

“THE ENFORCEABILITY OF PRISONER — PRISON OFFICIAL AGREEMENTS”

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1. AGREEMENTS DRAWN UP DURING HOSTAGE-TAKING INCIDENTS

Friday, October 1, 1976: British Columbia Penitentiary —
two hundred prisoners end their rampage of destruction in the
gaol's east wing — prison guard released after being held captive
for eighty hours — agreement signed between the solicitor
general's department and the prisoners' committee.

Thursday, October 28, 1976: Dorchester Penitentiary —
guard John Gabriel and convicted child-killer David William
Threinen held captive by three prisoners — set free after twenty-
seven hours — agreement reached with prison officials.

Saturday, November 6, 1976: Laval Institute, Montreal —
two guards taken hostage by a couple of prisoners — released
after eleven hours — agreement made between inmates and
penitentiary officials.

Sunday, November 7, 1976: Dorchester Penitentiary —
member of prison staff held for two hours by three inmates —
agreement reached with prison officials.

These are but a few of the reported incidents of this kind which occurred at prisons across the country during recent years. Typically, these dramas take place either during a riot situation or through the initiative of a small number of prisoners. But, in either situation, the pattern is the same:¹ once the hostages are taken (the usual targets being guards and the prison 'undesirables' — the stoolies and the sex offenders), the insurgent inmates or the prisoners' leader in the case of a riot draw up a list of grievances and demands, and present them to the prison's administrators. The lives of the hostages are threatened unless these demands are met, or if there is any attempt to regain the prison. A negotiating committee consisting of prison officials, the inmates, and a citizens committee acting as an intermediary is generally formed to consider the demands

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1. See Desroches, "Patterns in Prison Riots", (1974), 16 Canadian Journal of Criminology and Corrections 332.

and to negotiate for the safe release of the captives. Besides an immediate request for food and tranquilizers, a typical negotiation list will include demands for the general improvement of conditions in the gaol, for promises from the prison authorities of no subsequent physical retaliation on the part of prison administrators or guards, and for the transfer of certain inmates to other institutions. In many cases, inmates also demand as one of the conditions for the release of their captives that they be allowed to talk to newspaper reporters and that their grievances be made public. A process of negotiation ensues, and some demands are met, while others are rejected. An agreement is inevitably reached and the hostages are freed.

However, do these bargains constitute enforceable contracts? Given their nature and the atmosphere in which they are drawn up, this is a very important and pertinent question. Would a court of law uphold an action brought to enforce the terms of one of these agreements, or would their implementation ultimately depend upon the willingness of prison administrators? At least insofar as the courts have been concerned, prison officials have been given considerable latitude in administering the daily affairs of Canada's penitentiaries.² If they are bound to adhere to the terms of such agreements, their administrative discretion in this area will certainly be curtailed. Thus, whether they are legally obliged to put these bargains into effect becomes increasingly important, particularly in view of the mounting frequency of these hostage-taking incidents.

Assuming for the moment that such agreements are legally binding, to whom does the obligation to adhere to the terms of these bargains extend? While the prison authorities' right of action might well be characterized as academic (since a court order would not be the appropriate means of compelling a group of prisoners to release their hostages) the same cannot be said for the prisoner who believes he has a bargain and wants to see that its terms are enforced. But is there capacity and privity of contract in these situations such that the inmates could bring an action to force their keepers to comply with the terms of their bargain?

Whereas at one time 'civil death' attached to convicted

2. According to the Ontario Court of Appeal, "At the outset, it must be observed that the passing of a sentence upon a convicted criminal extinguishes, for the period of his lawful confinement, all his rights to liberty and to the personal possession of property, within the institution in which he is confined, save to the extent, if any, that those rights are expressly preserved by the *Penitentiary Act*. Since his right to liberty is for the time being non-existent, all decisions of the officers of the Penitentiary Service with respect to the place and manner of confinement are the exercise of an authority which is purely administrative, provided that such decisions do not otherwise transgress rights conferred or preserved by the *Penitentiary Act*." *Regina v. Institutional Head of Beaver Creek Correctional Camp, Ex Parte MacCaud*, [1969] 1 C.C.C. 371, at p. 377.

