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COMMENT ON RECENT DECISIONS

AGENCY—ATTORNEY AND CLIENT—PROMISE OF AN ADDITIONAL FEE—*Coon v. Ewing, Texas Court of Civil Appeals, 1925, 275 S. W. 481.*

Ewing, an attorney, brought this action against Coon to recover compensation for legal services rendered by defending Coon in an action concerning property which Coon owned. Ewing was hired by another attorney, Meek, agent for Coon, to assist Meek in defending Coon. At that time the parties agreed that Ewing should have \$2500 as compensation for his services. Just before the trial, Ewing discovered that Meek had misrepresented the facts of the case, that instead of being slightly contested as Meek had said, the case was going to be hotly contested, and that a boundary question which Meek had said would not be involved, was going to be included in the controversy. Thereupon, Ewing refused to continue with the trial work unless Coon would give him a \$2500 fee in addition to the amount previously agreed upon. After some wrangling, Coon promised to give the additional \$2500 if Ewing won the suit for him. Coon won, and then refused to pay the additional \$2500, for which Ewing brought this action. The defendant contended that the promise was to pay for services which the plaintiff was already under a contractual obligation to perform, and therefore without consideration and void. The court, however, agreeing with the contentions of the plaintiff, said that in this case the mistakes as to the facts involved in the litigation were such unforeseen difficulties and burdens as to take the case out of the operation of the general rule, that the plaintiff had taken no unfair advantage of the defendant, as the compensation was fair and reasonable, and therefore, there was sufficient consideration for the new agreement for the added compensation.

It is the general rule in contract law that a promise to pay additional compensation in order to secure the performance of that which the other party is already under an existing contractual obligation to perform is invalid, and not enforceable, *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Lingenfelder v. Wainwright* 103 Mo. 578, 15 S. W. 844; *Ayres v. Chicago Ry. Co.*, 52 Ia. 478; *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, 28 L. R. A. N. S. 450; *Galway v. Pragnano*, 134 N. Y.

S. 571; Williston "Contracts" Vol. 1, Sec. 130; 13 C. J., sec. 209, note 45, and cases cited. This rule, however, has been subject to various exceptions in some states. Some courts have enforced the promise of additional compensation on the ground that the promisor had the right to elect whether he would continue with the contract or break the contract and subject himself to damages, and his election to complete the contract furnished sufficient consideration for the new agreement, *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475; *Coyner v. Lynde*, 10 Ind. 282; *Bishop v. Busse*, 69 Ill. 403. Other courts have upheld the promise of additional compensation on the theory that the parties may mutually rescind the old contract and make a new one, *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Coyner v. Lynde*, 10 Ind. 282. While still other courts have enforced the promise of additional compensation when the contractor has encountered unforeseen difficulties or mistake, *King v. Duluth*, 61 Minn. 82; 63 N. W. 1105; *Linz v. Shuck*, 106 Md. 220, 67 Atl. 286, 11 L. R. A. N. S. 789, 14 Ann. Cas. 495. The cases concerning the promise by a client to pay an attorney compensation in addition to the amount promised when the relationship of attorney and client was entered into present a trend of decisions analogous to the law in contracts generally. The relationship of attorney and client, however, brings in another very important factor. That factor is the fact that the relationship of attorney and client is a confidential one of such a nature that the attorney is in such a position as to unduly influence his client; therefore, the relation is zealously guarded, and the burden is upon the attorney to show that the agreement was entered into by the client of his own free will, and that the agreement was fair and reasonable. One case has gone so far as to say that in dealings between the attorney and the client for the former's benefit are presumptively invalid as constructively fraudulent, and the burden is on the attorney to show that they are fair and entered into by the client's own free will, *Thomas Turners Adm'rs* (1890) 87 Va. 1. Another court in speaking of the attorney said, "He must be aggressive and advance against the presumption of invalidity, and overcome it if he can by evidence of fairness, adequacy and equity of the transaction . . . and must show that his client was informed of all the facts known to himself." *Burnham v. Heselon*, 82 Me. 495, 20 Atl. 80, 9 L. R. A. 90. As is the rule in general contract law, an agreement for compensation in addition to the fee agreed upon at the beginning of the relation of attorney and client is, in the absence of peculiar facts, without consideration and not enforceable. In *Lecatt v. Salle* (1836) 3 Port. (Ala.)

