [hereinafter cited as UCC]; *N.Y. GEN. OBLIGATIONS LAW* § 5-1103 (McKinney 1964); *N.Y. NEGOTIABLE INSTRUMENTS LAW* § 54 (McKinney 1943).

19. See O. W. HOLMES, *THE COMMON LAW* 293-94 (1881).

20. *RESTATEMENT OF CONTRACTS* § 75 (1932).

21. See text accompanying note 14 *supra*.

sizes party autonomy: "Bargains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action and exercise of judgment and as a means by which productive energy and product are apportioned in the economy. The enforcement of bargains rests in part on the common belief that enforcement enhances that utility."²² This emphasis is repeated in the text and comment dealing with "adequacy of consideration": text—"there is no additional requirement of . . . equivalence in the values exchanged . . .";²³ comment—

To the extent that the apportionment of productive energy and product in the economy is left to private action, the parties to transactions are free to fix their own valuations. . . . [I]n many situations there is no reliable external standard of value, or the general standard is inappropriate to the precise circumstances of the parties. Valuation is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions. In any event, they are not ordinarily bound to follow the valuations of others.²⁴

These affirmations of party autonomy are accompanied by recognition that the enforcement of some bargains may rest on substantive grounds of reliance and unjust enrichment. And many bargains involve natural formalities, such as acts in furtherance of performance, which fulfill one or more of the functions served by legal formalities: evidentiary, cautionary, channeling, and deterrent.²⁵ Still, "the bargain element alone satisfies the requirement of consideration,"²⁶ and "formality is not essential to consideration."²⁷ In the case of the wholly executory exchange of promise for promise, there may be no reliance or unjust enrichment. Here

[t]he promise is enforced by virtue of the fact of bargain, without more. Since the principle that bargains are binding is widely understood and is reinforced in many situations by custom and convention, the fact of bargain also tends to satisfy the cautionary and channeling functions of form. . . . Evidentiary safeguards, however, are largely left to the Statute of Frauds rather than to the requirement of consideration.²⁸

22. RESTR. 2D § 76, comment *b* (Tent. Draft No. 2, 1965).

23. *Id.* § 81.

24. *Id.* § 81, comment *c*.

25. *Id.* § 76, comment *c*; see Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929 (1958); von Mehren, *Civil-Law Analogues to Consideration*, 72 HARV. L. REV. 1009 (1959).

26. RESTR. 2D § 76, comment *b* (Tent. Draft No. 2, 1965).

27. *Id.* § 76, comment *c*.

28. *Id.* § 77, comment *a*.

The quoted passages expand upon what was stated in the original *Restatement* and do not contradict it. They lead naturally, however, to a more rigorous adherence to the bargain concept: "a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases there is no consideration and the promise is enforced, if at all, as a promise binding without consideration under §§ 85-94."²⁹ The original *Restatement* indicated that a formal pretense of bargain by the payment or promise of a nominal sum of money was sufficient for enforcement, and former Section 76(c) made an exception for promises to exchange unequal sums at the same time and place; in the new formulation of consideration the exception becomes unnecessary.³⁰

B. *Bargains Without Consideration*

The law could be restated more simply, and possibly with greater candor, if it were possible to say that there is consideration whenever there is bargain. But it seems clear that promisors often bargain for the performance of a legal duty by the promisee or for the making of an illusory return promise. When such promises are held not binding, the result could, in some cases, rest on an invalidating cause like mistake, duress, or unconscionable conduct. But in judicial and academic usage the promise is regularly said to be without consideration. In deference to that usage the second *Restatement*, like the first, states the legal duty and illusory promise rules³¹ as exceptions to the rule that anything bargained for satisfies the requirement of consideration. This treatment

renders unnecessary any inquiry into the existence of . . . an invalidating cause [such as fraud, mistake, duress, undue influence, or illegality], and denies enforcement to some promises which would otherwise be valid . . . [T]he likelihood that the promise was obtained by an express or implied threat to withhold performance of a legal duty . . . [negates] the presumptive social utility normally found in a bargain.³²

The phrasing of the consideration rules regarding performance of a legal duty and forbearance to assert invalid claims³³ occasioned a good

29. *Id.* § 75, comment *b*, especially illustration 8; *cf.* § 81, comment *d.* *Contra*, RESTATEMENT OF CONTRACTS § 84, illustration 1 (1932); *see* Note, 1 VALPARAISO U. L. REV. 102 (1966).