persons, it is clear that today a convict has the capacity to enter into a contract, to sue and to be sued.³ This was established by reform in both England and Canada,⁴ although the practice and terminology of civil death remains in force in some jurisdictions within the United States.⁵ By the Canadian *Criminal Code*,⁶ first enacted in 1892, all treasons, felonies and misdemeanors were placed together in one class of indictable offences, and the last traces of attainder and 'corruption of blood' and forfeiture on conviction for a felony or for treason were removed from the law. Today, there are three exceptions to the rule that an inmate has the capacity to contract, all concerning his ability to contract with the Crown. Any person convicted of a fraud upon the government,⁷ of selling or purchasing office,⁸ or of selling defective stores to Her Majesty⁹ no longer has the "capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any person".¹⁰ Thus there is no legal impediment in the way of a prisoner to enter into an agreement with penitentiary officials or to derive the benefits therefrom, provided he has not been guilty of any of the three aforementioned offences.

In theory, then, an inmate may enforce an individual agreement which he makes with prison officials. The same would be true of a group of prisoners, each bargaining for himself, for there is both capacity and privity of contract between the two parties. However if an inmate makes a deal with the penitentiary that confers certain rights or benefits on other inmates in the institution, those others apparently would not be able to enforce the terms of the agreement themselves since only a person who is a party to a contract can sue on it. "No principle is more clearly established in England and Canada than that if A and B make a contract for the benefit of C who is what is called a third party beneficiary, C gets *no rights whatever* under the contract made by A and B for his benefit."¹¹ One way to get around this principle would be to apply the rule in *Beswick v. Beswick*¹² under which the inmate promisee might be able to

3. *Young v. Carter* (1912), 5 D.L.R. 655 (Ont. H.C.) See also *Zawajowska v. Zawajowska*, [1922] 3 W.W.R. 492 (Man. K.B.) and *In re Noble Estate*, [1927] 1 W.W.R. 938 (Sask. Dist. Ct.)

4. See Kaiser, "The Inmate as Citizen: Imprisonment and Loss of Civil Rights in Canada" (1971), 11 *Queen's Law Journal* 208, at pp. 209-210.

5. See Grant et al., "The Collateral Consequences of a Criminal Conviction" (1970), 23 *Vanderbilt Law Review* 939.

6. 55-56 *Vict.*, c. 29, s. 965.

7. *Criminal Code*, R.S.C. 1970, c. C-34, s. 110.

8. *Ibid.*, s. 113.

9. *Ibid.*, s. 376.

10. *Ibid.*, s. 682(3).

11. MacIntyre, "Third Party Rights in Canadian and English Law" (1965), 2 *U.B.C. Law Review* 103.

12. [1968] A.C. 58 (H.L.)

obtain an order for specific performance against the authorities of the institution to compel them to carry out their promise in favour of the inmates affected.

In the alternative, the prisoners themselves might attempt to enforce the agreement by claiming that at the time it was made the one contracting inmate was acting as their agent. However, before any benefit under the 'contract' may be claimed, it would have to be shown that the negotiating prisoner had made it clear to the penitentiary officials that he was acting *on behalf of his companions*, and not merely acting *for their benefit*, since in this latter instance, the prisoners would not be privy to the 'contract'. But, in so acting, this inmate must not have been acting both as principal and agent in the same contract for, as Viscount Haldane stated in the case of *Dunlop Pneumatic Tyre Company Ltd. v. Selfridge and Co. Ltd.*¹³:

Two contracts — one by a man on his own account as principal, and another by the same man as agent — may be validly comprised in the same piece of paper. But they must be two contracts . . . I do not think that a man can treat one and the same contract as made by him in two capacities. He cannot be regarded as contracting for himself and for another *uno flatu*.¹⁴

Thus, in the situation where the one prisoner bargains for certain benefits for himself and for certain others for his companions, it would have to be established that there were in fact two agreements — one made by the prisoner for himself personally, and another worked out on behalf of the other inmates. Failing to prove this, the prisoners could not succeed since they would not be privy to the 'contract' made with the authorities.

