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The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions

Committee of Washington State Bar Association on Annotations to the Restatement of the Law by the American Law Institute

The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions*

Chapter 4

FORMATION OF FORMAL CONTRACTS**

Contracts Under Seal

Section 95. REQUIREMENTS FOR SEALED CONTRACT.

The requirements of the law for the formation of a contract under seal are

(a) A sealed written promise and delivery, either unconditionally or in escrow, of the document containing it; and if the delivery is in escrow, the happening of the condition on which delivery is made;

(b) A promisor and a promisee each of whom has legal capacity to act as such in the proposed sealed contract; and each of whom is so named or described in the document as to be capable of identification when it is delivered,

(c) Acceptance by the promisee or grantee in the case stated in Section 105;

(d) That the transaction, though satisfying the previous requirements, must not be void by statute or by special rules of the common law

Comment

a. The explanation of these requirements is given in Sections 96-110. The word "written" and the word "writing" not only in the present section, but throughout the Restatement include printing and others means of impressing characters on paper or other substance. The non-existence of one or more of the requisites stated in the section does not preclude the formation of an informal contract if the requisites for such a contract exist.

b. A contract under seal is almost invariably signed, but such a contract is possible without signature.

ANNOTATION

Section 95. The common law affect of seals is varied in Washington by statute.

The use of private seals upon all deeds, mortgages, leases, bonds, and other instruments, and contracts in writing, including deeds from a husband to his wife and from a wife to her husband for their respective community right, title, interest or estate in all or any portion of their community real property is hereby abolished, and the addition of a private seal to any such instrument or contract in writing hereafter made shall not affect its validity or legality in any respect. L. '23, Chap. 23, Sec. 1. Appd. Feb. 23, 1923. Rem. Comp. Stat. (1933), Sec. 10556.

All deeds, mortgages, leases, bonds, and other instruments and contracts in writing, including deeds from a husband to his wife and from a wife to her husband for their respective community right, title, interest or estate in all or any portion of their community real property which have heretofore been executed without the use of a private seal are, notwithstanding, hereby declared to be legal and valid. L. '23, Chap. 23, Sec.

*The absence of annotations to particular sections of the Restatement indicates that no Washington decisions have been found on the principle therein stated.

**Continued from last issue.

2. Appd. Feb. 23, 1923. Rem. Comp. Stat. (1933) Sec. 10557.
Notwithstanding that a broker's unauthorized contract to sell real estate does not disclose the name of his principal and is under seal, it may be ratified by the principal in view of Rem. & Bal. Code, Sec. 8751 abolishing the use of private seals, *McLeod v. Eshelman*, 66 W 683, 120 P. 528 (1912).

Section 96. DEFINITION OF A SEAL.

A seal is a piece of wax, a wafer or other substance, affixed to the paper or other material on which a promise, release or conveyance is written, or a scroll or sign, however made, on such paper or other material, or an impression made thereon; provided that by a recital or by the appearance of the document an intention of the promisor, releasor or grantor is manifested that the substance, scroll, sign or impression shall be a seal.

Comment

a. The definition of a seal in the section is based partly on the common law and partly on statutes that have been enacted in most States where seals are still in use.

b. Under the section the question whether a seal is upon a document is to be determined from the document itself. Evidence of extrinsic circumstances is not admissible to prove or disprove this. Such circumstances may, however, be shown to aid the determination of the questions whether a promisor affixed or adopted a seal (see Section 98) and whether the document has been delivered (see Section 102).

Section 97. WHEN A PROMISE IS SEALED.

A written promise is sealed if the promisor affixes or impresses a seal on the document or adopts a seal already thereon.

Section 98. WHAT AMOUNTS TO ADOPTION OF A SEAL.

(1) A promisor who delivers a written promise to which a seal has been previously affixed or impressed with apparent reference to his signature, thereby adopts the seal.