30. *See* Whittier, *The Restatement of Contracts and Consideration*, 18 CALIF. L. REV. 611, 623 (1930).

31. REST. 2D §§ 76A, 79 (Tent. Draft No. 2, 1965).

32. *Id.* § 76A, comment *a*.

33. *Id.* §§ 76A, 76B.

deal of difficulty in the second *Restatement*. References to the law of torts and crimes and to duties owed to the public, found in the original *Restatement*,³⁴ were deleted without important change of substance, since the generalized black letter statement still covers such situations. The black letter now states that performance of a legal duty "owed to the promisor" is not consideration; if the legal duty is not owed to the promisor, there is consideration, but illegality or other invalidating cause may exist which would invalidate the bargain. The statement in the original *Restatement* that performance which "differs in any way" from that owed may be consideration is rephrased to require a difference "in a way which reflects more than a pretense of bargain;"³⁵ according to a warning in the comment, that part of the rule which provides that performance of a contractual duty may not constitute consideration for a new promise has been much criticized and is commonly held to be displaced when slight variations in circumstance are found.³⁶ Finally, the performance of a legal duty amounted to consideration in the original *Restatement* if the existence of the duty was "the subject of honest and reasonable dispute,"³⁷ and there was consideration in the surrender of an invalid claim "by one who [has] an honest and reasonable belief in its possible validity."³⁸ These exceptions to the legal duty rule are now extended, in accordance with a great deal of authority, to any situation where an "honest dispute" exists³⁹ or where the "surrendering party believed that his claim or defense might fairly be determined to be valid."⁴⁰

With respect to illusory promises⁴¹ and voidable and unenforceable promises,⁴² the original *Restatement* took the position more rigorously than some judicial decisions that the law does not inquire into the adequacy of consideration. The second *Restatement* carries forward the rigor, adds a denial that there is any requirement of "mutuality of obligation" if the requirement of consideration is met, and seeks to rationalize and simplify the black letter statement. In the process two rather intricate changes of minor substance are made,⁴³ both of which

34. RESTATEMENT OF CONTRACTS §§ 76, 84 (1932).

35. REST. 2D § 76A (Tent. Draft No. 2, 1965).

36. *Id.* § 76A, comment c.

37. RESTATEMENT OF CONTRACTS § 76(a) (1932).

38. *Id.* § 76(b).

39. REST. 2D § 76A (Tent. Draft No. 2, 1965).

40. *Id.* § 76B(1)(b), as revised to reflect discussion at the 1965 Annual Meeting; see Whittier, *The Restatement of Contracts and Consideration*, 18 CALIF. L. REV. 611, 618-23 (1930).

41. REST. 2D §§ 78, 79 (Tent. Draft No. 2, 1965).

42. *Id.* § 80; RESTATEMENT OF CONTRACTS § 84 (1932).

43. REST. 2D § 77, illustration 4, § 79, illustration 11 (Tent. Draft No. 2, 1965) (con-

require the enforcement of promises that were considered not binding in the original *Restatement*.

C. *Contracts Without Consideration*

The second *Restatement* adheres to the decision made in the first: if consideration is used only in connection with bargains it is necessary to state that some promises are binding without consideration. These kinds of promises are set forth in the provisions regarding waiver of the statute of limitations,⁴⁴ discharge in bankruptcy,⁴⁵ a technical condition,⁴⁶ the right of avoidance,⁴⁷ and stipulations.⁴⁸ These provisions are rephrased but not materially changed in substance. The comments, however, are expanded and attention is called to various considerations which support enforcing promises without consideration—their historical background, reliance, unjust enrichment, and formality. Four new sections are added,⁴⁹ each of which specifies a new category of binding promise. The famous Section 90 on reliance is somewhat broadened. Like the original, the second *Restatement* indicates that there may be additional categories of promises which are binding without consideration.⁵⁰

Section 89A states a principle entirely new to the *Restatement*, though not to judicial decision or law school instruction.

§ 89A. Promise to Pay for Benefit Received.

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1)

(a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

(b) to the extent that its value is disproportionate to the benefit.

Like Section 90, this section probably has more theoretical interest than practical significance. The comment explains that judicial opinions and statutes have sometimes relied on "past consideration" or "moral obligation" as a ground for enforcing a promise. Such decisions can be

trary to RESTATEMENT OF CONTRACTS § 80, illustration 4, § 84, illustration 12 (1932), respectively).

44. REST. 2D § 86 (Tent. Draft No. 2, 1965).

45. *Id.* § 87.