It will be a question of fact in each case whether the authority was there for the one inmate to enter into the agreement on behalf of his companions. Failing to establish a pre-existing agency relationship, the prisoners could bring themselves into direct contractual relations with the prison authorities by ratifying the contract made on their behalf. The inmates could then enforce the agreement against the prison administration, for the requirements that the principal be in existence and be competent and ascertainable at the time of the agreement would all seem to be satisfied in the circumstances.

It is not all that uncommon for the negotiations to be conducted by a prisoners' committee on behalf of its con-

13. [1915] A.C. 847 (H.L.).

14. *Ibid.*, at p. 854.

stituents. While this group lacks the formal legal status¹⁵ that for example, a recognized trade union enjoys, and, as such, could not contract or sue in its own name, there is apparently no reason why such a committee could not enter into an agreement as agent for the prisoners since "All persons of sound mind, including infants and other persons with limited or no capacity to contract on their own behalf, are competent to contract as agents."¹⁶ If it could be established, then, that the inmates expressly authorized the committee to bargain for them, they, as principals, could individually bring actions to enforce the terms of the agreement made with the institution. Failing to prove that the agency relationship had previously been created, however, the necessary link could again be made by ratification: each prisoner would adopt the agreement made on his behalf by the committee. This process might be resorted to during a riot situation, where a group of prison leaders step forward to declare themselves to be the prisoners' bargaining unit. In this situation, the court would not be faced with the problem of interpreting whether there are in fact two agreements with the one 'contract', for the committee would be entering into one bargain, which would affect certain or all of the prisoners in a particular institution. Thus, by resort to the law of agency, the vital contractual link would be created, and the prisoners would have the right to claim benefits under the 'contract'.

Generally, where privity and capacity exist, there is a legitimate cause of action for breach of contract, provided, of course, that the agreements on which the actions are founded are, in reality, legally binding. But, in the case of the agreements between the prisoners and penitentiary officials, there is some doubt as to whether they are legal 'contracts'. Do these agreements contain all of the essential elements of a simple contract? While it is assumed that there have been both offer and acceptance, and that form is not a problem here, the other requirements of certainty, intent to create legal relations, and consideration must certainly be examined, as must the whole body of contract law concerned with vitiating elements. Clearly if the agreements are not valid, the prisoners have no cause of action.

An agreement is not a binding contract if it lacks certainty, since the Court cannot enforce an agreement without knowing

15. It would seem that the committee has no legal personality, for such unions are not sanctioned in Canada, there being no statutory authority which would compel the government or prison administrators to recognize them as the legal bargaining agent for a group of prisoners. Neither the *Penitentiary Act* (R.S.C. 1970, c. P-6) nor any other legislation dealing with the care, custody and control of prisoners either explicitly or implicitly authorizes inmates to form unions to act as their bargaining agents.

16. Reynolds and Davenport, editors, *Bowstead on Agency* (13th ed., 1968), at p. 13.

what exactly the agreement entails. It is therefore incumbent on the parties to clearly express their intention and "to find such expressions as will convey their meaning with reasonable certainty to a reasonable man conversant with the affairs of the kind in which the contract is made."¹⁷ Sir John Salmond laid down the test of certainty in the following manner:

What measure of precision must a declaration of will exhibit before it may have contractual efficacy? In other words, with what degree of precision must a declaration describe an obligation in order that it may be said to define it? In a general way the answer is that the declaration must describe the obligation with such particularity as to disclose with reasonable certainty what the party to be bound is by virtue of it required to do and upon what conditions. It must be sufficiently certain to enable the Court to give it a practical meaning. An alleged contract which does not define with at least this measure of precision the obligation or obligations which it purports to create will be void for uncertainty.¹⁸

