



1968

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Recommended Citation

Arthur L. Harding, *Contracts*, 22 Sw L.J. 51 (1968)
<https://scholar.smu.edu/smulr/vol22/iss1/6>

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CONTRACTS

by

Arthur L. Harding*

A FEW of the contract cases reported by Texas appellate courts during the past year involved more than the routine application of settled doctrine. Two cases in the Texas Supreme Court foreshadow important problems: (a) what standard of consideration is to be applied where the parties seek to modify a long-term contract that has become impracticable or even unjust to perform because of unforeseen changes in the economy, and (b) how is the court to deal with the situation where rapid economic inflation requires the parties to a long-term contract to leave the price term uncertain. A third case involved the relatively novel issue of breach of promise to marry.

Consideration for Modification of Contract. In 1928, the city of Beaumont leased land for ninety-nine years to Fertitta. The agreed rental for the first ten years was \$7,800 per year, computed at six per cent of an agreed valuation of \$130,000. The parties agreed to revalue the land by arbitration at the end of each ten years of the lease. The annual rental for the next ten years would be six per cent of such value. The lease provided further that the lessee should pay to the city an amount equal to the taxes and special assessments which the city might have levied on the property if it were taxable. In 1933, acting in view of general economic conditions then prevailing, the parties amended the lease to provide that for the remainder of the initial ten-year period the lessee should pay \$5,000 per year and that this would be in lieu of all considerations provided in the 1928 lease. In 1935 the parties negotiated a second amendment to both the original lease and the 1933 amendment. This second amendment provided that for the remainder of the initial ten-year term the lessee would pay \$5,100 per year, and that for the second, third and fourth ten-year periods he would pay \$6,000 annually, this to be in lieu of both the agreed rental payments and payments in lieu of taxes as originally provided.

In *City of Beaumont v. Fertitta*¹ the city brought suit against the lessee to collect both back rent and taxes, claiming first that the 1933 and 1935 amendments to the lease were invalid, and second that the liability of the lessee for city taxes on the leasehold was fixed by law and could not be varied by agreement. While the major thrust of the decision has to do with the taxation question, the validity of the lease amendments had to be determined.

The validity of the lease amendments turns on the application of article III, section 55 of the Texas Constitution, which prohibits any municipal corporation from releasing in whole or in part "the indebtedness, liability

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¹ 415 S.W.2d 902 (Tex. 1967). For further discussion, see Wingo, *Municipal Corporations*, this Survey, at footnote 16.

or obligation of any corporation or individual" to the city.² The Texas Supreme Court has construed this section to require that any release or modification be based upon a consideration that would support a modification in a contract between private parties.³

The court held the 1935 amendment, fixing the rental at \$5,100 for the next three years and then \$6,000 for the thirty years following, to be valid. Under the terms of the original lease the lessee was bound to pay \$7,800 per year from 1935 to 1938, but the rental from 1939 through 1968 remained to be determined by appraisals of the land to be made in 1938, 1948 and 1958. At the six per cent rate, these reappraised rentals might turn out to be greater or less than the initial \$7,800. For the lessee to surrender his contract right to have the rentals redetermined decennially was to incur legal detriment, and therefore constituted valid consideration for the city's promise to accept \$6,000 per year as full payment.

The decision finding invalid the 1933 amendment is more troublesome. That amendment substituted a rental of \$5,000 for the originally agreed \$7,800 plus an uncertain quantity in the payments in lieu of taxes. Under the usual rule, applied here, that part payment of a liquidated demand, admittedly owed, will not be sufficient consideration to support a release of the balance, the lack of consideration to the city in the instant case would seem to be clear. However, the decision throws into doubt the decision in *Liebreich v. Tyler State Bank & Trust Co.*⁴ That case involved a five-year lease of commercial property at a monthly rental of \$200 for the first three years and \$250 for the final two years. The lease was executed in August 1931. In December 1933 the lessor executed a written promise to reduce the rental for the remainder of the term to \$175. The lessee paid rent at the \$175 rate until May 1935, when the lessor demanded payment of the balance claimed to be due under the original terms of the lease. The district court gave judgment for the defendant and the court of civil appeals affirmed. The court conceded that by the usual tests there was no consideration for the promise to reduce the rent, but concluded that "the trial court's finding that the economic depression was a sufficient consideration for the modification agreement must be sustained."⁵