46. *Id.* § 88.

47. *Id.* § 89.

48. *Id.* § 94.

49. *Id.* §§ 89A-89D.

50. *Id.*, Introductory Note to ch. 4, topic 2, at 84.

treated as representing a minority view and as rejecting the orthodox view that this ground is insufficient. The new section seeks to draw a distinction between the cases involving moral obligations based on gratitude or sentiment and those cases which are on the borderline of quasi-contract or unjust enrichment, where the subsequent promise removes an objection which might otherwise bar quasi-contractual relief. In the latter situation, the second *Restatement* permits enforcement of the promise, making it unnecessary in some cases to decide a difficult question as to the limits on quasi-contractual relief. The new section states a principle rather than a rule and fairly bristles with unspecific concepts. Moreover, the illustrations are miscellaneous and diverse, including promises to correct mistakes, promises to pay for emergency services or necessities, and promises to pay expenses incurred in contemplation of a bargain which fails. Yet it is the reporter's belief that this statement of principle is more useful than the statutory formulation drafted by the New York Law Revision Commission.

A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.⁵¹

This provision is too broad in scope and too restrictive in formal requirements; it does not seem to have had any significant effect.

New Sections 89B-89D all deal with promises ancillary to bargains: option contracts,⁵² guaranties,⁵³ and modifications of executory contracts.⁵⁴ The comments note that each of the three types of promise possesses some of the presumptive utility of a bargain. Each of the three sections contains a reference to statutory validation without consideration⁵⁵ and to a provision applying the general principle of Section 90 to reliance on the particular type of promise. In addition, Sections 89B and 89C provide for nominal consideration, and Section 89D provides for a modification which is "fair and equitable in view of circumstances not anticipated when the contract was made."

51. NEW YORK GENERAL OBLIGATIONS LAW § 5-1105, (McKinney 1964) (enacted in 1941); see REP. N.Y. LAW REVISION COMM. 345,395-96 (1941); Braucher, *The Commission and the Law of Contracts*, 40 CORNELL L.Q. 696, 700-01 (1955).

52. REST. 2d § 89B (Tent. Draft No. 2, 1965).

53. *Id.* § 89C.

54. *Id.* § 89D.

55. *E.g.*, UCC §§ 2-205 (firm offers), 2-328 (auction without reserve), 3-408 (negotiable instrument given as security for antecedent obligation), 2-209 (modifying agreement).

In comparison with the original *Restatement*, the provisions on nominal consideration narrow the categories of binding promises in one respect and broaden them in another. Illustration 1 to former Section 84 indicated that a promise to make a gift of land worth \$5,000 would be made binding by payment or promise of a nominal \$1, but Illustration 1 to former Section 83 stated that a signed writing reciting payment of \$1 as consideration for a guaranty was not binding if it were shown that the \$1 was neither paid nor expected to be paid. New Sections 89B and 89C give effect to nominal consideration only if the promise is in writing and signed by the promisor, recites a purported consideration, and either is an offer for "an exchange on fair terms within a reasonable time" or is a "promise to be surety for the performance of a contractual obligation, made to the obligee." But if these conditions are met, the recital is conclusive: "the giving and recital of nominal consideration performs a formal function only. The signed writing has vital significance as a formality, while the ceremonial manual delivery of a dollar or a peppercorn is an inconsequential formality."⁵⁶ The validity of nominal consideration actually delivered is firmly based on authority in cases of option contracts and guaranties; as to promises to make gifts, the authorities look the other way. As to false recitals, the authorities are in direct conflict.⁵⁷

The limitation of the option contract provision on nominal consideration to an offer for an exchange "on fair terms"⁵⁸ has an analogue in the limitation of the binding effect of modifying agreements without consideration to "fair and equitable" modifications.⁵⁹ Both of these situations involve an unusual degree of judicial review of the fairness of private transactions. Although the overlapping provisions of the Uniform Commercial Code dealing with firm offers and modifications⁶⁰ are not expressly subject to such limitations, the accompanying comments note that the Code sections dealing with good faith and unconscionable terms⁶¹ should apply to prevent abuse.

Section 90 is even more explicitly limited to the enforcement of what justice requires. The second *Restatement* reaffirms the principle that reliance by a promisee may be a substitute for consideration and expands the comment and illustrations.⁶² The principal change is recog-

56. REST. 2D § 89B, comment c (Tent. Draft No. 2, 1965).

57. See *id.*, Reporter's Note § 89B, at 143-44.

58. *Id.* § 89B(1)(a).