While certain terms of the prisoners' agreements, such as the undertaking by the authorities to transfer certain inmates to other correctional institutions, would satisfy this test, many of the other obligations accepted by prison officials would seem to be of a most general and uncertain nature. One such example would be the promise to improve conditions within the prison. The press report of the incident at Dorchester in late October, 1976 indicated that officials agreed to investigate the recreational and medical facilities and to look into the practice of segregating some prisoners.¹⁹ If this was the promise actually given by the Dorchester officials, one might well question the nature and extent of the obligations they have assumed. Would a mere inspection of the facilities suffice, or is there implicit in this a promise to make some changes? While it is true that a court will generally be anxious to uphold a contract wherever possible, in such circumstances where the terms of the agreement cannot be determined with reasonable certainty, the Court will come to the inevitable conclusion that there was in fact no contract concluded between the parties. While in some cases, it might prove possible to sever these uncertain terms so as not to affect the entire 'contract' it is questionable what in fact will be left to enforce. This particular 'promise' given by the Dorchester authorities serves to illustrate that prison officials are not too anxious to commit themselves to anything specific, so their obligations could well be expected to be spelled out in very vague terms. After all, these officers are responsible for the running of the penitentiaries, and they would not likely promise

17. Winfield, editor, *Pollock's Principles of Contract* (13th ed., 1950), p. 35.

18. Williams, editor, *Principles of the Law of Contracts* (2nd ed., 1945), p. 192.

19. "2 Hostages are Set Free by Prisoners", *The Globe and Mail* (October 28, 1976), p. 1.

something which did not fit within their administrative scheme and budget. Furthermore, the prisoners who negotiate the agreements are generally not too familiar with all the legal requirements of contract law. As such, one can well expect that there would be problems of certainty in many of these agreements and the courts, without the aid of any guidelines such as custom or practice in similar circumstances, would not likely hold that such ambiguous promises could form the bases of binding contracts.

An agreement is binding in law only if it was made with the intention of creating legal relations. The test of intention is an objective one, as Lord Denning stated in the case of *Gould v. Gould*:²⁰

This question of an 'intent to create legal relations' is not to be resolved by looking into the minds of the parties . . . the parties probably possessed no intention one way or the other. It is not the actual intention of the parties, but the intention which the court imputes to them. It is to be found by looking at what the parties said and did in the situation in which they found themselves and then asking: What would reasonable people think about the provision? Would they regard it as intended to be binding? If it was a firm promise made for good consideration, a reasonable person will, as a rule, regard it as intended to be binding; and the courts will enforce it unless it was a mere domestic or social engagement.²¹

While the prisoners would argue that they intended that their bargain should be attended with legal consequences, it is, as Lord Denning points out, not the intention of the parties, but that which the court imputes to them that is significant.

Two guidelines have generally been used by the courts in resolving the matter of 'intention'. Firstly, in the case of commercial agreements, this intention is presumed to be present. Thus, it may be argued that the agreements in question resemble those made in a commercial sphere, since in both instances the parties are bargaining keenly, are dealing at arm's length, and are not merely relying on each other's honor and good faith. However, the parties to the bargains in question are not negotiating business contracts or employment contracts, nor anything else that is normally connected with business matters.

The second group of cases are those concerning domestic arrangements. It might be suggested that the relationship of prisoner and warden is analogous to that of child and parent, and, as such, their agreements should be placed in this category. Yet, while the Court begins with the assumption that these

20. [1969] 3 All E.R. 728 (C.A.).

21. *Ibid.*, at p. 730.

agreements were not to give rise to legal consequences, this presumption is rebuttable where, for example, the parties are actually dealing at arm's length. Accordingly, in the case of *Merritt v. Merritt*,²² where the parties, a husband and wife, were living separate and apart, Lord Denning decided that they did, in fact, intend to create legal relations. Because of their situation, he held "They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried, it may safely be presumed that they intend to create legal relations."²³ It may be argued that the same elements as in the *Merritt*²⁴ case were present in the negotiations between the inmates and the penitentiary authorities and, accordingly, the requisite intent should be imputed.

However, if there is one type of agreement which the bargains in question would seem to most closely parallel, it is that of collective agreements, where rates of wages and working conditions are negotiated and hammered out between trade unions and employers. After all, most of the grievances which the prisoners have are of the same general nature, for they concern living and employment conditions within the gaol. However, the courts have generally held that such collective agreements are *prima facie* not intended to be legally binding. Geoffrey Lane, J. reiterated this principle in the case of *Ford Motor Co. Ltd. v. Amalgamated Union of Engineering and Foundry Workers*²⁵ as follows:

Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are, in my judgment, not contracts in the legal sense and not enforceable at law. Without clear and express provisions making them amenable to legal action, they remain in the realm of undertakings binding in honour.²⁶

In arriving at his decision, the learned Judge relied mainly on 'the climate of opinion voiced and evidenced by the extra judicial authorities'. These authorities, including various articles, a Royal Commission report, and a government handbook on Industrial Relations indicated that the collective bargaining process was not intended to give rise to legal consequences. It may be argued, though, that the two kinds of agreements are distinguishable and that there is no direct authority for holding that the prisoners' agreements do not give rise to legal conse-

22. [1970] 2 All E.R. 760 (C.A.).

