

Contracts--Performance to Satisfaction--Overhead (Wynkoop Hallenbeck Crawford Co. v. The Western Union Telegraph Co., 268 N.Y. 108 (1935))

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tion to benefit him.⁸ The furthest that the Court of Appeals has gone in sustaining the donee beneficiary is the close relationship cases⁹ where no consideration other than a moral obligation is required between the beneficiary and promisee. In a recent case, *McClare v. Mass. Bonding and Insurance Co.*¹⁰ the principal opinion pronounced strong dicta to the effect that a donee beneficiary has enforceable rights in New York. A strong dissenting opinion did not disapprove this dicta, it simply maintained that the promisee had no legal capacity to contract with the promisor and that the beneficiary could therefore not recover.¹¹ *Seaver v. Ransom* does not limit beneficiary contracts to four classes. The progressive view on the subject is that any beneficiary clearly designated and intended to be benefited upon a contract has enforceable rights therein.¹² This seems to be the attitude of our highest court¹³ and will probably be so declared when the situation is presented.

I. J. B.

CONTRACTS—PERFORMANCE TO SATISFACTION—OVERHEAD.—

Defendant undertook to purchase stationery from plaintiff, the purchase price to be the cost of production plus a stipulated percentage of profit. The contract further provided that the overhead charges to be included in the cost of production, were to be satisfactory to the purchaser. As a matter of fact, the overhead charges were not satisfactory to the purchaser, and it refused to accept the stationery. The seller brings this action for breach of contract, claiming that the defendant should be satisfied with such an allowance of overhead

⁸ RESTATEMENT, CONTRACTS (1932) § 135, illustration 4 is precisely the situation here:

"D contracts to build a house for A. A obtains a bond from B. B promises A that all D's creditors for labor and materials who may acquire a lien on the house shall be paid. C is such a creditor of D's. C is a donee beneficiary."

⁹ *Todd v. Weber*, 96 N. Y. 181 (1884); *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724 (1899); *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 619 (1918); cf. *Vogeler v. Alwyn Construction Corp.*, 247 N. Y. 131, 159 N. E. 886 (1928), discussed in Note (1928) 18 CORN. L. Q. 621.

¹⁰ *McClare v. Mass. Bonding & Ins. Co.*, 266 N. Y. 371, 195 N. E. 17 (1935).

¹¹ *McClare v. Mass. Bonding & Ins. Co.*, 266 N. Y. 371, 380, 195 N. E. 17, 18 (1935). There must be an enforceable contract between the promisor and promisee before a beneficiary whose rights are derivative, can sue.

¹² 1 WILLISTON, CONTRACTS (1920) § 368; CARDOZO, NATURE OF THE JUDICIAL PROCESS (1922) 99; Corbin, *Third Parties as Beneficiaries of Contractor's Bonds* (1928) 38 YALE L. J. 1.

¹³ *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 169 (1918); *Ultramares v. Touche*, 255 N. Y. 170, 180, 174 N. E. 441, 445 (1931); *McClare v. Mass. Bonding and Ins. Co.*, 266 N. Y. 371, 379, 195 N. E. 17 (1935).

as would satisfy a reasonable person. From an affirmance of judgment by the Appellate Division in favor of plaintiff,¹ held, reversed. Where the promise to pay is expressly made conditional upon the satisfaction of the purchaser, he is not obliged to pay if he is not actually satisfied. *Wynkoop Hallenbeck Crawford Co. v. The Western Union Telegraph Co.*, 268 N. Y. 108, 196 N. E. 760 (1935).

Where a contract provides definite tests or specifications for the required performance, and the satisfaction of one of the parties is not made the sole determining factor, reasonable, and not actual, satisfaction is all that is required.² Similarly, although a contract does call for performance to the satisfaction of one of the parties, if the subject matter is not made dependent upon taste, the promisor is generally compelled to accept such performance as should reasonably satisfy him, regardless of whether he actually is satisfied,³ —and in such case there must be some reason for disapproval if the promisor is to escape liability.⁴ But when the subject matter of such a contract does involve personal taste or fancy, the actual satisfaction of the promisor is required, before he can be made liable upon his promise to pay.⁵ It is perhaps interesting to note that whenever it

¹ 242 App. Div. 680, *memorandum decision*.

² *Erikson v. Ward*, 266 Ill. 259, 107 N. E. 593 (1915); *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312 (1889); *Fechteler v. Whittemore*, 205 Mass. 6, 91 N. E. 155 (1910).