59. *Id.* § 89D(1)(a).

60. UCC §§ 2-205, 2-209.

61. UCC §§ 1-203, 2-203.

62. See Boyer, *Promissory Estoppel: Requirements and Limitations of Doctrine*, 98

nizing as a remedy the possibility of partial enforcement of the promise. Partly because of this change, the requirement in the original *Restatement* that the action or forbearance in reliance have "a definite and substantial character" is deleted; the comment points out that this requirement has not been enforced in cases of charitable subscriptions or marriage settlements. In addition, a phrase is added which protects reliance by beneficiaries. The net effect of the changes is to encourage the use of and to broaden this category of binding promises.

D. *Contracts Under Seal*

The principal feature of the treatment of the seal in the second *Restatement* is the statutory note describing the "decay of the seal" by delineating the extent to which the common law on the subject has been displaced by statute.⁶³ This development demonstrates that the seal has lost the force it once had in common understanding: the formality of creating the contract document has been eroded "until it can be met by a printed form." Meanwhile "literacy has become almost universal [and] the personal signature is widely used for the purposes of authentication"⁶⁴ To some extent the result reduces freedom of contract: in less than half of the states the seal remains effective to validate a promise to make a gift; in most of the other states there is no simple substitute.

Consistently with the "erosion" of the formality of affixing a seal and the "decay" of legal consequences of the use of a seal, the second *Restatement* allows more scope than the original for using evidence of extrinsic circumstances to determine whether an obligor "adopts" the printed word "seal" following his signature.⁶⁵ This change is consistent with the recognition in the original *Restatement*, carried forward in the revision, that a sealed instrument may be delivered to the promisee subject to an unsealed condition⁶⁶ and that a seal may be treated as surplusage when the elements of a bargain are present.⁶⁷

U. PA. L. REV. 459 (1950); Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639, 873 (1952).

63. REST. 2D, Introductory Note and Statutory Note to ch. 4, topic 3, at 189-96 (Tent. Draft No. 2, 1965). See Braucher, *The Status of the Seal Today*, 9 FRAC. LAW., May, 1963, at 97.

64. REST. 2D, Introductory Note to ch. 4, topic 3, at 190 (Tent. Draft No. 2, 1965).

65. *Id.* § 98, illustration 1; cf. *Transbel Inv. Co. v. Venetos*, 279 N.Y. 207, 18 N.E.2d 129 (1938).

66. REST. 2D § 103 (Tent. Draft No. 2, 1965).

67. *Id.* § 108; cf. *Johnson-Foster Co. v. D'Amore Const. Co.*, 314 Mass. 416, 50 N.E.2d 89 (1943).

II. Multiple Parties

Although disputes which involve more than two parties are inherently complex and difficult, the English law courts made matters worse. In an action at law, it was said that there could be only two sides, and it was sometimes thought that only unconditional relief could be awarded by the court. To some extent the equity courts mitigated the resulting confusion. But rules developed which were not and perhaps could not be rationalized in accordance with any intelligible policy. Rules and results were articulated in terms of the supposed inherent nature of the rights involved and were adhered to in circumstances which outraged both common and commercial sense. The modern history of joint contracts, third party beneficiaries and assignments is one of piecemeal reform by statute or decision. The legal pattern at any particular moment was usually a disgrace.

It is not difficult to articulate principles to be followed in dealing with contractual obligations involving more than two parties. Subject to any overriding social policy, the parties should have the power to define their rights and duties, and courts should try to divine and enforce the common intention. Where the parties have not provided a term governing the matter in dispute, the contract should be treated in the usual way if there is one, otherwise in some intelligent and workable manner consistent with the contractual framework established by the parties.⁶⁸ In litigation either the plaintiff or the defendant should be allowed to bring in any third party who may be affected by the decision, or the third party should be permitted to intervene; if the third party is not available the court should fashion the remedy so that no unfairness results to him or to the parties before it. Only if these requirements are impossible to meet should the action fail for non-joinder. To the extent the authorities permit, the rules stated in the second *Restatement* are consistent with these principles.