Assuming the general rule that simply performing what is an undoubted duty under an existing contract does not involve legal detriment and cannot be sufficient consideration for a new promise by the other party to the contract,⁶ should the rule be modified or subjected to an exception on the

² TEX. CONST. art. III, § 55 (1955). Application of this constitutional provision in a somewhat similar problem in *City of Big Spring v. Board of Control*, 404 S.W.2d 810 (Tex. 1966) was discussed in last year's *Survey*, Harding, *Contracts, Annual Survey of Texas Law*, 21 Sw. L.J. 115, 121 (1967).

³ *City of Big Spring v. Board of Control*, 404 S.W.2d 810 (Tex. 1966); *State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737 (1960).

⁴ 100 S.W.2d 152 (Tex. Civ. App. 1936) *error dismissed, noted in* 50 HARV. L. REV. 1314 (1937).

⁵ *Id.* at 154.

⁶ As the critics of the prevailing rule are quick to point out, performance of an existing contractual duty may well involve hardship or injury to the one performing the promise. The receipt of the performance previously promised may involve an actual benefit to the one promising additional compensation therefor, on the basis of the bird-in-hand argument if nothing else. To dismiss

basis of extreme economic dislocation such as was experienced at the time of the modifications of the two contracts here discussed? This leads to another question: What is the reason for the basic rule? Contracts are not enforced simply because the parties will that they be enforced; if this were the reason, there would be no requirement of consideration in any case. The commonly-held bargain concept of consideration seems to presuppose the economic justice of a bargain: it is socially good that one who has received that for which he promised to pay should pay the agreed price. Since value must be defined in final analysis in terms of what another is willing to give for the thing in question, no effort is made to assure that the promisor has received his money's worth; it is enough that the bargain was free of fraud, duress or mistake, and that the promisor received what he agreed to pay for.⁷ It is insisted that the promisor receive something he was not already entitled to have. But does this assumption of economic justice apply where there have been drastic changes in surrounding circumstances? An important social and economic function of contract is to shift or to redistribute the risks of economic change; but should private contract be relied upon, or required, to do this in face of unforeseeable and drastic change?⁸

Regardless of its ethical and economic aspects, the rule requiring a new consideration for modification of a contract has an important prophylactic effect, since it stands guard against what otherwise would be simple extortion. It is extortion for a building contractor to threaten to walk off the job unless he gets more money, when he knows that the owner can ill-afford the delay and added cost of getting another contractor to finish the job.⁹ It is extortion for an employee under contract for a stated term to threaten to quit unless his pay is raised, where he knows that a replacement would be difficult to obtain on short notice.¹⁰ It is well that the consideration rule usually defeats the claim to enforce a promise of added compensation in such cases. The question is whether the presence or absence or the probability of extortion is controlling in the disposition of the cause. Those who argue from some sort of Kantian free will theory that all modifications should be enforced without regard to consideration really beg the question.¹¹ Their argument is based upon the premise that the modification agreement is freely entered into by the parties, but the presence of the conditions of extortion raises a serious question as to the freedom of the will of the promisor. Recognizing this dilemma, Professor Corbin suggested that it might be possible to decide cases on the basis of the morality in-

this argument on the ground simply that there is no "legal" detriment or "legal" benefit involved is perhaps to beg the question.

⁷ *Haigh v. Brooks*, 10 Adol. & El. 309 (1839); *Quebe v. Gulf Coast & S.F. Ry.*, 98 Tex. 6, 81 S.W.2d 20 (1904); *Batsakis v. Demotis*, 226 S.W.2d 673 (Tex. Civ. App. 1949).

⁸ Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 37 (1932).

⁹ *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S.W. 844 (1891).

¹⁰ *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902).