23. *Ibid.*, at pp. 761-762.

24. *Ibid.*

25. [1969] 2 Q.B. 303.

26. *Ibid.*, at pp. 330-331.

quences.

Thus, it seems that it cannot be definitely stated whether or not these agreements do give rise to legal relations. However, it is important to note that the courts do take into consideration other factors in determining whether there was the necessary intent. These factors include the presence of certainty, consideration, and potential problems of enforcing the agreement. Thus, any difficulties found in these areas will cause the court to lean against finding the intent to create legal relations in the circumstances. As indicated earlier, there are problems of certainty with at least some of the provisions of these agreements. Is there at least consideration in these bargains?

In essence, a contract is a bargain struck by an exchange of promises. In enforcing an agreement, the plaintiff must show that he had bought the defendant's promise either by offering a counter-promise or by doing some act in return for it.²⁷ Furthermore, this consideration must move from the promisee; that is, the plaintiff must indicate that he contributed to the bargain on which he is presently suing. What consideration, then, have the inmates furnished in return for the promises they have received from the prison authorities? In most situations, their only part of the bargain is their promise to release their hostages unharmed and to return to their cells. In the riot situations, one might also add their undertaking to stop the destruction of the prison facilities. The prisoners would argue that since a promise for a promise constitutes good consideration, their undertaking would suffice. Alternatively, they might maintain that their act of releasing the captives unharmed would do, since an act done at the request of another is sufficient consideration to support a promise.²⁸ Moreover, the consideration need not even benefit the promisor, so long as the "promise does some act from which a third person benefits and which he would not have done but for the promise".²⁹ Here, the third party would be the hostages, and the benefit would be their release, which, but for the undertaking of the inmates at the express request of the prison administration would not have occurred.

These arguments, however, are likely to be met by the objection that their undertaking does not provide any 'fresh' consideration to support the bargain. While the Courts will not

27. In the words of Sir Frederick Pollock. "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." Winfield. *supra*, footnote 17, at p. 133. This statement was adopted by Lord Dunedin in *Dunlop v. Selfridge*, *supra*, footnote 13, at p. 855.

28. *Sloan v. Union Oil Co.*, [1955] 4 D.L.R. 64 (B.C.S.C.)

29. *Fred T. Brooks Ltd. v. Claude Neon General Advertising Ltd.*, [1932] 2 D.L.R. 45 (Ont. C.A.), at p. 46.

look to the adequacy of the consideration, they still demand that it be sufficient such that it "comprises some element which can be regarded as the price of the defendant's promise."³⁰ As Sir Frederick Pollock stated:

Neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party. It seems obvious that an express promise by A to B to do something which B can already call on him to do can in contemplation of law produce no fresh advantage to B or detriment to A.³¹

Accordingly, the promise of the prisoners to release their captives unharmed would seem to be insufficient consideration, for the authorities already have legitimate grounds to call upon them to do so, since it is a disciplinary offence for an inmate to assault or threaten to assault another person.³² Thus, by promising not to injure their captives they would not be doing any more than what they were in fact, already, legally bound not to do. As for the inmates' offer to return to their cells, the authorities could already legally require the prisoners to do so anyway, since the inmates are statutorily obliged to adhere to the rules and regulations of the institution.³³ Similarly, the promise to cease their destruction of the prison would also be insufficient consideration, since the *Penitentiary Service Regulations*³⁴ makes it an offence to damage "government property or the property of another person"³⁵. As such, the prisoners could already be called upon to stop their rampage. Clearly, these undertakings do not provide any 'fresh' consideration to support the bargain.