A. Joint Promisors

The common law was at its worst in cases where two or more promisors promised the same performance to the same promisee. In these cases the traditional rule is that the promisors incur only a joint duty unless an intention is manifested to create several duties or joint and several duties.⁶⁹

68. Cf. Farnsworth, *Disputes of Omission in Contracts*, 68 COLUM. L. REV. 860 (1968).

69. REST. 2D § 112 & comment b (Tent. Draft No. 2, 1965); see G. WILLIAMS, JOINT

Where a "joint" duty differs from "joint and several" duties, the joint duty is invariably less advantageous to the promisee, while the advantage to the promisor does not normally serve any legitimate interest; joint duties, as distinguished from joint and several duties, are likely to reflect ignorance or inadvertence on the part of the promisee.⁷⁰

The principal disadvantages to the promisee of the traditional joint duty are five: (1) compulsory joinder of joint obligors; (2) the requirement of judgment for or against all joint obligors; (3) discharge of joint obligors by a judgment against co-obligors; (4) the rule of survivorship, which bars actions against deceased joint obligors while co-promisors survive; and (5) discharge of all joint obligors by the release of some.⁷¹ All but the last are avoided if the obligation is "joint and several."

Reform has been accomplished primarily by statute, but occasional judicial decisions have adopted more modern rules without statutory compulsion.⁷² The statutes have taken two forms: "joint" duties are made "joint and several," or the particular rules associated with joint duties are abolished. As a result, in twenty-two states and the District of Columbia the reform is complete or nearly so;⁷³ in sixteen states there has been some reform except with respect to the rule on releases; in the remaining twelve states one or more of the other outworn rules seems to be retained.

The question involved in determining the appropriate format for restatement of this legal situation was whether or not the statutory changes should be stated or referred to in black letter.⁷⁴ The Institute

OBLIGATIONS (1949); Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

The revised *Restatement* provides the following definition:

There is a basic ambiguity in the use of the words "joint" and "several." In one usage, promissory duties are said to be "joint" if two or more promisors promise the same performance, "several" if they promise separate performances, even though similar. In the same way, promises are sometimes said to create "joint" rights if the same performance is promised to more than one promisee, "several" rights if each promisee is promised a different performance. In the second usage, both "joint" and "several" refer to rights and duties created by promises of the same performance. The second usage is more common in judicial and statutory language, and is the usage followed here.

REST. 2D, Introductory Note to ch. 5, at 240-41 (Tent. Draft No. 2, 1965).

70. REST. 2D, Introductory Note to ch. 5, at 258 (Tent. Draft No. 2, 1965).

71. *Id.* 242.

72. *Id.*, Statutory Note to ch. 5, at 241-50.

73. *Id.* The Maine statute resulted from the discussion in the American Law Institute, MAINE REV. STAT. ANN. tit. 14, §§ 11-17 (Supp. 1965).

74. This question was the subject of a good deal of discussion among the reporter and his advisors, in the Council of the Institute, and at its annual meeting. The original *Restatement* simply stated the traditional common-law rules, with very little comment, although reference was made in the comments to the Negotiable Instruments Law and to

decided: (1) to state the modern rule in black letter only if it was supported by respectable judicial authority not based on statute (for example, the requirement of a joint judgment⁷⁵ and survivorship⁷⁶); (2) to state the traditional rule in black letter with qualifications supported by judicial decisions, and give warning in black letter of further statutory changes (joinder,⁷⁷ merger by judgment,⁷⁸ and the effect of a release or covenant not to sue⁷⁹). The rationale for these decisions was that where the modern rule is statutory, a statement of the traditional rule provides the background against which the statute is to be read. In all cases the situation is elaborated in the comments and reporter's notes. The effect of the changes is to come a great deal closer to providing rules which require the manifested intention of the parties to be made fully effective than was done either by the traditional common-law rules or the original *Restatement*.

B. *Joint Promisees*

No comparable need to reform the common-law rules on joint obligees existed because these rules were far more satisfactory than those for joint obligors. Possibly in the interest of symmetry, the original *Restatement* provided that co-promisees of the same performance might have a "joint" right, "several" rights, or "joint and several" rights.⁸⁰ But nothing of substance seemed to turn on this terminology and the second *Restatement* refers only to "joint" rights.

One difficulty remains. The compulsory joinder of joint promisees as plaintiffs is workable because one joint obligee may sue in the name of all.⁸¹ But there is a corollary: one joint promisee has power to discharge the duty that the promisor owes to all, unless the promisor participates in a breach of the promisee's duty to his co-promisees and is not in the position of a bona fide purchaser.⁸² These rules are appropriate for joint promisees who are partners with power to act for each other; they are likely to be contrary to common understanding where a receipt signed by all promisees is useful. And Section 3-116 of the

statutes changing the rules on the effect of a judgment for or against co-obligors, but to no other statutes. There was general agreement that the second *Restatement* should describe the statutory situation more fully.