³ *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749 (1886) (repairing a boiler); *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406 (1889) (contract to finish woodwork); *Hummel v. Stern*, 21 App. Div. 544, 48 N. Y. Supp. 528 (1st Dept. 1897), *aff'd*, 164 N. Y. 603, 58 N. E. 1088 (1900) (installing ventilation system). But note that in *Frary v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156 (1893), the court says: "Those which have refused to hold the parties to such a stipulation according to its letter have generally done so, we apprehend, not because the parties were not bound, if such were their contract, but because it was not the contract. It is a matter of construction." It is submitted that in the instant case, *Wynkoop Hallenbeck Crawford Co. v. Western Union Telegraph Co.*, 268 N. Y. 108, 196 N. E. 760 (1935), the court seems to lean toward the position that regardless of whether the subject matter is made dependent upon taste, if the contract actually calls for performance "satisfactory to the purchaser", it is to be read, not as a stipulation for what a court or jury would pronounce satisfactory to a reasonable man, but literally as meaning actually satisfactory to the purchaser personally.

⁴ In *Vought v. Williams*, 12 N. Y. 253, 24 N. E. 195 (1890), a contract for the purchase of real estate provided that the title should be "first class", to be passed upon by a lawyer designated by the purchaser. It was held that simply a marketable title was required, and that a decision by the purchaser's lawyer that the title was good, was not a condition precedent to the right to enforce performance of the contract. The reasoning given by the court in *Folliard v. Wallace*, 2 Johns. 397 (N. Y. 1807), applies: "* * * a simple allegation of dissatisfaction without some good reason assigned for it, might be a mere pretext, and cannot be regarded." In that case a seller was successful in an action to enforce a contract which provided for the conveyance of land when the purchaser would be "well satisfied" that the title was undisputed.

⁵ *Brown v. Foster*, 113 Mass. 136 (1873) (making a suit of clothes); *Gray v. Alabama Nat. Bank*, 14 N. Y. Supp. 155 (1891) (engraving designs); *Crawford v. Mail & Express Pub. Co.*, 163 N. Y. 404, 57 N. E. 616 (1900) (engaging the services of a writer); *Ginsberg v. Friedman*, 146 App. Div. 779,

is doubtful whether the words in the contract actually mean that the promise is conditional on the promisor's personal satisfaction, an interpretation is adopted which merely calls for such performance as would satisfy a reasonable person in the promisor's position.⁶ Whether, in a case requiring personal satisfaction, the promisor in good faith is actually satisfied, is a question of fact.⁷ He cannot feign dissatisfaction as an excuse for non-performance on his part,⁸ but must exercise an honest judgment and give fair consideration to the matter.⁹ A refusal to examine the performance,¹⁰ or a rejection of it not in reality based on its unsatisfactory nature,¹¹ but on fictitious grounds, may amount to prevention of performance of the condition precedent, and excuse it.¹² It should be noted that since the promisor cannot reject for any whim, fancy or caprice, but only for genuine dissatisfaction, the promisor's right to avoid the contract is limited, and thus the mutuality of the contract is not affected.¹³ The express condition that performance is to be satisfactory to the promisor may, like other conditions, be waived by the promisor, and is deemed to be waived where he accepts and makes use of the performance.¹⁴ In the instant case, there is no doubt but that the con-

131 N. Y. Supp. 831 (1st Dept. 1911) (employment of a designer and cutter of cloaks and suits); *Waladt v. Goodwin Mfg. Co.*, 165 App. Div. 244, 150 N. Y. Supp. 831 (1st Dept. 1914) (master and servant relationship).

⁶ RESTATEMENT, CONTRACTS (1932) § 265.

⁷ *Smith v. Robson*, 148 N. Y. 252, 42 N. E. 677 (1896). But see *Crawford v. Mail & Express Pub. Co.*, 163 N. Y. 404, 57 N. E. 616 (1900).

⁸ *Delano v. Columbia Co.*, 226 N. Y. 660, 123 N. E. 862 (1919); *Ginsberg v. Friedman*, 146 App. Div. 779, 131 N. Y. Supp. 517 (1st Dept. 1911); *Zitlin v. Max Heit Dress Corp.*, 151 Misc. 241, 271 N. Y. Supp. 275 (1934). RESTATEMENT, CONTRACTS (1932) § 265, comment (a): " * * * His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine."

⁹ 1 WILLISTON, CONTRACTS (1924) § 44, n. 16.

¹⁰ *School District of Warsaw v. Sidney School Furniture Co.*, 130 Pa. 76, 18 Atl. 604 (1889).