(2) A promisor who delivers a written promise to which a seal has been previously affixed or impressed with apparent reference to the signature of another party to the document is presumed to have adopted the seal unless extrinsic circumstances show a contrary intention.

Comment

a. Under the rule stated in Subsection (1) extrinsic evidence is not admissible, under the rule stated in Subsection (2) such evidence is admissible.

Section 99. ADOPTION OF THE SAME SEAL BY SEVERAL PARTIES.

Any number of parties to the same instrument may adopt one seal.

Section 100. RECITAL OF SEALING OR DELIVERY.

A recital of the sealing or of the delivery of a written promise is not essential to its validity as a sealed contract.

Comment

a. A recital may be of importance to show that a dash or scroll

after a signature is a seal (see Section 96), but the recital is not an independent requirement, so that if a wafer or other object attached to a written promise is evidently a seal, a sealed contract is formed though there is no recital.

Section 101. SEALED PROMISE DELIVERED UNCONDITIONALLY OR IN ESCROW

A promise under seal may be delivered by the promisor unconditionally, in which case there is a present contract under seal, or may be delivered in escrow, in which case there is no present contract under seal. Delivery may be made either unconditionally or in escrow to the promisee or to any other person.

Comment

a. The section by its terms is applicable to the power of a promisor to subject himself to a duty It does not enable a promisor by inserting in a document not only his own promise, but what purports to be a promise by the promisee, to subject the latter to a duty by delivering the document to a third person. If, however, a promisor attempts this, his own promise is likewise ineffective until the promisee by accepting the document assents to assume the the stated duty (see Sections 105-107)

Section 102. WHAT AMOUNTS TO UNCONDITIONAL DELIVERY.

A promise under seal is delivered unconditionally when the promisor puts it out of his possession with the apparent intent to create immediately a contract under seal, unless the promisee then knows that the promisor has not such actual intent.

Section 103. WHAT AMOUNTS TO DELIVERY IN ESCROW AND ITS EFFECT.

(1) A promise under seal is delivered in escrow by the promisor when he puts it out of his possession without reserving a power of revocation, and with the expressed intent that the promise shall become a contract under seal upon the happening in the future of some condition not expressed in the document, and shall not become a contract under seal until that time. This condition must be something other than the promisor's future mental desire or intention.

(2) On the happening of such a condition as is stated in Subsection (1) the promise becomes a contract under seal. Until the time has elapsed for the happening of the condition that was fixed by the promisor when he delivered the document, or, if he then fixed no time, until a reasonable time has elapsed for the happening of the condition, the promisor has no power to annual the delivery Thereafter he has a right to reclaim the document, if the condition has not happened.

Comment

a. Delivery in escrow is to be distinguished from delivery to hold as agent for the promisor.

Section 104. ACCEPTANCE OR DISCLAIMER BY THE PROMISEE OF UNILATERAL SEALED CONTRACT.

(1) Acceptance by the promisee in the case of a promise under seal is not essential to the formation of a unilateral contract, nor is knowledge of the existence of the promise; but a promisee who has not accepted such a promise may, within a reasonable time after learning of its existence and terms, render it inoperative from the beginning by disclaimer.

(2) Acceptance or disclaimer is irrevocable.

Section 105. ACCEPTANCE BY THE PROMISEE OF A BILATERAL SEALED CONTRACT.

Acceptance by the promisee or grantee in the case of a sealed promissory writing or conveyance which purports to contain a return promise by him is essential to create any contractual obligation.

Comment

a. In order to subject the promisee or grantee to a duty he must express assent thereto, and unless he makes the promise stated in the writing, promises in his favor are equally inoperative, since it is not contemplated that one promise shall be made without the other.

b. The case of a grantee is included in the Section and in Sections 106, 107 though the subject of this Restatement does not include conveyances, because a deed of conveyance by A to B may contain as one of its provisions a promise by B. It is the effect of such a provision that is stated in these Sections.

Section 106. WHAT AMOUNTS TO ACCEPTANCE OF INSTRUMENT.

