

A PROMISE TO PERFORM A BROKEN CONTRACT AS
A CONSIDERATION FOR A PROMISE TO PAY
ADDITIONAL COMPENSATION.

The cases on this subject indicate that there is a distinct conflict among the various states as to the legal validity of the subsequent promise. The general rule seems to be that the promise to pay one already under a contractual obligation to perform, additional compensation to make him perform is void, and without consideration.

The courts seem to base this rule upon the principle that the one who is to receive the additional compensation in the second agreement obtains no legal benefit for he is already under an obligation to perform, while the one promising the additional compensation to the other who has broken or has threatened to break his contract receives nothing more in return for the additional compensation than he should have received under the prevailing contract.

This rule, however, has been subject to many exceptions in the different states. Some courts have upheld the promise of additional compensation on the ground that the parties waived their mutual rights under the old contract, and this waiver constitutes a sufficient consideration for the new provision.¹ Another court has found that in a case where the promisor has elected to pay the additional compensation rather than sue under the existing contract, that this election

1. 33 Ala. 265.
14 Johns. 331
10 Ind. 282.

constituted sufficient grounds on which to enforce the contract.² Other courts have enforced the subsequent agreement when they found that the parties had rescinded the original agreement and had entered into a new agreement.³ In two other states⁴ the courts have enforced the subsequent agreement when they found that after the performance of the original contract was begun the contractor encountered unforeseen difficulties which were not within the contemplation of the parties at the time of executing the original agreement and which would make necessary additional expenditure on the part of the contractor. Courts in most have upheld the subsequent agreement if they were able to find any definite change in the subject matter.

Recently, this question has arisen in New York in *McGowan & Connolly Co., Inc., v. Kenny-Moran Co., Inc., et al.*,⁵ where the court held, "A promise to pay a sum in addition to the contract price, when the contractor threatened to break his contract because labor and material costs had increased, was without consideration, because the contractor only promised to perform that which it was already its duty to do under the contract." In the decision, the court not only seems to have followed the general rule, but expressly states in the opinion that the exceptions do not apply. The court there says, "The agreement to pay the \$1000 was without consideration, as the plaintiff only agreed to do what it was already bound to do under the existing contract. There was no rescission, no new

2. 139 Mass. 440.

3. 172 N. Y. Supp. 683.
152 Mo. App. 221.

4. Minnesota and Maryland.

5. 202 N. Y. S. 513.
207 App. Div. 617.

contract, and no consideration for the agreement to pay the additional \$1000." The McGowan case seems to be an application of the rule generally applied in New York toward promises of additional compensation in order to make a contractor complete his contract, but there are cases where the subsequent promise has been recognized and enforced. However, the decisions which uphold the promise of additional compensation are to be found in cases where the court found that there was a rescission of the old contract and the formation of a new agreement, as in the case of *Schwartzreich v. Bauman-Basch*.⁶ In the McGowan case, the court decided that there was no rescission of the old contract and the substitution of a new one, but merely a promise to pay additional compensation to make a contractor perform a pre-existing legal obligation.

In the opinion in *Schwartzreich v. Bauman-Basch*, where the court found that the promise of additional compensation could be enforced, the judge refers to the rule that a promise made to induce a party to do that which he is already bound by contract to do is without consideration and *nudum pactum*, but decides that as there was a rescission of the old contract and the formation of a new contract indicated by the facts, the rule did not apply, and the new contract was valid.

The earlier New York cases indicate the same general application of the rule and the exception. *Galway v. Prignano*⁷ recognized "the promise of additional compensation as invalid unless there is a substitution of a new contract." The cases which have upheld the validity of the promise of addi-

6. 172 N. Y. Supp. 683. (1918.)

7. 134 N. Y. Supp. 571.

tional compensation follow *Lattimore v. Harsen*⁸ in which the court found that the facts indicated that the old contract was rescinded and a new agreement entered into. The new agreement is also recognized as enforceable in *Hart v. Lauman*,⁹ where the facts indicated that the old contract had been abrogated by the new provision.

In *Vanderbilt v. Schreyer*¹⁰ the court said, "It would doubtless be competent for the parties to cancel the existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that there should be a valid cancellation of the original contract." The court did not find a cancellation of the existing contract. A majority of New York decisions, however, indicate that the promise of additional compensation is unenforceable.

