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Arthur L. Harding

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# CONTRACTS

by

Arthur L. Harding\*

**D**URING the year almost all the reported contract decisions were of routine nature, but there were important decisions with reference to donee beneficiary contracts, a significant excursion into promissory estoppel, and noteworthy developments concerning mutuality of obligation in bilateral agreements.

## I. DONEE BENEFICIARY CONTRACTS

It is well settled that where *A* and *B* enter into a contract in which *B* promises to render a stated performance to *C*, not a party to the transaction, there usually will be created in *C* a right to sue *B* directly for failure to render the promised performance.<sup>1</sup> This is true whether the contract be of the creditor beneficiary type (where *A*'s purpose is to discharge a real or claimed obligation owed by him to *C*), or of the donee beneficiary type (where *A*'s purpose is to make a gift to *C*).<sup>2</sup> However, difficult questions may arise as to just when the rights in *C* so accrue as to make them invulnerable to an attempted rescission by *A* and *B*, or, in the donee type case so as to make the right in *C* survive the death of *A*. In the creditor beneficiary case it is clear that the beneficiary's rights are not so "vested" until he knows of and has assented, expressly or tacitly, to the agreement.<sup>3</sup> Some would postpone the vesting until the beneficiary has changed his position with reference to his original claim against *A* in reliance on *B*'s promise.<sup>4</sup> In the donee-type case it has been urged, following the possible analogy of delivery in escrow of a gift chattel without the knowledge of the donee, that the donee's assent to *B*'s promise should be presumed and that his rights in the contract should be indefeasible from the moment it is made.<sup>5</sup> This result is uniformly reached in the case of a life insurance policy where a

\* A.B., University of Arkansas; J.D., University of Michigan; S.J.D., Harvard University. Professor of Law, Southern Methodist University.

<sup>1</sup> This is an American doctrine originating in *Lawrence v. Fox*, 20 N.Y. 268 (1859).

<sup>2</sup> *Lawrence v. Fox* was a creditor beneficiary case. For a considerable period many courts, troubled by this departure from English common law, drew what were thought to be important distinctions between creditor and donee cases and worked out different rules as to enforceability. Today the general trend is to treat the two types alike as concerns the basic issue of enforcement by the beneficiary.

<sup>3</sup> *Hill v. Hoeldtke*, 104 Tex. 594, 142 S.W. 871 (1912). Because the creditor's assent to the assumption agreement has an effect on his future remedies against his original debtor, such an assent cannot be presumed.

<sup>4</sup> 2 WILLISTON, CONTRACTS § 397 (rev. ed. 1936), with the qualification that the rescission be not vulnerable under the statute of fraudulent conveyances. See RESTATEMENT, CONTRACTS § 143 (1932).

<sup>5</sup> 2 WILLISTON, CONTRACTS § 396 (rev. ed. 1936).

beneficiary is named without his knowledge and where no power to change beneficiaries is reserved to the insured, and it is held that the rights of the beneficiary are indefeasible from the moment the contract of insurance is made.<sup>6</sup> The few donee-type cases other than life insurance involving this issue are divided.<sup>7</sup> The *Restatement of Contracts*, section 142 would make the donee beneficiary's rights indefeasible from the instant of contracting, but not all authorities agree.<sup>8</sup>

This problem was presented in *Quilter v. Wendland*.<sup>9</sup> There Mrs. Lutz had deposited money in a building and loan association and had opened three separate accounts, each in her name and that of one of the three named beneficiaries as joint owners with right of survivorship. Mrs. Lutz received three passbooks and three signature cards which were supposed to be signed by herself and the named joint owners and returned to the association. Thereafter Mrs. Lutz received the dividends on the accounts; she died with the passbooks and the signature cards still in her possession. Although one of the named beneficiaries had signed the wrong card, there was nothing in the opinion to indicate that the other beneficiaries had ever heard of the accounts. Quite properly, the court held that the contract between Mrs. Lutz and the association by which the latter promised to pay money to the named beneficiaries under the terms stated was a donee beneficiary contract. Had the signature cards been signed by the beneficiaries and returned to the association, the rights of the beneficiaries would have been indefeasible.<sup>10</sup> If the analogy be pertinent, this would seem to have satisfied the requirements for creditor beneficiary contracts formulated in *Hill v. Hoeldtke*.<sup>11</sup> But these cards had not been signed and returned, and all the justices agreed that this fact, plus Mrs. Lutz' control of the dividends and her retention of the passbooks, effectively preventing the beneficiaries from drawing on the accounts in her lifetime, would defeat any argument of executed gift inter vivos. But this did not prevent a finding of an enforceable donee beneficiary contract. The holding that a donee beneficiary does acquire indefeasible rights in a contract of which he has no knowledge and to which he has not assented brings the Texas court into line with the *Restatement of Contracts*, section 142.