Acceptance in the case of a sealed promissory writing or conveyance consists of a manifestation of assent to the delivery thereof, made to the promisor or grantor or to a person to whom the document has been delivered in escrow. Such manifestation must comply with any requirement imposed by the promisor or grantor. It may be made either before or after delivery If made before delivery it is revocable until the moment of delivery.

Section 107 CREATION OF INFORMAL CONTRACT BY ACCEPTANCE BY PROMISEE.

One who accepts but does not sign or seal a sealed document which contains not only a conveyance or a promise to him or for his benefit, but also words expressing a promise by him thereby makes the promise expressed in the document, but the promise so made by him is not under seal, and whether it is binding depends upon the rules governing informal contracts.

Section 108. REQUIREMENT OF NAMING OR DESCRIBING PROMISOR AND PROMISEE.

A promise under seal is not operative as a contract under seal unless both the promisor and the promisee are named or so described therein as to be capable of identification when the writing is delivered.

Comment

a. It is a requirement of a sealed contract that all facts essential to a determination of all the terms of the contract appear in the document. Attempts to make a contract under seal, which are ineffectual as such for failure to observe this principle, may, however, create an informal contract, if the requirements of such a contract exist.

Section 109. ENFORCEMENT OF A SEALED CONTRACT BY PROMISEE WHO DOES NOT SIGN OR SEAL IT.

The promisee of a promise under seal is not precluded from enforcing it as a sealed contract because he has not signed or sealed the document, unless his doing so was a condition of the delivery, whether the document does or does not contain also a promise by him.

Comment

a. Other circumstances (as indicated by Sections 105, 107) than the fact that the promisee has not signed or sealed the document may prevent the promisee from acquiring a right, but the failure to sign or seal does not itself have this effect, unless a condition so providing is imposed when the document is delivered.

Section 110. SEALED CONTRACT WITHOUT CONSIDERATION.

It is not essential in order to make a promise under seal operative as a sealed contract that consideration be given for the promise.

ANNOTATION

A contract under seal still imports consideration, notwithstanding L. '88, Chap. 97, Sec. 1, abolishing private seals, *Considine v. Gallagher* 31 W 669, 72 P 469 (1903) *Munro v. National Surety Co.*, 47 W 488, 92 P 280 (1907) *Golle v. State Bank*, 52 W 437, 100 P 984 (1909) But lack of consideration may be shown as a matter of defense, the presumption of consideration being rebuttable, *Gates v. Herr* 102 W 131, 172 P 912 (1918).

Chapter 5
DUTIES AND RIGHTS WHERE MORE PERSONS THAN ONE ARE PROMISORS OR PROMISEES OF THE SAME PERFORMANCE

Section 111. JOINT, SEVERAL OR JOINT AND SEVERAL PROMISORS OR PROMISEES.

(1) Two or more parties to a contract who promise to the same promisee that the same performance shall be given, thereby bind themselves
- **(a) jointly, or**
- **(b) severally, or**
- **(c) jointly and severally,**

according to the rules stated in Sections 112-127

(2) Two or more parties to a contract who are promised by the same promisor that the same performance shall be given, thereby acquire
- **(a) a joint right, or**
- **(b) several rights, or**
- **(c) joint and several rights,**

according to the rules stated in Sections 128-132.

Comment

a. It is possible for several persons to contract to render as many distinct performances. In such a case each promisor not only becomes subject to a duty different from that of the other promisors, but the performance for which he binds himself is different from the performance for which the other promisors bind themselves. Each of such contractual duties is subject to the same rules that would be applicable if none of the other duties existed. It is also possible for several promisors to undertake severally that a single performance shall take place. In such a case though there are several duties, only one performance is due. Reference to the latter class of several duties is necessary in connection with the rules governing joint promises, because it is possible that a number of persons not only promise jointly that a specified performance shall take place, but may also each of them severally make a promise identical in terms with the joint promise.

