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OPEN SALES AND OPEN PRICE CONTRACTS

In *Bailey v. Austrian*¹ it was held that an agreement to sell all the buyer might require in his business was an illusory contract and not enforceable for lack of consideration. The weight of authority is rightly otherwise.² An unlimited choice in effect destroys a promise and makes it illusory,³ that is, not a valid consideration for the promise of the other party. Even though it be held that the vendor in an output contract or the vendee in a requirement contract may go out of business without its being a breach of contract, still there is valid consideration for the other party's promise because the agreement was not wholly optional, for such results can only be obtained by suffering a legal detriment.⁴ Furthermore the right to deal with anyone he pleases has been surrendered;⁵ but perhaps the real consideration is the promise to sell or buy.⁶ Even if the buyer has an option of not taking any of the goods, but if he should buy any of the specified goods to buy from the seller, there is a valid consideration;⁷ likewise it seems the rule should apply conversely to the seller in an output contract. If there is a binding promise on one side to buy, and on the other to sell, and the quantity to be taken does not depend upon the will, wish, or want of one party, the weight of authority sustains such contracts.⁸

Such contracts being valid, what are the obligations of the parties under them? In *Fayette-Kanawha Coal Company v. Lake & Export Coal Corporation*,⁹ it was said that where the output of the mine was the subject matter of the contract, it meant the output of the mine operated in good faith in the usual and ordinary way, and that the owner thereof is under obligation so to operate the same during the life of the contract, and the purchaser is under obligation to take and pay for the output produced by such

¹ 19 Minn. 465 (1872).

² 1 WILLISTON, CONTRACTS (1931) § 104; Note (1921) 14 A. L. R. 1300; Note (1923) 24 A. L. R. 1352.

³ WILLISTON CONTRACTS § 43.

⁴ Note (1892) 15 L. R. A. 218. Patterson, "Illusory" Promises and Promisors' Options (1920) 6 IOWA L. BULL. 209, 224.

⁵ *In re United Cigar Stores Co.*, 8 F. Supp. 243 (1934).

⁶ Note (1928) 28 COL. L. REV. 223.

⁷ 2 WILLISTON, SALES (1924) § 464. *Ramey Lumber Co. v. John Schroeder Lumber Co.*, 237 Fed. 39 (1916); *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367 (1902); *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273 (1912).

⁸ 1 WILLISTON, CONTRACTS § 104. In *Bell v. Wayne United Gas Co.*, 181 S. E. 609 (W. Va. 1935), the West Virginia court in dealing with an output contract did not even question its validity.

⁹ 91 W. Va. 132, 140, 112 S. E. 222, 226, 23 A. L. R. 565, 570 (1922).

operation. There is good authority to the effect that the seller has no obligation to continue in business, and that he must only act in good faith even though the approximate amount to be sold under the contract is stated.¹⁰ In *Mathieson Alkali Works v. Virginia Banner Coal Corporation*,¹¹ it was held that under a contract to supply the buyer's annual coal requirements, estimated at 200,000 tons, the buyer was required to take from the seller coal sufficient to meet its *bona fide* actual requirements and that execution in good faith is required of the purchaser. This may mean that Virginia will follow the view that the parties have no implied obligation to remain in business. It is true that in *Wiseman v. Dennis*¹² it was held that the purchaser could not avoid the requirement contract by a sale of his business, but that case is distinguishable because there the seller paid \$900 for the contract which naturally presupposed that the purchaser would have a business for the time agreed. This illustrates the fact that the intention of the parties as determined by the contract controls the construction of requirement and output contracts as it does in contracts in general.¹³

Contracts are held invalid where it is impossible to ascertain the extent of damages upon an alleged breach because some essential term such as price, quantity, or duration, has been left indefinite. If these essentials are not mentioned, the law will imply (unless a statute requires it to be expressed in the contract¹⁴) in each case a reasonable amount¹⁵ and save such contracts from uncertainty, if a reasonable amount is capable of being ascertained. However, even where the parties provide for such terms but have left them too indefinite to be enforced, if the parties have transacted business under such agreements, the extent of the duties may be sometimes sufficiently established,¹⁶ or such indefinite contract may be enforced as to any particular order given in respect there-

¹⁰ Note (1922) 23 A. L. R. 574 contains an annotation collecting recent cases on the validity and construction of contracts for sale of season's output. Note (1919) 1 A. L. R. 1392 and Note (1920) 9 A. L. R. 276 annotate earlier cases on the same subject.