<sup>6</sup> VANCE, INSURANCE §§ 106-08 (3d ed. 1951). See *Washington Life Ins. Co. v. Berwald*, 97 Tex. 111, 76 S.W. 442 (1903).

<sup>7</sup> Holding donee's interest to be indefeasible: *Richards v. Gilmore's Estate*, 140 Neb. 165, 299 N.W. 365 (1941); *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 404 (1903). *Contra*, *McCulloch v. Canadian Pac. R.R.*, 53 F. Supp. 534 (D. Minn. 1943).

<sup>8</sup> Page, *The Power of the Contracting Parties To Alter a Contract for Rendering Performance to a Third Person*, 12 Wis. L. REV. 141 (1937), followed in *Lehman v. Stout*, 261 Minn. 384, 112 N.W.2d 640 (1961).

<sup>9</sup> 403 S.W.2d 335 (Tex. 1965), Note, *Joint Bank Account as a Third Party Beneficiary Contract in Texas*, in this issue. For further discussion see Galvin, *Wills and Trusts*, this Survey at footnote 49.

<sup>10</sup> *Krueger v. Williams*, 163 Tex. 545, 359 S.W.2d 48 (1962).

<sup>11</sup> 104 Tex. 594, 142 S.W. 871 (1912).

## II. CONSIDERATION

*Promissory Estoppel.* It has been almost a half-century since the drafting of section 90. of the *Restatement of Contracts* which authorizes the courts, where necessary to avoid injustice, to enforce what otherwise would be a gratuitous promise, upon which the promisee foreseeably relied to his substantial detriment or injury.<sup>12</sup> The concept of enforceability of such a promise is, in at least some cases, as old as the common law action of assumpsit. However, it largely was lost sight of in the early nineteenth century when judges over-generalized consideration in contract to include only the single concept of detriment incurred *in exchange for* the promise sued on.

Texas courts long have recognized the enforceability of promises in the nature of charitable subscriptions where the charity, in reliance on the promise, expands substantial sums or incurs substantial liabilities;<sup>13</sup> but they have had little experience in the concept now labeled promissory estoppel as applied to business situations.<sup>14</sup> In *Johnson v. Breckenridge-Stephens Title Co.*,<sup>15</sup> where the doctrine well might have been applied, the possibility was ignored. However the Texas courts have chosen to base the irrevocability of short-term exclusive real estate listings on the injurious misreliance by the broker, as evidenced by expense in advertising and showing the property,<sup>16</sup> rather than upon the available alternative basis of an implied promise by the broker to employ reasonable diligence to sell the property.<sup>17</sup>

In *Wheeler v. White*,<sup>18</sup> the defendant promised the plaintiff property

<sup>12</sup> RESTATEMENT, AGENCY (SECOND) § 378 (1958) advanced a similar position applicable to nonfeasance by a gratuitous agent or bailee on whose promise the principal or bailor foreseeably had relied to his detriment.

<sup>13</sup> The variety of approaches is suggested in *Thompson v. McAllen Federated Woman's Bldg. Corp.*, 273 S.W.2d 105 (Tex. Civ. App. 1954).

<sup>14</sup> Another prototype is found in the equitable enforcement of promises to make a gift of land, followed by possession and the making of substantial improvements by the promisee. *Murphy v. Stell*, 43 Tex. 123 (1875). See Pound, *Consideration in Equity*, 13 ILL. L. REV. 667 (1919).