The Massachusetts courts have adopted a more liberal attitude toward the finding of grounds upon which to sustain and enforce the promise of additional compensation than found in the decisions of the New York courts. In *Munroe v. Perkins*,¹¹ a leading Massachusetts case on the subject, the court decided that as the plaintiff had refused to perform his contract, made himself liable in a suit for damages, and after the promise of additional reward had performed the contract in good faith relying on the promise of additional reward, the completion of the contract relying on the promise of additional reward, the waiver on the part of the defendant of his right to sue for the breach of the contract, and the difficulty which the plaintiff had in completing the contract formed suf-

8. 14 John. 330.

9. 29 Garb. 410.

10. 91 N. Y. 392.

11. 9 Pick. 298.

ficient consideration on which to enforce the promise of additional compensation. *Hastings v. Lovejoy*¹² follows *Munroe v. Perkins* and cites it as the authority for enforcing the contract.

In *Rollins v. Marsh*,¹³ the court said that the new contract with the promise of the additional compensation rescinded the old contract, that the release of one party by the other was consideration for the release on the other side, and the mutual releases were a consideration for the new contract. In another Massachusetts case the court decided that the promisor could have elected either to sue for damages or pay more, and the plaintiff acting on the promise completed the contract, the contract was enforceable. In that case, the court decided that the performance of the old obligation was a sufficient contract *prima facie* takes the place of the old one. sufficient consideration for the new promise, and that the new

In recent case of *Farrot v. Mexican Central Ry. Co.*,¹⁴ the Massachusetts court did not enforce the promise of additional compensation, but the court did not deny the rule generally recognized in previous cases in Massachusetts, but distinguished the facts of the case at hand from the facts in the cases where the promise was enforced, and said that the Massachusetts rule in *Munroe v. Perkins*¹⁵ could not be applied to the case in question. In general, the Massachusetts courts have sustained the validity of the promise of additional compensation when they could find that the facts indicated a

12. 140 Mass. 261.

13. 128 Mass. 116.

14. *Rogers v. Rogers*, 139 Mass. 140.

15. 207 Mass. 184.

waiver of the right to sue, satisfaction of a claim for damages, abrogation of the old agreement and the formation of a new contract.

Minnesota and Maryland have enforced the new provision for additional compensation, but have denied the principle upon which the Massachusetts courts have upheld the new provision and have a different principle upon which to enforce the execution of the new provision. The Minnesota court has enforced the provision for additional compensation in cases where it found that after the contractor began to perform his contract, he encountered unforeseen difficulties which were not reasonably within the contemplation of the parties at the time of the formation of the original agreement and which would make necessary additional expenditure on the part of the contractor if he was to complete his contract. As to what constitutes such unforeseen difficulties, the judge in *King v. Duluth M. & N. Ry. Co.*,¹⁶ said, "What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties at the time the contract was formed. * * * Inadequacy of the contract price which is a result of an error of judgment and not some excusable mistake of fact, is not sufficient."

The last statement indicates that the promise of additional compensation in the recent McGowan case, *supra*, in New York would not have been sustained even under the Minnesota

16. 61 Minn. 487.

exception, because the unforeseen difficulty in the McGowan case was an unforeseen rise in material costs, a fact which is not an unforeseen difficulty in the light of the Minnesota exception.

The Minnesota exception has also been followed in Maryland. In *Linz v. Shuck*,¹⁷ a contractor agreed to excavate for a cellar, and after he had penetrated beneath the surface of the earth he encountered an unforeseen bed of swampy mud which made it necessary for the contractor to obtain compensation in addition to the contract price in order to perform his contract without loss. The court enforced the owner's promise of additional compensation and recognized the unforeseen difficulty coupled with the completion of the contract in reliance on the promise of additional compensation as a valid consideration.

There are decisions in other jurisdictions which indicate the application of a principle somewhat analogous to the unforeseen difficulty exception applied in Minnesota and Maryland. In one case, mutual mistake as to the character of the soil when the parties were forming the original agreement was held to be sufficient consideration to uphold the promise of additional compensation made after the mistake was discovered. In another case the promise was sustained when the contractor had encountered solid rock which was not within the contemplation of the parties at the time the agreement was formed.

17. 106 Md. 220.