Aside from the apparent lack of consideration, one would expect that these agreements would at any rate not be enforced, due to their inherent lack of true consent (such consent being basic to every contract) on the grounds of duress or undue influence. Yet, such is not the case. While the 'threat' element of 'duress' is certainly present in the circumstances, the courts have limited the scope of the doctrine by requiring that the subject of the threatened violence must be the contracting party himself, his wife, parent, child or other close relative.³⁶ Prison guards and inmates of an institution would clearly not fit within this category. Nor is this the kind of situation to which the Courts have applied the doctrine of undue influence.³⁷

30. Cheshire, Fifoot and Furnston, *The Law of Contracts* (8th ed., 1972), at p. 77.

31. Winfield, *supra*, footnote 17, at p. 146.

32. *Penitentiary Service Regulations*, S.O.R./62-90, 2.29(b).

33. *Prisons and Reformatories Act*, R.S.C. 1970, c. P-21, s. 12.

34. S.O.R./62-90.

35. *Ibid.*, 2.29(e).

36. *Seear v. Cohen* (1881), 45 L.T. 589 (Q.B.D.).

37. See Cheshire, *supra*, footnote 30, at pp. 283-287.

It is clear though that on public policy grounds, a bargain based upon such promises will not be upheld. The courts will not tolerate the use of black-mail in securing agreements. In discussing these kinds of situations, Sir John Salmond articulated the argument in the following way:

Presumably, however, in many cases of this kind the contract would be held void not for want of good consideration, but as illegal or opposed to public policy. It can hardly be supposed that the law would recognize and enforce a contract in which the consideration was nothing more than a promise not to commit a criminal offence, or nothing more than the act of refraining from such an offence. A contract that if A will not assault or libel B, C will pay A £100, is presumably invalid as contrary to public policy. To enforce such contracts would enable persons to bargain for remuneration for not violating the law, or to extract money by threats to do so.³⁸

These agreements entered into under threat of violence, where the lives of human beings are placed in jeopardy and property is being destroyed would clearly be repugnant and not enforceable.

One of the more attractive concessions which the prisoners may demand of the authorities is the promise of total amnesty. While it is one demand that is never met,³⁹ if it should be agreed to it would be void on the grounds of public policy. In these circumstances, the prisoners would clearly be liable for any number of criminal offences, such as forcible confinement or kidnapping.⁴⁰ As Lamont, J. said in the case of *Pachal v. Schiller*,⁴¹ "An agreement to stifle a prosecution, or which has a tendency, however slight, to affect the due administration of justice, is illegal, and any obligation assumed by a person not previously liable therefore as a result of such agreement cannot be enforced."⁴²

The final problem in attempting to enforce these bargains, relates to the remedy which the inmates would be seeking. In these circumstances, where damages would be inappropriate, the prisoners would likely be asking for specific performance and possibly some form of injunction (for example to prevent the authorities from physically punishing them). Both of these remedies, however, are equitable, and so are available only at the court's discretion. Thus the prisoners would be confronted by yet another insurmountable hurdle — that of convincing the court that they are deserving of its discretion.

38. As quoted in Goodhart. "Blackmail and Consideration in Contracts" (1928), 44 L.Q.R. 436, at p. 441.

39. See Morton. "What really happened at Kingston?" *The Globe and Mail* (April 21, 1971), p.7.

40. *Criminal Code*, R.S.C. 1970, c. C-34, s. 247.

41. (1914), 20 D.L.R. 851 (Sask. S.C.).

42. *Ibid.*, at p. 854.

The first and perhaps most formidable obstacle in the way of the prisoners is the requirement that 'he who comes to equity must come with clean hands'. In discussing the equitable jurisdiction of the courts, one trial judge stated:

The discretion must not be exercised arbitrarily or capriciously, for it is a judicial discretion, to be exercised on settled and fixed rules, and, in the exercise of such judicial discretion, the Court can refuse to direct specific performance of even a valid contract. The Court has regard to the contract of the plaintiff and to circumstances outside the contract itself, and, as stated by Vice-Chancellor Plumer in *Cloves v. Higginson*, 1 V. & B. at p. 527: "If the defendant can shew any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of specific performance, a Court of Equity, having satisfactory information upon that subject, will not interpose."⁴³

Clearly the prisoners' hands are soiled and no court is going to exercise its equitable jurisdiction in these circumstances.