<sup>15</sup> 257 S.W. 223, 226 (Tex. Comm'n App. 1924). The defendant's counterclaim set up that he was contemplating entry into the abstract and title business; that the plaintiff promised to permit the defendant to make use of the plaintiff's abstract plant in the conduct of that business, in return for thirty per cent of the fees received by the defendant for abstracts prepared in the plant; that as contemplated by the parties the defendant expended a considerable sum in establishing his abstract office; and that the plaintiff after a short time denied the defendant further access to his premises. The counterclaim was held to state no cause of action. The opinion is quite unsatisfactory in that it refers to the defendant's "secret and uncommunicated intention" in face of the allegation that the defendant's misreliance and injury were "contemplated" by the parties. Cf., *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948). See also note 27 *infra*.

<sup>16</sup> See *Strother v. Ryon*, 239 S.W.2d 858 (Tex. Civ. App. 1951); *Holms v. Holik*, 238 S.W.2d 260 (Tex. Civ. App. 1951).

<sup>17</sup> The basis of such an implied promise is stated by Judge Cardozo in *Wood v. Lucy, Lady Duff Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). See *Eastern Woodworks v. Vance*, 206 Md. 419, 112 A.2d 231 (1955). This theory of implied promise was employed in enforcing a promise to purchase the output of the promisee's business. *Portland Gasoline Co. v. Superior Marketing Co.*, 150 Tex. 533, 243 S.W.2d 823 (1952).

<sup>18</sup> 398 S.W.2d 93 (Tex. 1965), 20 Sw. L.J. 656 (1966).

owner that he would procure a loan for purposes of redevelopment. While the amount of the loan, the plan of repayment in 180 monthly installments, and the interest at not more than six per cent per annum, were all specified in their agreement the promise to procure the land was still unenforceable for uncertainty under the perhaps overly exacting standards of the Texas decisions. The plaintiff alleged that in reliance on this promise, indeed at the urging of the defendant, he razed the revenue-producing structures on the land, and that the defendant failed to procure the loan. The court of civil appeals affirmed the trial court's order sustaining special exceptions to the petition for uncertainty and dismissing the action. The supreme court, reversing, held that the exceptions properly were sustained for uncertainty, but that the plaintiff stated a cause of action under the *Restatement*, section 90 on the basis of his misreliance on the defendant's promise. The court's broad approval of the promissory estoppel doctrine is gratifying and the result is sound. One may wonder, however, whether *Wheeler v. White* is actually an example of the enforcement of a contract under that doctrine.<sup>19</sup> The vice of the agreement alleged was not want of consideration but was uncertainty. Had the promise met the Texas standard of certainty<sup>20</sup> there was ample consideration to support it, in that the defendant was to receive a flat fee and a percentage of rentals in return for the financial service promised. Promissory estoppel does not supply the elements of certainty, however, and it causes one to wonder here just what the court has done?

The line between contract and tort in this area is tenuous at best.<sup>21</sup> It has long been held that an action in the nature of common law deceit would lie where one has caused injury by making a promise which he did not intend to perform or which he knew he would be unable to perform.<sup>22</sup> Even where the promise was unexceptionable when made, tort liability has been visited on a promisor who gives repeated assurance of forthcoming performance,

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<sup>19</sup> A more nearly typical situation is *Evers v. Arnold*, 210 S.W.2d 270 (Tex. Civ. App. 1948), where the purchaser of land lost his \$500 down payment because of his reliance on the real estate broker's gratuitous promise to procure a purchase money loan on the property.

<sup>20</sup> In his concurring opinion Justice Greenhill makes the quite pertinent observation that the supererogatory (my word, not his) standard of certainty invoked in *Wheeler v. White*, while perhaps defensible in the context of specific performance where most of the cases originated, is hardly necessary in ordinary actions for damages. In this case the precise uncertainty was whether the 180 equal monthly payments were to include both principal and interest, in the manner of the ordinary home loan, or whether there were to be 180 equal monthly payments of principal, with six per cent interest on the diminishing balance to be paid in addition. Such an uncertainty hardly seems relevant in determining the issue of breach where the defendant has done nothing under his promise. Its effect if any on the computation of damages would be minimal. One can only be distressed at those opinions which suggest that because a minor item of uncertainty in the promise renders the court unable to say with assurance whether the damages are \$100 or \$120, the court should deny any recovery at all. Such an uncertainty can always be cast in the posture most unfavorable to the promisee and minimum damages computed accordingly.