¹¹ 147 Va. 125, 136 S. E. 673 (1927).

¹² 156 Va. 431, 157 S. E. 716 (1931).

¹³ Note (1920) 7 A. L. R. 498; Note (1923) 27 A. L. R. 127.

¹⁴ West Virginia has no statute requiring the price, if agreed upon, to be stated in the memorandum of the contract.

¹⁵ Note (1911) 32 L. R. A. (N. S.) 429; *Huminsky v. Gary National Bank*, 107 W. Va. 658, 150 S. E. 9 (1929).

¹⁶ Note (1923) 27 A. L. R. 127; *Elk Refining Co. v. Falling Rock Cannel Coal Co.*, 92 W. Va. 479, 115 S. E. 431 (1922); *Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927 (1912); *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F. (2d) 3 (1928).

to until terminated by the will of one of the parties.¹⁷ Requirement contracts have been held invalid where the buyer had no established business which would require the product.¹⁸ In all of these contracts the parties intended to accomplish some purpose and these should not be held void if they can reasonably be interpreted as valid,¹⁹ for the law leans against the destruction of contracts because of uncertainty.²⁰

The price has been set forth in contracts in various ways, many of which have been held too uncertain for a valid contract. The parties may provide that the price shall be fixed by future agreement; but if they do not later agree, the contract is traditionally²¹ regarded as illusory because the parties have reserved the right to do something unreasonable²² or a privilege not to agree.²³ Alternate prices²⁴ or ones depending on some contingency not within the control of either party²⁵ are valid if they are not wagering contracts.²⁶ Contracts in which the price is to be made certain by some external criteria, as market price,²⁷ "cost plus",²⁸ price of resale,²⁹ or competitors' price,³⁰ should be held valid. Maximum and minimum prices are recognized if considered as an option³¹ or reasonable price³² within those limits, but not if it amounts to a provision for future agreement within those limits.³³ If the price

¹⁷ *Abrams v. George E. Keith Co.*, 30 F. (2d) 90 (1929). Cf. *Chappell v. F. A. D. Andrea, Inc.*, 41 Ga. App. 413, 153 S. E. 218 (1930).

¹⁸ Note (1931) 74 A. L. R. 477. But see *Texas Co. v. Pensacola Maritime Corp.*, 279 F. 19 (1922).

¹⁹ *Fayette-Kanawha Coal Co. v. Lake & Export Coal Corp.*, 91 W. Va. 132, 138, 112 S. E. 222, 225, 23 A. L. R. 565, 569 (1922).

²⁰ *Manss-Owens Co. v. Owens & Son*, 129 Va. 183, 105 S. E. 543 (1921).

²¹ 1 WILLISTON, SALES §§ 167-168; *St. Regis Paper Co. v. Hubbs & Hastings Paper Co.*, 235 N. Y. 30, 138 N. E. 495 (1923).

²² *Prosser, Open Price in Contracts for the Sale of Goods* (1932) 16 MINN. L. REV. 733, 745.

²³ 1 WILLISTON, SALES §§ 167-168.

²⁴ 3 WILLISTON, CONTRACTS § 1407.

²⁵ *Ames v. Quimby*, 96 U. S. 324, 24 L. Ed. 635 (1877); *Montague v. Lumpkins*, 178 N. C. 270, 100 S. E. 417 (1919).

²⁶ *Harper v. Crain*, 36 Ohio St. 338 (1881).

²⁷ *Duff v. Thrall*, 35 Pa. Sup. Ct. 136 (1908).

²⁸ Note (1923) 27 A. L. R. 48; Note (1919) 2 A. L. R. 126.

²⁹ Note (1928) 57 A. L. R. 747. Cf. *Wood v. Duff-Gordon*, 222 N. Y. 88, 118 N. E. 224 (1917). *Contra*: *Brooks v. Federal Surety Co.*, 58 D. C. App. 56, 24 F. (2d) 884, 57 A. L. R. 745 (1928).

³⁰ *Salem King's Products Co. v. Bamp*, 100 Ore. 329, 196 Pac. 401 (1921). Cf. 30 A. L. R. 575 (1924).

