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Article 8

Contracts - Promise to Pay when Able

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Contracts—Promise to Pay When Able—Petition alleged an oral agreement under which the defendant would reimburse plaintiff upon the completion of certain construction work upon an apartment building. The defendant agreed to pay the plaintiff, "when she got the apartments on a paying basis . . . when she was financially able and the apartment was paying off." *Held:* these various statements were practically equivalent to an agreement to pay when able. A promise to pay when the promiser is financially able to do so is construed to mean that payment was to be made within a reasonable time. "The ability to pay" or any equivalent provision was too uncertain and indefinite to constitute a condition: *Sanford v. Luce 60 N.W. 2d 885 (Iowa, 1953).*

The problem in this case is whether a contract calling for payment by a promisor when able demands ability to pay as a condition precedent or whether a promise to pay when able is an absolute promise with payment anticipated at least within a reasonable time. The courts are split on this issue. A majority, taken numerically, hold that a promise to pay when the promisor "is able" is not absolute but a conditional promise.[1] A minority, however, followed in this case, hold that a promise to pay when able is absolute, and payment must be made at least within a reasonable time.[2]

The reasoning of the majority is based upon the premise that a contract calling for payment by a promisor when he is able means exactly what the words literally denote. So construed, the promisor must pay only when, and if, and not before he is able. These courts feel that, if one wishes to contract in this fashion, such contract is proper, and that freedom to contract as the parties see fit must be protected. The promisee cannot complain, since he got exactly what he bargained for. One court puts it clearly:

> "The express contract of the parties is that the debtor is to pay when he shall be able, and that he shall be the judge of his ability. No doubt the parties thought this a reasonable arrangement when they made it, though creditors think otherwise now. If it is reasonable for a man to release a debt altogether, surely it is reasonable to release the remedies for a debt, not itself released, as is done in covenants not to sue. And even if it be not reasonable, we cannot set up our reason or the public reason for that of contracting parties, and make a contract for them that is contrary to their plain intention without violating the first principle of freedom and the very nature of contract relations."[3]

On the other hand, the minority reasons that such a contract never

[1] 12 AM. JUR., CONTRACTS §303; 94 A.L.R. 721.
[2] 12 AM. JUR., CONTRACTS §303; 94 A.L.R. 724; Mock v. Trustees of First Baptist Church of Newport, 252 Ky. 243, 67 S.W. 2d 9 (1934).
[3] Carlson v. Johnson, 275 Mich. 35, 265 N.W. 517 (1936).

contemplated that the provision to pay when able would involve the possibility that there might never be any payment. This, they feel, would be contrary to the intention of the parties; and certainly contrary to the intent of the promisee, who obviously did not envision that he might never receive his consideration. It would also seem contrary to justice to allow the promisor to receive his benefit without giving anything in return. In a case regarding a promise by a church to pay an architect for his services when able, the Kentucky court said:

> "Such an agreement cannot be construed as requiring the architect to wait more than a reasonable time. He did not mean that he would wait forever."[4]

The minority view has usually been held to prevail in those instances where a promissory note or other commercial paper is involved.[5] The courts so deciding imply that, since the promisor has already received that for which the promise to pay is given, he should not be allowed to escape making recompense for it. One court puts it clearly and succinctly:

> "The parties evidently regarded the note as a binding obligation, and, whenever the language will permit, it should be so construed as to support rather than destroy its legal obligation. It is conceded that the intentions of the parties to a contract cannot prevail if directly contrary to the plain sense of words employed; but when the intention is sufficiently apparent, effect should be given to that intent, though some violence be thereby done to the words."[6]

The question of what is the precise effect of a promise in a contract to pay when able has not been decided by the Wisconsin court.

In considering what view should be followed, it would be pertinent to note that both the majority and minority beg the question in that each assumes the intention of the parties, although that is precisely what is at issue. The majority assumes that the parties intended payment only conditionally, and the minority assumes that payment is intended absolutely. Actually, it seems fair to speculate that the parties never really considered the issue at all, since the future ability of the promisor to pay might reasonably have been assumed to be imminent, and other possibilities were not considered. Hence one party must endure a hardship by a term he did not contemplate.

In the interest of substantial justice it would seem that both the modern and better reasoned view would be that a promise to pay "when able" should be construed as demanding payment at least within

[4] Mock v. Trustees of First Baptist Church of Newport, *supra,* note 2.
[5] Benton v. Benton, 78 Kan. 366, 97 P. 378 (1908); Pistel v. Imperial Mutual Life Insurance Co. of America, 88 Md. 640, 42 A. 210 (1898); Folkerts v. Shields, 319 Ill. App. 261, 49 N.E. 2d 295 (1943).
[6] Lewis v. Lipton, 10 Ohio State 88, 75 Am. Dec. 498 (1856).

a reasonable time. Although this may work a heavy hardship upon a promisor who is forced to pay before he feels himself able, to hold such language as a condition precedent would work a heavier hardship upon a promisee who might never receive value for what he has given. However, the hardship on the promisor could be lightened, to a certain extent at least, by construing a reasonable time most liberally in favor of the promisor. To the average person this would seem the fairest of two difficult alternatives. He would consider such a promise as one requiring payment at some time.

Thus in the light of the balancing of the hardships and an attempt at substantial justice, the Wisconsin court in any future decision should, it seems, follow the lead of the Iowa court in *Sanford v. Luce.*

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Landlord and Tenant—Leases—The Validity of Rent Acceleration Clauses—The plaintiff leased premises to the defendant for a three year period, rent payable monthly in advance. Under the terms of the lease,[1] the lessor, without demand or notice, could lawfully declare the term ended and re-enter the premises should the lessee default in any of his contractual obligations. Furthermore, the lessor had an option, in addition to his other remedies on default, to give the lessee written notice of any default or neglect and to advise the lessee that unless all the conditions and covenants of the lease were complied with within thirty days, the entire rent for the remainder of the term would become immediately due and payable. Eight months after the beginning of the term, the lessee vacated the premises and shortly thereafter defaulted in the payment of the rent due. The lessor brought an action for rent on the rent acceleration clause in the lease. Judgment was rendered for the lessor, and the lessee appealed. *Held:* Judgment for the plaintiff reversed. Any clause in a lease of real property for rent acceleration effective upon the breach of a covenant to pay rent is void since it is either an agreement for liquidated damages, when the damages are readily ascertainable, or a penalty. *Ricker v. Rombough, 261 P. 2d 328 (Cal. 1953).*

The courts are not in agreement concerning the validity of rent

[1] "Lessor may likewise at lessor's option and in addition to any other remedies which lessor may have upon such default, failure or neglect, give to lessee written notice of such default, failure or neglect and advise lessee thereby that, unless all the terms, covenants and conditions of the lease are fully complied with within thirty (30) days after giving of said notice, the entire amount of rent herein reserved or agreed to be paid and then remaining unpaid shall immediately become due and payable upon the expiration of said thirty days. . . ."