Specific performance will not be awarded to a plaintiff if he has himself been in breach of contract.⁴⁴ Thus far it has been assumed that the prisoners lived up to their end of the bargain, and released their hostages unharmed. If, however, one captive was injured, they would be in breach, and would therefore be disentitled to the remedy.

Furthermore, a judge will not order specific performance where "the performance cannot be ensured without the constant superintendence of the court."⁴⁵ This is surely one of those instances where the court would have to be continually checking to see whether its order was in reality being carried out: i.e., whether the appropriate changes were being made by the prison officials, whether there were any acts of physical retaliation by the penitentiary staff, and so on. Thus, an order for specific performance would not be made. This accords with the pattern that has generally been followed by the courts in not interfering with prison officials. In discussing this practice, Ronald Price suggested:

As the more abundant American case law demonstrated, the courts have adopted a variety of rationales for declining to take up claims of inmates. Various they have held: that there has been a virtually total delegation of authority by the legislature to correctional authorities, and the entire responsibility for determining an inmate's circumstances during the term of his sentence is entrusted to the professional judgment of correctional personnel; that matters dealing with the manner in which a sentence is to be served are altogether a matter of "grace" and "favour", or of "privilege" rather than "right", and that an inmate can only make "requests", not demands based on claim of "right"; that correctional decisions are not "judicial", but "administrative" and "discretionary", and not subject to judicial review; that

43. *McCready v. Clark and Wootton* (1910), 14 W.L.R. 480 (B.C.S.C.) per Gregory, J., at p. 484.

44. See, for example, *Australian Hardwoods Pty. Ltd. v. Railways Commissioners*, [1961] 1 All E.R. 737.

45. *Cheshire*, *supra*, footnote 30, at p. 608.

judicial interference will subvert prison discipline; that courts lack the expertise to involve themselves in correctional decisions; and that intervention could involve the courts in judicial supervision of every aspect of prison life.⁴⁶

In conclusion, it seems quite apparent that these agreements made between the prisoners and the prison officials will not be afforded the binding status of a contract, because of the many inadequacies and difficulties which they present. Not only are there problems of enforcement and in finding all the necessary ingredients of a contract, but their very nature and history would cause these bargains to be set aside. They are, in reality, legal nullities. This is not to say, however, that these agreements will never be carried out since there are other non-legal considerations which operate to bind the prison authorities to their promises.

2. BARGAINS REACHED DURING PEACEFUL DEMONSTRATIONS

The hostage-taking ploy is not the only weapon used by prisoners to attain concessions from their jailers. Occasionally inmates resort to less violent means such as engaging in peaceful demonstrations or work slowdowns, and agreeing to return to work or to their cells upon certain promises being made by the authorities. However, while there are not the same public policy considerations operating against agreements made in these circumstances, they too, are legally inefficacious. Just as with bargains reached during hostage-taking incidents, the prisoners cannot be seen to have paid the price of the authorities' undertaking. At least insofar as federal prisoners are concerned, they are statutorily required to work,⁴⁷ so a promise on their part to do so does not provide any 'fresh' consideration for the bargain. Moreover, by engaging in even a peaceful form of protest, they are, presumably, in breach of a number of prison regulations including disobeying an order of a penitentiary officer,⁴⁸ refusing to work,⁴⁹ leaving work without permission of a penitentiary officer,⁵⁰ and possibly engaging in some act "that is calculated to prejudice the discipline or good order of the institution".⁵¹ So, by undertaking to return to work and to restore 'normal' conditions within the jail, the inmates

46. "Bringing the Rule of Law to Corrections" (1974), 16 *Canadian Journal of Criminology and Corrections* 209, at pp. 210-211.

47. *Penitentiary Service Regulations*, S.O.R./62-90, 2.25(1).

48. *Ibid.*, 2.29(a).

49. *Ibid.*, 2.29(c).

50. *Ibid.*, 2.29(d).