<sup>21</sup> Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951).

<sup>22</sup> *Chicago, T. & M. C. R.R. v. Titterton*, 84 Tex. 218, 19 S.W. 472 (1892).

after he has learned that he will be unable to render that performance.<sup>23</sup> Justice Smith in *Wheeler v. White* stresses the fact that the defendant continued to give assurances in the face of mounting difficulty in obtaining the loan, and urged the razing of the old building.<sup>24</sup> He states that the "binding thread" of promissory estoppel is a promise "designedly made to influence the conduct of the promisee, tacitly encouraging the conduct" which resulted in economic loss. There is no such limitation on the doctrine of promissory estoppel in contract. The *Restatement* speaks of a promise "which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee . . ." Wilful deceiving or "design" has nothing to do with it. Justice Smith's language suggests the intentional or reckless deceiver, a tortfeasor.

There is also a problem of damages. If we accept the proposition of the *Restatement of Contracts* that promissory estoppel in effect substitutes for consideration and makes enforceable what otherwise would be a gratuitous promise, the successful plaintiff should recover ordinary contract damages. Included would be such loss of profits as would fall within the contemplation rule of *Hadley v. Baxendale* and be provable with the requisite certainty.<sup>25</sup> This view has not gone unchallenged and there have been suggestions that justice in such a case requires only that the promisee be returned to the *status quo ante*, that he be compensated only for the actual loss or injury suffered by reason of his misreliance; in other words that tort damages only should be allowed.<sup>26</sup> The Texas court limited the plaintiff to tort-style damages without discussing the basic problem,<sup>27</sup> but asserting the interesting reason that "the promisee in such cases is partially responsible for his failure to bind the promisor to a legally sufficient contract."<sup>28</sup>

<sup>23</sup> *Charpentier v. Socony-Vacuum Oil Co.*, 91 N.H. 38, 13 A.2d 141 (1940).

<sup>24</sup> 398 S.W.2d at 95.

<sup>25</sup> § WILLISTON, *CONTRACTS* § 1338 (rev. ed. 1937).

<sup>26</sup> Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52 (1936).

<sup>27</sup> Reliance was almost exclusively on *Goodman v. Dicker*, 257 S.W. 223 (Tex. Comm'n App. 1924). Here the plaintiff, relying upon defendant's gratuitous promise to make plaintiff a franchised dealer in Emerson radios, incurred considerable expense in preparing a store for opening and in hiring sales personnel, only to have the defendant refuse the franchise. It was held that he was entitled to be reimbursed for his money outlay, but could not recover loss of anticipated profits, even on what would have been the initial stock of merchandise. The authority of this case is weakened by the fact that plaintiff appeared unable to establish with any certainty the probable amount of such profits. See *Chrysler Corp. v. Quimby*, 1 Storey 264, 144 A.2d 123 (Del. 1958), rejecting *Goodman v. Dicker* as an unreasonable restriction upon the promissory estoppel doctrine, and allowing recovery of anticipated profits. The tort element (*i.e.*, wilful deception) was much stronger in *Quimby* than in *Wheeler v. White*. For a case where the facts were similar, *i.e.*, misreliance based on uncertainty, and the decision was based on § 90 of the *Restatement* and tort damages were awarded, see *Hoffman v. Red Owl Stores*, 26 *Wisc. 2d* 638, 133 N.W.2d 267 (1965), 65 *MICH. L. REV.* 350 (1966).

<sup>28</sup> In *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933) Judge Learned Hand used this same argument to justify refusal to employ the promissory estoppel principle at all in a business transaction negotiated at arms' length, suggesting that the doctrine should be limited to such things as charitable subscriptions and family settlements. *But see N. Litterio & Co. v. Glassman Const. Co.*, 319 F.2d 736 (D.C. Cir. 1963). Few cases indicate an inclination to follow Judge Hand's suggestion.