¹¹ See Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899). The leading American case expounding this view is *Frye v. Hubbell*, 74 N.H. 358, 68 A. 325 (1907). *Rye v. Phillips*, 203 Minn. 567, 282 N.W. 459 (1938), frequently cited for this holding, is not in point since the facts of that case established sufficient consideration under the usual standard.

volved, to separate out the cases involving extortion, and to deny enforcement of the modification in those cases only.¹²

One might well shudder at the prospect of introducing into contract litigation an issue of whether the promisor's will was really free at the time he made the promise. But there are cases where there is no substantial fact question regarding this issue. An analogy might be helpful. It has been held that a change in the conditions surrounding the transaction, of a sort well beyond the realm of foreseeability and making performance of the contract much more onerous and expensive to the party, might well excuse the party from any further duty to perform.¹³ In such a case, even one where there may be doubt as to possible excuse from performance, it is difficult to characterize the party as a blackmailer if he demands more money to complete his performance. There is authority for enforcing the promise to pay more money, even though consideration in the usual sense is lacking.¹⁴ It would appear sound to hold that where the parties to an existing contract find themselves in unforeseen and radically changed circumstances, which affect seriously the ability of a party to perform or which change the economic effect of performance to something not contemplated by the parties, they should be free to modify their contract to meet the new circumstances. On this basis the *Liebreich* decision is sound.¹⁵ The situation appears to be morally neutral, and there appear to be good economic reasons to permit the parties to adjust their affairs to the new economic situation.¹⁶ After all, one of the principal causes of business failure in the depression of the 1930's was the burden of high fixed rentals established by pre-depression long-term leases.

Certainty of Terms: Specific Performance. In the past years the Supreme Court of Texas has been prominent among those courts adamantly insisting upon a high degree of certainty and precision in the terms of a contract as a condition to judicial enforcement. In *Bendalin v. Delgado*¹⁷ the court attained a result somewhat at variance with that position. The plaintiff was

¹² 1A A. CORBIN, CONTRACTS § 183 (1963).

¹³ *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916); RESTATEMENT OF CONTRACTS § 454 (1932).

¹⁴ *Linz v. Schuck*, 106 Md. 220, 67 A. 286 (1907). This decision was approved in 1A A. CORBIN, CONTRACTS § 184, at 150 (1963), but condemned in 1 S. WILLISTON, CONTRACTS § 130A (rev. ed. 1936). This case is to be distinguished from those where the parties compromised an honest and reasonable dispute as to whether the changed circumstances discharged the party from further duty to perform, *Pittsburgh Testing Laboratory v. Farnsworth & Chambers Co.*, 251 F.2d 77 (10th Cir. 1958), or those decided in states where the basic rule is rejected, *Watkins & Son v. Carrig*, 91 N.H. 459, 21 A.2d 591 (1941).

¹⁵ *Levine v. Blumenthal*, 117 N.J.L. 23, 186 A. 457 (Sup. Ct. 1936), *aff'd*, 117 N.J.L. 426, 189 A. 54 (Ct. Err. & App. 1937) is the leading case *contra*.

¹⁶ Considering the problem on its fundamentals, a most imaginative English judge, Sir Alfred Denning, held that a rent modification promise induced by wartime conditions in London might be enforced on promissory estoppel principles so far as it was executed, *i.e.*, for the period in which the tenant had remained in possession and paid the reduced rental, but that the landlord was free to repudiate and to demand the original rentals for the period following repudiation. *Central London Property Ltd. v. High Trees House Ltd.*, [1947] 1 K.B. 130. It should be noted that the English courts have rejected the promissory estoppel doctrine in all other instances in which it has been argued. For an American example of this approach, see *Wm. Lindeke Land Co. v. Kalman*, 190 Minn. 601, 252 N.W. 650 (1934), *noted in* 32 MICH. L. REV. 1001 (1934).