³¹ *Fraser v. Des Moines Wholesale Grocer Co.*, 298 Fed. 930 (1924).

³² *Burlington Grocery Co. v. Lines*, 96 Vt. 405, 120 Atl. 169 (1923).

³³ *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527 (1900), which was followed in *Sun Printing & Pub. Ass'n v. Remington Paper and Power Co.*, 235 N. Y. 338, 139 N. E. 470 (1923). In this latter case Judge

is to be fixed by a third party, the valuation is a condition precedent to the existence of any binding obligation;³⁴ and equity will not compel specific performance,³⁵ but if one of the parties intentionally caused the valuation to fail, that party may be liable in damages.³⁶ As was mentioned above, the parties usually intend to make a binding contract; and except where a contrary intention appears, they should be considered as valid agreements at a reasonable price.³⁷

Provisions that price or quantity will be agreed upon later are traditionally regarded as contracts to make a contract and as such unenforceable,³⁸ leaving an essential element undetermined. Business men understand such agreements as being valid contracts since they have in mind reasonable agreements, but since courts have refused to recognize them as valid,³⁹ commercial arbitration has been substituted. Admittedly courts should not make contracts for the parties; but by enforcing such agreements on the basis of reasonableness, courts would only be construing them to conform to the intention of the parties.⁴⁰ The parties consider such agreements as complete when made, though one party may contend later that it was not in order to avoid liability. These are regularly made by the commercial world, which cannot understand the courts' attitude, for such are essential for big forward con-

Crane dissented, naming four possible constructions, any of which, if applied, would have made it a valid contract.

³⁴ 1 WILLISTON, SALES § 174.

³⁵ POMEROY, SPECIFIC PERFORMANCE (1926) §§ 150-151; 1 WILLISTON, SALES § 176; Note (1914) 47 L. R. A. (N. S.) 366; Smallwood v. Mercer & Hansborough, 1 Wash. 290 (Va. 1794). But see Lester Agricultural Chemical Works v. Selby, 68 N. J. Eq. 271, 59 Atl. 247 (1904); Kaufmann v. Liggett, 209 Pa. St. 87, 58 Atl. 129 (1904).

³⁶ 1 WILLISTON, SALES § 176.

³⁷ This problem of open price contracts is comprehensively discussed in Prosser, *op. cit. supra* n. 22, at 733. See also VOLD, SALES (1931) 30; 1 WILLISTON, CONTRACTS § 41; Note (1902) 53 L. R. A. 288; Note (1927) 49 A. L. R. 1464.

³⁸ *Supra* n. 20.

³⁹ See controversy as to whether such agreements should be enforced by the courts: Note (1932) 43 L. Q. REV. 4; Note (1932) 48 L. Q. REV. 141; Note (1932) 48 L. Q. REV. 310; Note (1933) 49 L. Q. REV. 316. See also Note (1935) 44 YALE L. J. 684 and Note (1935) 19 MINN. L. REV. 702 commenting upon Foley v. Classique Coaches, Ltd., [1934] 2 K. B. 1, 103 L. J. K. B. 550, 151 L. T. R. 242, which held such an agreement binding.

⁴⁰ "It is worth while to be ingenious and even to strain a point of form if effect can thereby be given to men's reasonable intentions and expectations. Want of imagination in legal and even judicial minds is more in fault, it is submitted, than anything in the law itself." Note (1932) 48 L. Q. REV. 141.

tracts in which it is impossible to set forth details.⁴¹ The courts might be aided by a statute recognizing the validity of such contracts on the basis of reasonable amounts.⁴²

⁴¹ "Shock absorbers in the form of open price or time or quantity arrangements may be as important in practical business affairs as are seat cushions and springs in motor vehicle transportation." *VOLD, SALES* 30.

⁴² *OHIO GEN. CODE ANN.* (Page, 1926) § 8389, provides that the price may be fixed by the contract or left to be fixed in such manner as may be agreed upon, and "when the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case." In *Domhoff & Joyce Co. v. Hamilton Furnace Co.*, 108 Ohio St. 25, 29, 140 N. E. 485, 486 (1923) it is said that where the parties provide for a price to be agreed upon but do not later do so, the seller is under obligation to ship the coke, and the buyer is obligated to pay a reasonable price therefor.