In another case, contract liability was found in what has become a commonplace application of the promissory estoppel doctrine—where an employer without bargaining publishes a promise of vacation, retirement pay, or holiday bonuses for the benefit of his employees.<sup>29</sup> Enforcement is based upon the foreseeable and desired result that employees remain on the job in order to obtain this added benefit.<sup>30</sup>

*Mutuality.* In 1937 the Texas Legislature authorized the establishment of an additional hospital for the mentally ill, directing that it be established at some place west of the 100th meridian at a site to be selected by the State Board of Control on the basis of several factors listed, including the supply of water.<sup>31</sup> The Board entered into negotiation with the City of Big Spring and citizens of Howard County, and located the hospital at Big Spring. As a part of the transaction, the Board entered into an agreement with the city, by which the city was to supply water needed by the hospital to a maximum of 300,000 gallons per day at a rate of ten cents per thousand gallons, for "as long as the State of Texas shall in good faith maintain and operate said hospital on said site." As its cost of supplying water increased the city became increasingly disenchanted with the agreement, and in 1961 sought legislative relief on the ground that its costs were at least double the price received. The legislature authorized the renegotiation of the contract,<sup>32</sup> but this was prevented by a ruling by the Attorney General that renegotiation would have to be based on some new and adequate consideration to the Board for release of the existing contract.<sup>33</sup> The legislature then authorized a declaratory judgment suit against interested state officials to determine the validity of the 1937 agreement.<sup>34</sup> The city brought suit for a declaration of nullity, arguing (1) that the contract was beyond the power of the Board to make, and (2) that long-term contracts by governmental agencies unconstitutionally impaired the governmental powers of such agencies. As a further argument it was urged that the 1937 agreement was for an indefinite period and was therefore terminable at will by either party, or, in the alternative, that if the contract be construed to be for a reasonable time, such a reasonable time had expired and the agree-

<sup>29</sup> *Danaho Ref. Co. v. Dietz*, 398 S.W.2d 307 (Tex. Civ. App. 1965).

<sup>30</sup> *Schofield v. Zion's Co-Op. Merchantile Co.*, 85 Utah 281, 39 P.2d 342 (1934). More strikingly, this result has been reached even where the published announcement stated that it was intended to create no legal obligation. *Mobley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N.E. 697 (1935); *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N.W. 385 (1936), 34 MICH. L. REV. 700, 36 COL. L. REV. 996. *But see Spooner v. Reserve Life Ins. Co.*, 47 Wash. 2d 454, 287 P.2d 735 (1955).

<sup>31</sup> Texas Acts 1937, 45th Leg., ch. 388, now TEX. REV. CIV. STAT. ANN. art. 3185a (1952).

<sup>32</sup> Texas Acts 1961, 57th Leg., p. 1249. Previously the Attorney General had ruled that the contract was valid and effective, and that the Board for Texas State Hospitals and Special Schools, as successor to the State Board of Control, was without authority to renegotiate it. OPS. TEX. ATT'Y GEN. NO. WW-689 (1959).

<sup>33</sup> OPS. TEX. ATT'Y GEN. NO. WW-1081 (1961). This opinion rests largely upon the opinion in *Rhoads Drilling Co. v. Allred*, 123 Tex. 229, 70 S.W.2d 576 (1934).

<sup>34</sup> Texas Acts 1962, 57th Leg., p. 233.

ment was now terminable at will. The lower courts held the contract to be valid and subsisting, and, in *City of Big Spring v. Board of Control*,<sup>35</sup> the supreme court affirmed. On the ultra vires issues the court held that the power of the Board to contract for water necessarily was to be implied from the terms of the 1937 statute, that the Board as a managing agency had authority to make long-term contracts for necessary supplies, and that the city in its proprietary capacity had power to make long-term contracts for the sale of its water. As to these points there was a vigorous dissent, the validity of which is not commented on here. Moving to the contract point, the court held (1) the contract was not for an indefinite term, but was for so long as the state should operate the hospital, a determinable period; (2) that the express period precludes implication of a term of reasonable time; and (3) that there was a sufficient consideration at the outset when the Board located the hospital as desired by the city.