¹¹ *McCormick Co. v. Ockertrom*, 114 Iowa 260, 86 N. W. 284 (1901); *Frery v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156 (1893); *Williams v. Hirshorn*, 91 N. J. L. 419, 103 Atl. 23 (1918); *Noa Spears Co. v. Inbau*, (Tex. Civ. App. 1916), 186 S. W. 357.

¹² 2 WILLISTON, CONTRACTS (1924) § 677, citing *Sidney School Furniture Co. v. Warsaw School District*, 103 Pac. 76, 18 Atl. 604 (1889).

¹³ *Livesly v. Johnston*, 45 Ore. 30, 76 Pac. 13 (1904). RESTATEMENT, CONTRACTS § 265, comment (a): "A promise conditional upon the promisor's satisfaction is not illusory since it means more than that validity of the performance is to depend on the arbitrary choice of the promisor."

¹⁴ *WHITNEY, CONTRACTS* (2d ed. 1934) § 84, n. 813, citing *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749 (1886), where the defendant made use of the boiler though he claimed he was dissatisfied with plaintiff's performance. But the decision there, did not seem to be based upon a waiver of the condition, but upon the fact that the subject matter of the contract was not dependent upon taste, and even though the contract seemed to require performance to the personal satisfaction of the defendant, it was held that he should be satisfied with such performance as would satisfy a reasonable person. But note that in the instant case, *Wynkoop Hallenbeck Crawford Co. v. Western*

tract expressly required the purchaser's personal satisfaction as to the items to be included in the overhead. Further, there was no waiver or other equity in favor of the seller. The court explains that while overhead charges may not be dependent upon taste or fancy, still experts often disagree as to what items should be included in overhead, and since it is largely a matter of individual judgment, such a contract requiring personal satisfaction should be strictly construed.¹⁵

L. H. R.

CONTRACT—REPLEVIN—ENGAGEMENT TOKENS.—The plaintiff and the defendant were engaged to be married. As a pledge for, or token of, a mutual agreement to marry one another, plaintiff presented defendant with a diamond ring. Plaintiff alleges that he intended the gift as an engagement ring and that it was so accepted by the defendant. Thereafter, plaintiff and defendant by "mutual consent" cancelled and abandoned their contract to marry. In an action in replevin to recover possession of the ring, defendant moved for judgment on the pleadings. *Held*, motion denied; the complaint stated facts sufficient to constitute a cause of action. *Wilson v. Riggs*, 267 N. Y. 570, 196 N. E. 584 (1935).

It is well settled that when the donee breaks the engagement without legal cause, the ring or other consideration must be returned,¹

Union Telegraph Co., 268 N. Y. 108, 113, 196 N. E. 760 (1935), Loughran, J., says: "When literal construction is rejected in cases like this, the reason is usually some consideration of hardship or unjust enrichment."

¹⁵In *Dairymen's League Co-op. Ass'n, Inc. v. Holmes*, 207 App. Div. 429, 438, 202 N. Y. Supp. 663, 672 (4th Dept. 1924), Sears, J., in remarking that "overhead" is a word of vague content, says: "It may be said to include broadly the continuous expenses of a business irrespective of the outlay on particular contracts." *Lytle, Campbell & Co. v. Somers, Fidler & Todd Co.*, 276 Pa. 409, 415, 120 Atl. 409, 411 (1923): " * * * there are many uncertain items fluctuating between the administrative and operative ends, partaking somewhat of both." In the instant case, *Wynkoop Hallenbeck Crawford Co. v. Western Union Telegraph Co.*, 268 N. Y. 108, 112, 196 N. E. 760 (1935), the court says that although strictly there is no element of taste or fancy involved, "the allocation of administrative and overhead charges, to one of many separate undertakings in a single business, is in large degree an affair of individual judgment,—an interpretation which is not a matter of general agreement in the business community." It is submitted that this explanation given by the court, may be the basis for a contention that the instant case merely adds "overhead" to that group of cases whose subject matter is considered as being dependent upon personal taste, fancy or judgment.

¹*Beck v. Cohen*, 237 App. Div. 729, 262 N. Y. Supp. 716 (1st Dept. 1933); *Beer v. Hart*, 153 Misc. 277, 274 N. Y. Supp. 671 (1934); *Humble v. Gay*, 168 Cal. 516, 143 Pac. 778 (1914); *Lumsden v. Arbaugh*, 207 Mo. App. 561, 227 S. W. 868 (1921); *cf. Rosenberg v. Lewis*, 210 App. Div. 690, 206 N. Y. Supp. 353 (1st Dept. 1924), where it was held that where gifts are made