75. *REST. 2D* § 118 (Tent. Draft No. 2, 1965).

76. *Id.* § 125.

77. *Id.* § 117.

78. *Id.* § 119.

79. *Id.* §§ 121, 122.

80. *Id.* §§ 111, 128.

81. *Id.* § 129; see Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 *MICH. L. REV.* 327 (1957).

82. *REST. 2D* §§ 130, 131 (Tent. Draft No. 2, 1965).

Freedom of Contract

Uniform Commercial Code provides that a negotiable instrument payable to the order of two or more persons, not in the alternative, may be enforced or discharged only by all. In other situations, an explicit agreement for payment only on two or more signatures would of course control, and a manifestation of intention which is less than explicit might well be given effect.⁸³ As a result of the discussion at the 1965 Annual Meeting, the rule that one joint promisee has power to discharge the rights of all will be qualified by the words "unless limited by agreement."

C. *Contract Beneficiaries*

The original *Restatement* contained no definition of "promisee" and was criticized by Professor Gardner for the omission. He suggested a definition which would have included people commonly referred to as beneficiaries rather than promisees: "A promisee is a person to whom the speaker attributes some power which is asserted by the promise to exist."⁸⁴ The second *Restatement* defines "promisee" as the person to whom a promise "is addressed" and "beneficiary" as a person, other than the promisee, whom performance will benefit.⁸⁵

Decisions in the latter part of the nineteenth century in both England and the United States overruled or limited earlier precedents recognizing the rights of contract beneficiaries. The overruling decisions did not rest on any rational considerations of policy but on supposed necessities of doctrine and logic. In England it was said that consideration for the promise must move from the party who brings the action, a requirement which denied any remedy to the beneficiary;⁸⁶ this view was reaffirmed by the House of Lords as recently as 1967.⁸⁷ In the United States the principal difficulty was that the beneficiary was not a party to the contract; there was no "privity of contract." The supposed "privity" requirement was largely eaten up by exceptions and, with the help of the original *Restatement*, American courts have recognized the rights of contract beneficiaries as such, except in Massachusetts.⁸⁸

83. *But cf.* *Freedman v. Montague Associates, Inc.*, 18 Misc. 2d 1, 187 N.Y.S.2d 636, *rev'd mem.*, 9 App. Div. 2d 936, 195 N.Y.S.2d 392 (1959), *motion for leave to appeal denied*, 10 App. Div. 2d 637, 197 N.Y.S.2d 441 (1960).

84. *See* Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 5 (1932); *cf.* RESTATEMENT OF CONTRACTS, MASS. ANNOTS. ch. 6 (1935).

85. RESTR. 2d § 2 (Tent. Draft No. 2, 1965).

86. *Tweddle v. Atkinson*, 1 B. & S. 393 (Q. B. 1861); *see* 4 A. CORBIN, CONTRACTS §§ 836-855 (1951).

87. *Beswick v. Beswick*, [1967] 3 W.L.R. 932 (H.L.); *see* Note, 30 MOD. L. REV. 687 (1967); Note, 83 L.Q. REV. 465 (1967). The holding was deprived of any practical consequence in the particular case by a decree of specific performance at the suit of the promisee's administratrix (who also happened to be the beneficiary).

88. *See* L. FULLER & R. BRAUCHER, BASIC CONTRACT LAW 462-63 (1964), identifying seven

The original *Restatement* took the view that either a "donee beneficiary" or a "creditor beneficiary" could assert rights on a contract; other beneficiaries were "incidental" and could not.⁸⁹ The terminology was somewhat artificial: "donee beneficiary" situations included not only cases where the beneficiary received a gift but also cases where the promisor sought "to confer on [the beneficiary] a right";⁹⁰ "creditor beneficiary" situations included not only cases involving creditors but also cases where the promisor promised to perform a "supposed or asserted duty" of the promisee to the beneficiary.⁹¹ The terminology had some judicial acceptance, but it carried overtones of obsolete doctrine. In the interest of simplification and in recognition of the power of the parties to control the legal consequences of their agreement, the second *Restatement* substitutes the term "intended beneficiary" for both "donee" and "creditor" beneficiaries. Unless otherwise agreed, a beneficiary is an "intended beneficiary"

if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

- (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
- (b) the promise manifests an intention to give the beneficiary the benefit of the promised performance.⁹²