That there was consideration for the contract seems clear. Mutuality of obligation on a bilateral contract does not require that the burdens on the two sides be equal or co-extensive, but only that the performance on each side involves a legal detriment to the respective promisors, and that the performances be in exchange for each other. A buyer may agree to buy and a seller agree to sell so much of certain goods as the buyer may require in his business for a stated time. True the buyer does not promise to buy anything, but to perform his promise either he must refrain from buying from others and buy from the seller, or he must discontinue his business or so modify it as to eliminate his need for this item. No matter which way he may turn there is legal detriment, and there is sufficient consideration.<sup>36</sup> Some courts reinforce these cases by finding an implied promise on the part of the buyer to make at least an honest effort to have a requirement for the goods of the type specified.<sup>37</sup> Thus there were two arguments supporting the Board. Locating the hospital could be consideration for a valid option to purchase water at the agreed price. Also the promise by the Board was not illusory; it did not leave its freedom of choice unfettered. It had two choices, either to buy water from the city, or to close the hospital.<sup>38</sup>

A bothersome question remains. With continuing inflation it may be as-

<sup>35</sup> 404 S.W.2d 810 (Tex. 1966). For further discussion see Webster and FitzGerald, *Municipal Corporations*, this Survey at footnote 56.

<sup>36</sup> *Brightwater Paper Co. v. Monadnock Paper Mills*, 161 F.2d 869 (1st Cir. 1947); *McMichael v. Price*, 177 Okla. 176, 58 P.2d 549 (1936); Comment, 78 HARV. L. REV. 1212 (1965).

<sup>37</sup> As in *Portland Gasoline Co. v. Superior Marketing Co.*, 150 Tex. 533, 243 S.W.2d 823 (1951), where the promise was to buy the output of a certain butane plant, and the court found an implied promise on the part of the seller to employ reasonable diligence to have an output. This does no harm, but it may be doubted whether such an implication is essential to the enforcement of the agreement.

<sup>38</sup> Obviously this case satisfies the additional requirement imposed by some courts that, at the time of making of the contract, there must be a reasonable probability that the purchaser will have a requirement for a quantity of the commodity. *G. Loewus & Co. v. Vischia*, 2 N.J. 54, 65 A.2d 604 (1949), 48 MICH. L. REV. 362 (1950); *Pessin v. Fox Head Waukesha Corp.*, 230 Wis. 277, 282 N.W. 582 (1938).



sumed that ultimately a time will come when the Board no longer desires to hold the city to its ten cent price. If the Attorney General's opinion be sound, the much disputed rule of *Foakes v. Beer*,<sup>39</sup> is engrafted upon article III, sections 53 and 55 of the Texas Constitution,<sup>40</sup> and would prevent the legislature from authorizing the Board to pay more than ten cents as provided in the 1937 agreement. It is likely that this water-supply contract falls within the definition provisions found in section 2-105 of the Uniform Commercial Code.<sup>41</sup> If this be true, would it be constitutional to apply to this situation section 2-209 of that code which eliminates the requirement of consideration for the modification of a contract for the sale of goods, at least in good faith, non-extortionate transactions?

It has been said that in bilateral contracts there must be mutuality of obligation; that if either party can perform his promise strictly according to its terms without incurring legal detriment of any sort in so doing, the entire agreement is rendered unenforceable.<sup>42</sup> So, in what otherwise would be enforceable contracts, findings of nullity have been based on the presence of an escape clause which would permit one of the parties to refuse or to discontinue performance, without any period of notice, and for any or no reason.<sup>43</sup> A promise containing such a clause is labeled illusory, *i.e.*, no promise at all, and hence is unenforceable and insufficient to be consideration for the return promise.<sup>44</sup> But, in spite of the widespread acceptance of these propositions the Texas courts of civil appeals have built up an idiosyncratic line of cases holding that an employer's promise of employment for a stated time at stated wages, is not rendered unenforceable by the fact that the employment agreement leaves the employee free to quit the job at any time without liability.<sup>45</sup> These cases, of course, are to be dis-

<sup>39</sup> L.R. 9 A.C. 605 (1884) (part payment in money of a liquidated and undisputed debt presently due is insufficient consideration for a contracted release of the total obligation). See *Austin Real Estate & Abstract Co. v. Bahn*, 87 Tex. 582, 30 S.W. 430 (1895).