¹⁷ 406 S.W.2d 897 (Tex. 1966).

employed as general manager of the Consumers Wholesale Lumber Company; the defendant was president of the company and a large stockholder of the closely held shares. Shortly after the plaintiff was appointed manager, he purchased fifty shares of the stock from one McCutcheon, his predecessor in office. About a year and a half later the plaintiff resigned his position. Plaintiff brought suit for specific performance of an oral promise of the defendant, alleging that the defendant had urged him to buy the stock; that the defendant had promised to purchase the stock from him if for any reason his employment was terminated (although nothing was said about the purchase price); and that the defendant had refused to purchase the stock upon demand by the plaintiff after the plaintiff had resigned. Over the defendant's objection, the trial court found that the oral agreement had been made as alleged. It held that the contract was one for purchase at a reasonable price, found the reasonable price to be \$2,867 (plaintiff had purchased from McCutcheon at par, or \$5,000), and decreed specific performance against the defendant at the price fixed. The court of civil appeals affirmed.¹⁸ In turn the supreme court held the contract to be specifically enforceable at a reasonable price but found the \$2,867 price to be unsupported by the evidence, and remanded for a new trial.

In this decision the court may well be attuned to the wave of the future. There is ample authority for specific performance at a reasonable price, where the contract is silent as to the price term, if such a remedy is necessary to avoid unjust enrichment of the defendant.¹⁹ An obvious example would be the case where a tenant makes valuable improvements to the land in reliance upon an option to purchase contained in the lease, but where the purchase option agreement is silent as to price.²⁰ The instant case goes well beyond such unjust enrichment precedents, since, while the denial of specific performance would impose substantial loss upon the plaintiff due to the absence of a market for the closely-held stock of an unsuccessful corporation, such denial would not enrich the defendant.

Rapidly accelerating inflation indicates that in the immediate future long-term leases and contracts with fixed dollar rentals and prices will become almost extinct. Drafting rent and price terms in such contracts is taxing the ingenuity of lawyer and client alike. Sometimes a simple reference to an index that will become certain is encountered, as in a gross-receipts rental contract for a retail store, or the acceptance of more complicated formulae based upon such things as the market price of a particular commodity or more dubious things as the Consumer's Price Index. So long as the formula is understandable and resolves the uncertainty, such a contract may be enforced.²¹

Another resort is to provide for future price determination by the use

¹⁸ *Bendalin v. Delgado*, 397 S.W.2d 889 (Tex. Civ. App. 1965).

¹⁹ *Chesapeake & O.R.R. v. Herringer*, 158 Ky. 267, 164 S.W. 948 (1914), is an analogous case where the court fixed the location of a railroad grade crossing to avoid an unjust enrichment.

²⁰ *Tureman v. Altman*, 361 Mo. 1220, 239 S.W.2d 304 (1951).

²¹ "There is no objection to a promise that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when the time arrives, there shall be in existence some standard by which that can be tested." Judge Learned Hand in *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F.2d 3, 4 (2d Cir. 1928), a case involving uncertainty as to quantities.

of arbitration or appraisal in the usual three-man format. Such a provision is effective if the defendant does his part to set the machinery into operation, but if he refuses to do so the plaintiff is in trouble. Historically, there was no way to compel specific performance of an agreement to arbitrate.²² Since this sort of price-fixing does not come within the usual definition of arbitration, it is doubtful whether a state arbitration statute would help.²³ Courts have permitted recovery on a reasonable price basis where the arbitration has failed without the fault of the plaintiff, where such recovery is necessary to avoid unjust enrichment,²⁴ but these precedents would not be helpful where the unjust enrichment element is lacking.²⁵

In some cases it appears that the parties forego any attempt to establish a formula for future prices, and make no reference to price whatever. This may indicate either a hope that they can come to agreement as to price when the need arises, or that a court somehow can manage to enforce the contract with the price term missing. The first hope may be well-founded. The self-interest of the parties in continuing a profitable contractual arrangement would impel them to reach agreement on a price with which both could live. How well the courts will rise to the needs of the times and satisfy the second hope remains to be seen.