This consolidation of beneficiary terminology required reconsideration of the principal substantive distinction made in the original *Restatement* between "donee" and "creditor" beneficiaries. In the case of the donee, the duty to the beneficiary could not be released or affected by a subsequent agreement between promisee and promisor;⁹³ in the case of the creditor, subsequent discharge or variation was effective unless the beneficiary brought suit or otherwise relied on the promise before he knew of the discharge or variation, or unless there was a fraud on creditors.⁹⁴ This distinction was subjected to vigorous attack and was contrary to the weight of authority.⁹⁵

exceptions to the Massachusetts rule that "no action can be maintained by the beneficiary of a contract who is not a party thereto."

89. RESTATEMENT OF CONTRACTS § 133 (1932).

90. *Id.* § 133(1)(a).

91. *Id.* § 133(1)(b).

92. REST. 2d § 133 (Tent. Draft No. 4, 1968).

93. RESTATEMENT OF CONTRACTS § 142 (1932).

94. *Id.* § 143.

95. See Page, *The Power of the Contracting Parties to Alter a Contract for Rendering a Performance to a Third Person*, 12 WIS. L. REV. 141 (1937); Note, 57 COLUM. L. REV. 406 (1957); Annots., 97 A.L.R.2d 1262 (1964), 44 A.L.R.2d 1270 (1955), 148 A.L.R. 359 (1944), 81 A.L.R. 1271 (1932), 53 A.L.R. 178 (1928), 47 A.L.R. 339 (1927), 21 A.L.R. 439 (1922).

The second *Restatement* recognizes the power of promisor and promisee to create a duty which cannot be modified without the consent of the intended beneficiary. If the agreement or promise contains no such term, however, the original parties retain power to modify until the beneficiary, before receiving notification of modification, "materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee."⁹⁶ The provision for manifestation of assent by the beneficiary follows a leading Alabama case which relied on the analogy of offer and acceptance;⁹⁷ the comment to this provision also relies on "the probability that the beneficiary will rely in ways difficult or impossible to prove."⁹⁸ Suit by the beneficiary is treated as a "sufficient manifestation of assent to preclude discharge of modification,"⁹⁹ rather than as a material change of position. Acts which constitute a fraud on creditors are not defined in black letter; instead they are noted in the comments and are considered invalidating causes.¹⁰⁰

D. Assignment

The historic rule of English common law was that a contractual right could not be assigned. During the seventeenth century the scope of that rule was narrowed by the reception of the law merchant into the common law and by the recognition of an assignment as the equivalent of a power of attorney granted to the assignee to sue in the assignor's name. Courts of equity protected the assignee in cases of death or bankruptcy of the assignor or revocation by him. In the eighteenth century the common-law courts began to give effect to the equitable rights of the assignee. In the United States statutes generally require actions to be brought in the name of the real party in interest, and the assignee of a contractual right can sue in his own name without regard to the distinction between law and equity, although it is still sometimes said that the rights of an assignee are inherently equitable.

These developments were complete before the original *Restatement* was written, and the rules stated in it did not need revision to eliminate medieval residue. But much of the subject has been affected by the Uniform Commercial Code and by modern statutes on wage assignments, retail installment sales, and government contracts. In addition

96. REST. 2D § 142 (Tent. Draft No. 3, 1967).

97. *Copeland v. Beard*, 217 Ala. 216, 115 So. 389 (1928); see REST. 2D § 142, Reporter's Note at 167 (Tent. Draft No. 3, 1967).

98. REST. 2D § 142, comment *h* (Tent. Draft No. 3, 1967).

99. *Id.*

100. *Id.* § 142, comment *i*; see *id.*, Reporter's Note, at 66. See p. 602 *supra*.

to reorganization in the interest of clarity and rationalization in expanded comments, the new material on assignment in the second *Restatement* consists primarily of an account of modern statutory developments. Perhaps the most pervasive change is terminological rather than substantive: the second *Restatement* uses "assignment" to mean what the original called "effective assignment";¹⁰¹ a manifestation of intention to assign which is not effective is called an "attempted" or "purported" assignment.¹⁰²

Two questions in this area presented some difficulty. First, Section 9-318 of the Uniform Commercial Code renders ineffective a contract term which prohibits assignment of an account or contract right; according to the official UCC comment this provision "states a rule of law which is widely recognized in the cases." The reporter for the second *Restatement* was unable to find such recognition; and Professor Gilmore, the principal draftsman of Article 9, has said, "No pre-Code case has been found . . . in which it has been held squarely in an action between assignee and obligor that the clause was ineffective."¹⁰³ The second *Restatement* continues to recognize the possibility that assignment may be validly prohibited by contract.¹⁰⁴ But it limits the effect of such a contract term by construing it narrowly "unless a different intention is manifested."¹⁰⁵ Of course, the *Restatement* rule is displaced by the Code in cases to which Section 9-318 of the Code applies.