<sup>40</sup> TEX. CONST. art. III, § 53 (1955): "The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; . . ."

<sup>41</sup> A municipal water supply contract was held to come within the predecessor Uniform Sales Act in a case involving an implied warranty of wholesomeness. *Canavan v. City of Mechanicville*, 229 N.Y. 473, 128 N.E. 882 (1920).

<sup>42</sup> This proposition was derived historically from *Harrison v. Cage*, 5 Mod. 411 (1698).

<sup>43</sup> *Miami Coca Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693 (5th Cir. 1924); *Bernstein v. W. B. Mfg. Co.*, 238 Mass. 589, 131 N.E. 200 (1921); RESTATEMENT, CONTRACTS § 79 (1932).

<sup>44</sup> *Corbin, Effect of Options on Consideration*, 34 YALE L.J. 571 (1925); *Patterson, Illusory Promises and Promisor's Option*, 6 IOWA L. BULL. 129 (1921); 1 WILLISTON, CONTRACTS § 104 (3d ed. 1957). Texas applications of this principle may be found in *Missouri K. & T. R.R. v. Smith*, 98 Tex. 47, 81 S.W. 22 (1904); *Houston & T. C. R.R. v. Mitchell*, 38 Tex. 85 (1873); *cf.*, *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181 (1951).

<sup>45</sup> Frequently cited are: *St. Louis, B. & M. R.R. v. Booker*, 5 S.W.2d 856 (Tex. Civ. App. 1928); *Gulf, C. & S. F. R.R. v. Jackson*, 69 S.W. 89 (Tex. Civ. App. 1902). These cases are to be distinguished from those where one party is entitled to terminate upon giving notice for a certain period, since the party obligates himself for at least this period. *Merchants Life Ins. Co. v. Griswold*, 212 S.W. 807 (Tex. Civ. App. 1919).

tinguished from option contracts, as where a promise of employment for so long as the employee wants is given in exchange for the release of a claim for damages, or where an employer, engaged in winning an employee from a competitor, promises employment if the employee will quit his present job.<sup>46</sup> However, quitting another job in order to take the new one, where not bargained for by the employer, does not invoke the doctrine of promissory estoppel so as to make the wholly one-sided employment agreement enforceable.<sup>47</sup>

This peculiar Texas doctrine reappeared in *Dallas County Water Control Improvement Dist. v. Ingram*,<sup>48</sup> where the defendant's manager had been discharged without good cause and was allowed to recover damages for the remainder of the five-year term of employment, although the written agreement stated that the manager would not be liable for any damages incurred while in such employment beyond the date on which he gave notice of his intent to cancel. One wonders how long this kind of case will endure. The result cannot be justified by the statement that, "The real basis for the decisions is the agreement on the part of the employer, implied in law, that he will not unjustly or wrongfully discharge the employee during the period of the contract." This promise is implied in any promise of employment, but is irrelevant to the issue of consideration. The employer's promise cannot be consideration for itself. Nor is the situation helped by language in *St. Louis S.W. R.R. v. Griffin*,<sup>49</sup> referring to a natural right of contract and sometimes quoted out of context in these employment cases. This language is an interesting throwback to early nineteenth-century metaphysics, which, carried to its logical conclusion, would eliminate the requirement of consideration from all contracts and would require the courts to enforce all agreements simply because the parties will them. Not everyone would take offense at such a development, but it is certainly foreign to the well-entrenched notion of the essentialness of mutuality.

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<sup>46</sup> *Rague v. New York Evening Journal Pub. Co.*, 164 App. Div. 126, 149 N.Y.S. 668 (1914).

<sup>47</sup> *Fisher v. Jackson*, 142 Conn. 734, 118 A.2d 316 (1955).

<sup>48</sup> 395 S.W.2d 834 (Tex. Civ. App. 1965). For further discussion see Davis, *Insurance Law*, this Survey at footnote 70.

<sup>49</sup> 106 Tex. 477, 171 S.W. 703 (1914).