67 Atl. 286.

11 L. R. A. (N. S.) 789.

The ruling in New York in the McGowan case is much similar to the rule generally applied in Missouri on the same subject. In *Smith v. Sickenger*,¹⁸ Judge Ellison said, "Now, it is a well-recognized law that, when one promises another additional or different compensation if he will do what he is already obligated to the promisor to do, the promise is without consideration and unenforceable." This decision follows the rule in *Lingenfelder v. Wainwright Brewing Co.*,¹⁹ where the court held that the promise of additional compensation made to an architect after he had refused to perform his contract in order to make him complete the contract was unenforceable. This ruling seems to have been upheld in a majority of the cases on this subject in Missouri, although there seems to have been an exception to the rule applied when the court found that there was a valid abrogation of the old contract and the formation of a new contract.

In *Lindsay and Son v. Kansas City V. & T. Co.*,²⁰ the court found that the facts were such as to bring the case within the exception and enforced the promise of additional compensation as an independent contract with a new consideration. In the opinion the judge recognized the general rule, but decided that it did not apply as the facts indicated that the provision for the additional compensation was an independent contract with a new consideration *i. e.* the agreement of the new promisor to pay an increased consideration. On the other hand in the *Lingenfelder* case, *supra*, the court found the subsequent promise to be based on neither a compromise of a doubtful claim, nor the abrogation of the old

18. 202 S. W. 263 (1918.)

19. 103 Mo. 578.

20. 152 Mo. App. 221.

contract with the formation of a new one, but merely a promise without consideration and a *nudum pactum*.

In *Alaska Packers Ass'n v. Domenico*,²¹ the United States Circuit Court of Appeals held, that the promise to pay a fisherman a larger salary than he was entitled to under the hiring contract because he threatened to desert the shipowner after the season had commenced and men were scarce, was void and not enforceable. The court said that it would be a travesty of justice to allow the man to recover on the promise which he had practically extorted from the promisor. This decision is much similar to the decisions of the English courts which held that a promise to pay a seaman higher wages in order to make him perform his labors was not enforceable because the seaman was already under a contractual obligation to perform those duties. However, even in England where the general rule seems to have been applied strictly, in *Scotson v. Pegg*,²² Baron Martin said, "If a builder was under a contract to finish a house on a particular day, and the owner promises him a sum of money if he would do it, what is to prevent the builder from recovering the money?"

In two recent cases, the Federal Courts have seen fit to hold a promise of additional compensation as enforceable, but the facts have not been analogous to the Alaska Packers case. In *United States v. Casey*,²³ the court decided that when a contractor had been delayed by the fault of the owner himself and the delay was such as to prevent the completion of

21. 117 Fed. 99.
54 C. C. A. 485 (1902).
22. 6 H. & N. 295.
23. 262 Fed. 889. (1920.)

the work during good weather and make necessary the completion of the work during the winter season, the provision for additional compensation was enforceable. The waiver of damages for the delays occasioned by the owner and the completion of the contract during the bad weather were sufficient consideration for the promise of additional compensation.

In the *United States v. Cook*,²⁴ the Supreme Court found that the promise of additional compensation made because the contractor had been delayed in the completion of the contract by the San Francisco earthquake and fire was valid and enforceable. The court said in the opinion that there was a moral consideration which properly induced the recognition of an honorable obligation and turned an unenforceable equity into a binding and effective provision.

The decisions of the court seem, in the main, to indicate that as far as possible the judges have applied either the general rule denying the validity of the subsequent promise; or one of the exceptions enforcing payment of the additional compensation according to the equities of the particular case. The cases manifest a tendency to apply the rule strictly where the facts indicate that the promise of additional compensation was practically extorted from the promisor, but indicate that exceptions have been made where the facts of the case tended to show that the promise of additional compensation was voluntary and was prompted by a recognition of the hardship involved in the performance of the original agreement without extra compensation.

24. 257 U. S. 523 (1922.)

As one judge has said, it would be a traversity of justice to enforce payment of the additional compensation when the promise was practically coerced from the promisor by a laborer who had an unjustifiable advantage.

There are cases which indicate that it is just and equitable to apply an exception and enforce the payment of the extra compensation. Where for example, a contract to excavate having been entered into in good faith, the contractor encountered a type of soil different from that anticipated at the time of the formation of the original agreement, it would seem just to enforce a promise of additional compensation made in recognition of the difficulty, particularly if acted upon by completing the excavating.

The ease with which the judges apply the exceptions, however, seems to depend upon the state in which the court is located. In New York and the States which follow the New York rule, it is harder to obtain the application of an exception, as the evidence must show that there was an intention to abrogate the old agreement and form a new agreement. In Massachusetts, Minnesota, Maryland, Michigan and Washington it is easier to find an exception to the general rule upon which the promise of additional compensation will be sustained.

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