51. *Ibid.*, 2.29(k).

are doing no more than what the law requires of them — in other words, no new consideration is flowing from them to the authorities. Thus, even these agreements would be unenforceable in a court of law.

3. AN ENFORCEABLE CONTRACT?

Are there any situations in which a bargain struck between inmates and penitentiary officials will constitute a valid contract? Clearly, certain elements would be required in order to ensure the enforceability of such an agreement: there can be no violence or threatened violence in the history of such an agreement; the terms of this 'contract' must be clear so that it is obvious what obligations each party has assumed; the authorities' undertaking should not be the type which will require the constant superintendence of the court (again, since the inmates would be seeking specific performance of the agreement or injunctive relief); and the prisoners should be able to point to negotiations which occasioned the agreement and ideally they should have evidence of having bargained keenly with the penal officers. The one ingredient which undoubtedly would be the most difficult for the inmates to furnish is 'fresh' consideration. After all, what do they have to bargain with? What can they offer as the price for the prison officials' promises? While it would be somewhat of an exaggeration to suggest that a citizen upon entering jail becomes 'a slave of the state'⁵², it is true that many of his liberties, privileges and rights are temporarily suspended. He becomes a 'prisoner' and must abide by the rules and regulations of the institution. These rules and regulations greatly restrict his 'bargaining power'.

Yet the inmates must still provide consideration for the bargain. Even the presence of the agreement in the form of a sealed document would not be of any help to the prisoners in this situation, since the rule of deeds not requiring consideration does not extend to the granting of equitable remedies of a gratuitous agreement under seal. As Egbert, J. stated in *Chilliback v. Pawliuk*⁵³ "The mere presence of a seal cannot 'import' consideration, or raise an irrebuttable presumption of a consideration which did not, in fact, exist. The Court, in the exercise of its equitable jurisdiction may look at the true bargain between the parties, and refuse to enforce an otherwise unenforceable agreement merely because it is under seal."⁵⁴ Thus, an inmate

52. In 1871, the Supreme Court of Virginia ruled that a prisoner "has, as a consequence of his crime not only forfeited his liberty but all his personal rights except those which the law in its humanity affords him. He is for the time being a slave of the state". *Ruffin v. Commonwealth* 62 Va. 790. at p. 796.

53. (1956), 1 D.L.R. (2d) 611.

54. *Ibid.*, at pp. 616-617.

who was well-versed in the law of contract, could not simply pull out a seal upon completion of a written contract with his keepers, place it on the document and in so doing, avoid the requirement of consideration.

The prison regulations do however, provide the inmate with at least one bargaining weapon. With the exception of those persons who perform vital administrative tasks or who are called upon to meet an emergency, inmates of federal prisons are not required to work on Sundays and statutory holidays.⁵⁵ Therefore, a convict in offering to work on even one Sunday or a statutory holiday, when the nature of his job would not otherwise require him to do so, would be paying the price for the authorities' promises.

However, the ability of prisoners to provide good consideration is not limited to this one instance, since the Courts do not require that the consideration be adequate. This rule makes it possible to satisfy the doctrine of consideration, by making a gratuitous promise binding by providing a nominal consideration. All the prisoners would have to do to convert their unenforceable agreement into a binding contract is to provide the penal officials with a 'peppercorn' such as a dollar bill or a promise to forfeit their canteen rights for a day. Provided that all of the other ingredients are present, the authorities could be legally bound to carry out the terms of these agreements.

Thus, while agreements reached during prison hostage-taking incidents and during peaceful demonstrations are clearly not binding, it is conceivable that some prisoners may reach an enforceable contract with their keepers. The question of the unenforceable agreement into a binding contract is to provide discretion of a judge, the one independent variable in the equation. The inmates would be applying to the court for the exercise of its equitable jurisdiction. As Ronald Price has written, the courts have found "a variety of rationales for declining to take up claims of inmates."⁵⁶ Yet the litigation flood-gates are opening slowly,⁵⁷ and the day may yet come when the administrators of a penal institution may be required by court order to honour a contract made with its inmates.

55. *Penitentiary Service Regulations*, S.O.R./62-90, 2.25(2).

56. *Supra*, footnote 45, at p. 210.

57. See *ibid.*, at p. 211.