Where goods have been sold and delivered or services have been rendered under an agreement to pay which is silent as to price, it is routine to allow an action for damages to recover a reasonable price.²⁶ On the other hand, where the plaintiff is suing for damages for breach of a purely executory contract to take and pay for goods or services, but with no price fixed, the reasonable price is usually related to market price, and damages for breach of contract are usually based on the difference between market and contract prices. The implication of reasonable price will probably reduce the actual damages to zero and give the successful plaintiff nominal damages only. It is in the area where, because of the uniqueness of the commodity involved or the absence of a market in which the goods may be obtained or on which they may be disposed of (areas where specific performance is an appropriate remedy),²⁷ that the court's willingness to imply a reasonable price becomes all-important. This is the problem with which the court in *Bendalin* dealt, and it appears to have reached a correct solution.

In a case where the parties are unable to agree in advance upon a price-determining formula, the draftsman may be well advised to forego any mention of price whatever. Reciting "at a price to be agreed upon by the

²² RESTATEMENT OF CONTRACTS § 550 (1932); 5 S. WILLISTON, CONTRACTS § 1421 (rev. ed. 1937).

²³ *In re Fletcher*, 237 N.Y. 440, 143 N.E. 248 (1924) held that the New York arbitration law could not be used to authorize judicial appointment of an arbitrator to make a price-fixing term effective. Section 7601 was added to the New York Civil Practice Law in 1958 to authorize judicial intervention in such cases.

²⁴ *Bedwick v. Mecham*, 26 Cal. 2d 92, 156 P.2d 757 (1945).

²⁵ Where the contract is for the sale of goods, UNIFORM COMMERCIAL CODE § 2-305(3) makes an important change. Where one party to the transaction wrongfully interferes with the agreed machinery for price fixing, the other party has an election to cancel the contract or to proceed upon the basis of reasonable price.

²⁶ This situation is frequently handled under the rubric of implied contract. See UNIFORM COMMERCIAL CODE § 2-305(1); 1 S. WILLISTON, CONTRACTS § 41 (3d ed. 1957).

²⁷ UNIFORM COMMERCIAL CODE § 2-716.

parties" has been held by one court to refute what would otherwise be a permissible inference that a "reasonable" price was intended;²⁸ other courts could simply fall into the rubric that a contract to make a contract is unenforceable. Use of vague terms about price might also be held to prevent implication of reasonable price. Perhaps the best that can be done is to challenge the court to reach a just result on the facts of the particular contract as they may develop.²⁹

Breach of Promise To Marry. Actions for breach of promise to marry are infrequent, but an interesting one has been reported by the Austin court of civil appeals.³⁰ Two residents of Texas, a married man and an unmarried woman, were temporarily stationed in the Canal Zone. The plaintiff testified that the parties fell into sexual relations, with the result that a baby was born to the woman after her return to Texas. She brought a three-pronged action in Texas: a claim based upon breach of promise to marry, with seduction and childbirth alleged in aggravation of damages; a statutory claim for child support under Canal Zone legislation enabling the mother of an illegitimate child to maintain such an action against the father; and, as the final alternative, upon an alleged contract by the father to support. The district court entered summary judgment for the defendant on all three counts; the court of civil appeals reversed on the first and third.

The summary judgment record pertaining to the count on breach of promise to marry raised, in addition to the usual issues as to the making of the promise, issues involving two possible defenses: the existing marital status of the defendant, and the prior unchastity of the plaintiff. It is hornbook law that a promise by a married man to marry a woman other than his present wife, either now or after obtaining a divorce, is illegal and unenforceable;³¹ but there is an important exception. Where the promisee is ignorant of the subsisting marriage and acts in good faith, she is held not *in pari delicto* and may enforce the promise.³² The record in the instant case indicates that the plaintiff was seduced before she learned of the defendant's existing marriage; whether or not she had this knowledge when she became pregnant is not clear. But the inquiry does not end here. Does the promisee lose her status as the innocent party to an illegal transaction if, with knowledge of the promisor's married status, she continues to engage

²⁸ For sales of goods this rule is changed by UNIFORM COMMERCIAL CODE § 2-305(1)(b). The Code also seeks to save as against a defense of want of mutuality those contracts which leave a future price to be determined unilaterally by one party; the device being an obligation to fix such a price in good faith.