Second, the original *Restatement* set forth the rule, now codified for sale of goods by Section 2-210 of the Uniform Commercial Code, that "unless the language or the circumstances . . . indicate the contrary, an assignment of "the contract" or an assignment in similar general terms is also a delegation of performance of the assignor's duties, and that acceptance of the assignment by the assignee constitutes a promise by him to perform the assignor's duties."¹⁰⁶ That rule was rejected by the New York Court of Appeals in 1928 as a "proposed change" and "a complete reversal of our present rule of interpretation as to the probable intention of the parties."¹⁰⁷ This view was announced in a case involving assignment of a purchaser's rights under a contract to sell

101. REST. 2D, Reporter's Note § 149, at 171 (Tent. Draft No. 3, 1967).

102. *Id.* § 149, comment a.

103. G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 7.9, at 228 (1965). See UCC § 2-210; cf. RESTATEMENT OF PROPERTY §§ 404-417 (restraints on alienation) (1936).

104. REST. 2D § 149(2)(c) (Tent. Draft No. 3, 1967), formerly RESTATEMENT OF CONTRACTS § 151 (1932).

105. REST. 2D § 154 (Tent. Draft No. 3, 1967), formerly RESTATEMENT OF CONTRACTS § 176 (1932).

106. UCC § 2-210(4); cf. RESTATEMENT OF CONTRACTS § 164 (1932).

107. *Langel v. Betz*, 250 N.Y. 159, 163, 164 N.E. 890, 892 (1928).

land, and it seems to be supported by the great weight of authority in such cases;¹⁰⁸ the New York court apparently requires an express assumption of duties regardless of the type of contract.¹⁰⁹ The reporter and advisers believed the formulation in the original *Restatement* to be sound in principle, but in deference to the weight of authority they submitted a statement of a contrary rule for land contracts. The council directed that a caveat on the point be submitted as an alternative, and the Institute by a close vote adopted the caveat: "The Institute expresses no opinion as to whether the rule stated in Subsection (2) applies to an assignment by a purchaser of his rights under a contract for the sale of land."¹¹⁰ The comment explains the caveat as resulting from analogizing the purchaser's assignment of his rights under a land contract to "sale of land subject to a mortgage" and from "doctrinal difficulties in the recognition of rights of assignees and beneficiaries [which] . . . have . . . been overcome, . . . [b]ut . . . the shift in doctrine has not yet produced any definite change in the body of decisions"¹¹¹

III. Conclusion

The effort to make the *Restatement of Contracts* more useful has required a very considerable expenditure of energy on the part of the Institute. In the course of the work there have been occasional expressions of skepticism as to the utility of the effort. One distinguished member of the Institute asked the reporter whether the material on consideration could not simply be omitted: he had not found that the subject arose very much. Of course he had not been exposed to a representative sample of modern cases; but even if he were right as to the incidence of litigation, there would be reason to try to formulate in rational terms the grounds on which contracts are enforced in modern American law.

The effort to restate the law of contracts in modern terms highlights the resilience of private autonomy in an era of expanding government activity. As restraints imposed on the private sector in the name of good faith and fair dealing become more candid, they seem also to

108. See 3 S. WILLISTON, *CONTRACTS* § 418A (3d ed. Jaeger 1960). But cf. *Bank of America Nat'l T. & S. Ass'n v. McLaughlin*, 152 Cal. App. 2d 911, 313 P.2d 220 (1957); *Hodges v. Campbell*, 212 Ore. 428, 316 P.2d 312 (1957); *Radley v. Smith*, 6 Utah 2d 314, 313 P.2d 465 (1957).

109. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387 (1957).

110. *REST. 2D* § 160 (Tent. Draft No. 3, 1967).

111. *Id.* § 160, comment c.

become more cautious, more restrained. Freedom of contract, refined and redefined in response to social change, has power as it always had. In recording the response of contract law to the needs of a developing social order, the *Restatement* is incorporating concepts documented for us by Professor Corbin over a lifetime.

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