ANNOTATION

Subsection (1) (a). Where a complaint in an action for breach of contract alleged that the contract was entered into by one of the defendants, acting for himself and his co-defendants, and all of the defendants filed a joint answer containing a general denial only, all were bound jointly upon proof of the contract as alleged, *Carlisle Packing Co. v. Deming*, 62 W 455, 114 P. 172 (1911).

Section 112. WHEN TWO OR MORE PROMISORS OF THE SAME PERFORMANCE ARE BOUND JOINTLY.

Except as qualified by Sections 115, 116, where two or more parties to a contract promise the same performance to the same promisee they incur only a joint duty unless the contrary is stated, or unless the terms of the promise or the extrinsic circumstances indicate an intention on their part to be bound severally, or jointly and severally The fact that one promisor is under a duty to the other to perform the promise or that one promisee has received all or the greater portion of the consideration does not prevent their duty from being joint.

ANNOTATION

Landers v. Foster, 34 W 674, 76 P. 274 (1904) held that parties who have jointly entered into a contract for the purchase of an interest in a patent cannot escape liability therein because the interest purchased was, by their authority, conveyed to one of their number instead of to all.

Section 113. WHEN TWO OR MORE PROMISORS ARE SEVERALLY BOUND.

Where two or more parties to a contract promise separate performances, to be rendered respectively by each of them, or where each of them makes only a separate promise that the same performance shall be rendered, each is severally bound for the performance which he promises and is not bound jointly with any of the others.

Comment

a. The words "A and B severally promise C $100" or similar words contain a possible ambiguity Each of them may promise that C shall receive separate sums of $100, or each of them may promise that C shall receive one sum of $100. In both cases A and B are severally bound to the extent of $100, but in the latter case pay-

ment of one sum of $100 will extinguish the obligation of both to C. It is a question of interpretation which meaning is to be attached to the words of a given contract.

b. In this Chapter it is to be assumed in the absence of words indicating the contrary that where several promises are referred to, promises of the same performance not merely similar performances are intended.

ANNOTATION

Hudnall v. Pennington & Co., 136 W 155, 239 P 2 (1925), held that a marketing plan by which growers pool their products for sale through the agency of a corporation is not a joint venture making each member responsible to the corporation for its dealings with other members where the corporation obligated itself to furnish each grower with a complete itemized statement of his account.

Section 114. TWO OR MORE PROMISORS MAKING SEPARATE PROMISES AND ALSO A JOINT PROMISE.

Where two or more parties to a contract promise the same performance to the same promisee in such words as apart from other promises made by them would bind them jointly, and in the same contract promise separately that this performance shall be rendered, they are jointly and severally bound.

ANNOTATION

Partners who each sign a contract personally are severally as well as jointly liable therein, *Barbo v. Norris*, 138 W 627, 245 P 414 (1926).

Section 115. A PROMISE IN THE FIRST PERSON SINGULAR SIGNED BY SEVERAL PERSONS.

Where a promise in a written contract is expressed in the first person singular, but the contract is signed by several persons, they are jointly and severally bound in the absence of express words in the instrument to the contrary

ANNOTATION

The Washington statute is in accord with this section.

Remington's Comp. Stat., Sec. 3408 (7) provides: "Where an instrument containing the words 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable therein."

Section 116. JOINT INDORSERS.

Joint payees or joint indorsees of a negotiable instrument who indorse the same are jointly and severally bound in the absence of express words in the instrument to the contrary

Comment

a. This rule, which is an exception to the general rule of Section 112, is established by Section 68 of the Negotiable Instruments Law The statute is in force throughout the United States.

ANNOTATION

The Washington statute is identical with this section.

"Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally" Rem. Comp. Stat., Section 3459.*

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*The annotations to this Chapter were prepared in memorandum form by the late Professor Harvey Lantz of the University of Washington Law School. His notes were arranged for publication by Dean Harold Shepherd and Warren Shattuck.