²⁹ In this connection one should compare the forward looking opinion in *Mantell v. International Plastic Harmonica Corp.*, 141 N.J. Eq. 379, 55 A.2d 250 (Ct. Err. & App. 1947) with the backward looking approach of *Sun Printing & Pub. Ass'n v. Remington Paper & Power Co.*, 235 N.Y. 338, 139 N.E. 470 (1923). The basic policy statement of UNIFORM COMMERCIAL CODE § 2-204(3), "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy," might well be applied to all contracts.

³⁰ *Moore v. Bramlett*, 415 S.W.2d 526 (Tex. Civ. App. 1967) *error ref. n.r.e.* For further discussion, see Larsen, *Conflict of Laws*, this *Survey*, at footnote 58.

³¹ RESTATEMENT OF CONTRACTS § 588 (1932).

³² *Id.* § 590(a). See *Robinson v. Schockley*, 266 S.W. 420 (Tex. Civ. App. 1924).

in what she now knows to be an illicit connection? One rather obscure authority suggests that she does.³³ Quite apart from the question of whether she has lost her cause of action, there would be a question as to whether she should be allowed damages for any harm or injury incurred after knowledge of the existing marriage.³⁴

Plaintiff's deposition revealed that she had engaged in acts of intercourse with another man prior to her acquaintance with the defendant. Prior chastity of a female plaintiff is thought of as an implied condition to the defendant's promise to marry, so that the defendant is held justified in repudiating the engagement when he learns of its absence.³⁵ Furthermore, prior unchastity has been held to be a defense even though not learned of until after suit is brought.³⁶ There is serious question, however, as to whether a man who seduces a woman under promise of marriage should be heard to claim that he relied upon her prior chastity when making the promise. This would seem to be ultimately a fact issue.³⁷ If a defense of prior unchastity is found not to be available to the seducer, the fact of such unchastity should be available in mitigation of damages.³⁸

While the point is outside the scope of this Article, it should be noted that the court, citing *California v. Copus*,³⁹ rejected plaintiff's claim based on the Canal Zone support statute. Increasing liberality of the Texas Supreme Court in dealing with out-of-state causes of a novel nature makes reliance on the language of *Copus* hazardous. There are persuasive arguments for enforcing the Canal Zone statute here, if the facts of the case come within it.

³³ *Wolon v. Welsh*, No. 1, 19 Pa. D. & C. 319 (C.P. No. 2 1933).

³⁴ *Coover v. Davenport*, 1 Heisk. 368, 2 Am. R. 706 (Tenn. 1870).

³⁵ *Coombs v. Fazzio*, 386 S.W.2d 650 (Tex. Civ. App. 1965) *error ref. n.r.e.*

³⁶ *Kent v. Buchanan*, 149 F.2d 289 (D.C. Cir. 1945); *Barrett v. Vander-Meulen*, 264 Ky. 441, 94 S.W.2d 983 (1936).

³⁷ In *Coombs v. Fazzio*, 386 S.W.2d 650 (Tex. Civ. App. 1965) *error ref. n.r.e.* the evidence indicated that defendant had intercourse with plaintiff on their second date, and that his connection continued over a period of several months before there was any talk of marriage, and before the making of the claimed promise to marry. In rendering judgment for the plaintiff, the court of civil appeals held that it was no defense simply that at the time of making the promise to marry, the defendant did not know of the plaintiff's prior unchastity with another man. The defendant, the court said, should have submitted an issue as to whether, in view of the "almost immediate" illicit relationship between plaintiff and defendant, there was any tacit representation of prior chastity on the part of the plaintiff. *Coombs* is to be distinguished from the classical seduction case where the agreement to marry precedes the illicit intercourse, where the false promise to marry is a means employed to induce the woman to yield. In the instant case the plaintiff testified that she yielded to a promise of marriage, but the court of civil appeals held that an issue of the sort suggested in *Coombs* was raised.

³⁸ *Watson v. Bean*, 208 Ky. 295, 270 S.W. 801 (1925).

³⁹ 158 Tex. 196, 309 S.W.2d 227 (1958).