115, the early leading American case in which, following the English cases, the court laid down the rule that the subsequent agreement for additional compensation could not be enforced by the attorney, the court said, "The firmest ground for the support of the principle to which the complainant (client) has resorted for relief, consists of the confidence reposed by a client in his attorney, and the influence which an attorney has over client. . . . No principle has been more rigidly adhered to by the English chancellors. . . . This confidence between the attorney and the client has been an important point in all the later cases which refused to uphold the agreement for the additional fee on grounds of public policy, and a basis for the rule that the burden is on the attorney to show the fairness of the agreement. In 1896, the Alabama court said that no subsequent agreement with the client for added compensation can be supported unless a fair and just remuneration for his services, *White v. Tolliver*, 100 Ala. 300; 20 So. 97. This last mentioned case shows a slight tendency to depart from the rigid rule laid down in *Lecatt v. Sallee*, *supra*, but it is still in general conformity with the rule laid down there. Incidentally, the above mentioned Alabama rule is in conformity with the rule in other contracts in Alabama, *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, 28 L. R. A. N. S. 450. In 1878, when an attorney in a divorce suit refused to continue with the case unless promised a larger fee, the court held that he could be compelled to state what his reasons were for refusing to continue with the case, *Bolton v. Daily*, 48 Ia. 348. In 1892, the Arkansas court decided that the promise of a client to give his attorney a mule in addition to his regular fee was not enforceable, *Marshall v. Dossett*, 57 Ark. 93, 20 S. W. 810. In another case, the promise to pay an attorney an additional fee to bring on a speedy trial, an act which was considered to be within the ordinary scope of an attorney's services, was declared to be without consideration and not enforceable, *Bailey v. Devine* (1905), 123 Ga. 653, 51 S. E. 603. In 1910, an Illinois appellate court held an agreement for additional compensation unenforceable, *Miller v. Lloyd*, 181 Ill. A. 230. The same rule was adopted in *Egan v. Burnight*, 34 S. D. 473, 149 N. W. 176 (1914), and in *Vance v. Ellison et al.* 75 W. Va. 592, 85 S. E. 776; in the latter it was said that the promise by a client to pay an attorney \$1000 for services which he was already under an obligation to perform for \$500 was without consideration and unenforceable. The early Texas cases indicate the adoption of a similar rule, *Kahle v. Plummer* (1903) 74 S. W. 786, and *Waterbury Water Co. v. City of Laredo*, 68 Tex. 565. However, the general rule that the subse-

quent agreement for additional compensation for the attorney for services which the attorney was bound to render by a prior agreement for a smaller fee is subject to exceptions in some jurisdictions. The exceptions depend upon the jurisdiction in which the action is laid and upon the particular facts of the cases. The exceptions are chiefly to be found in cases where the attorney has been placed in such a position that he must do work which was not contemplated in the original agreement, or where the court has adopted the theory that the parties may mutually rescind the old agreement and make a new one. In 1919, the Texas court allowed an attorney to recover on a promise of an additional fee when the facts indicated that the new agreement covered additional work. The decision was based on the theory that the parties could mutually rescind the old agreement and make a new contract, *Laybourn v. Bray & Shifflet*, Texas (1919) 214 S. W. 630. This last mentioned case was a step toward the rule laid down in *Coon v. Ewing*, briefed at the beginning of this note, that the attorney could recover the promise of the additional fee as he had encountered additional work and had been mistaken as to the services necessary in the original agreement. These last two cases seem to have almost completely abrogated the old Texas rule that the promise of an additional fee could not be enforced, *Kahle v. Plummer*, 74 S. W. 786; *Waterbury Water Co. v. City of Laredo*, 68 Tex. 565. Three recent Minnesota cases indicate that the new agreement for a larger fee is enforceable in that state. In one the court said, "The mere fact that the amount which the attorney was to receive was changed subsequent to the employment does not invalidate the contract." *Anker v. Chicago G. W. Ry. Co.* (1919) 174 N. W. 840. In another the court said that the client has an unrestricted right to agree with the attorney as to his compensation. "That this right includes the right to modify an existing contract on the subject, and if the modification be free from fraud or unfairness, the courts are bound to respect it," *Erikson v. Boyum* (1921), 184 N. W. 961. While in the other case the court allowed the additional fee where the services to be rendered were larger than had been originally contemplated, *Farmer v. Stillwater Water Co.*, 108 Minn. 41, 127 N. W. 48. The above mentioned Minnesota rule in attorney and client cases is in conformity with the Minnesota rule in other contract cases in which they are contrary to the general rule, and allow the contractor to recover when he has broken his contract and has later gone on and completed the contract when promised additional compensation. In 1915, the St. Louis Court of Appeals allowed an attorney to recover an additional 5% fee which

was promised by the client in return for the attorney's personal attention in taking a deposition in the state of California. The court recognized the general rule, but said that the services were such as were not contemplated in the original agreement, and, therefore, could be recovered, *Bishop v. Vaughn*, 172 S. W. 644. These cases show that it is the general rule that the promise of a client to pay a fee in addition to the fee agreed upon at the beginning of the relation of attorney and client for the same services is void and not enforceable. That the exceptions to this rule depend upon the facts of the particular case and the state where the case is tried, and that Minnesota has gone the farthest in allowing the attorney to recover the increased fee because of the fact that the Minnesota courts will construe the new agreement to be an abrogation of the old agreement and the former. M. L. S., '27.

BANKRUPTCY—CLAIMS—SALES—BAILMENTS.—*In re Belle*,
District Court W. D. Pennsylvania, 1925.

The petitioner, one Herman Goldberg, sought to repossess and recover from the receiver in bankruptcy certain drug store fixtures. The fixtures in question had been in the possession of the bankrupt under a contract which is in the correct form of a bailment contract, and alleged by the petitioner to be a bailment lease. The receiver, after this petition, had asked for a sale of the bankrupt's personalty, including the latter's interest in the fixtures claimed by Goldberg. Contemporaneously with the so-called lease, a contract of sale of the stock of goods in the store was entered into between Goldberg as vendor and the bankrupt Belle as vendee. Certain down payments were made and the remainder of the purchase price was payable by monthly installments of \$100 each. By this contract, when the whole was paid on the goods, Goldberg was to give a bill of sale for the fixtures. Title and possession of the stock of goods were not deferred, but given immediately. *Held*: the contract concerning the fixtures, while in form a bailment, is in reality a conditional sale. The surrounding facts determine the real nature of the transaction. Under Pennsylvania law the fixtures could not be recovered from the receiver.

This decision is rightfully reached by construing the fixtures contract in the light of extraneous facts, and in view of the contract of sale of the stock of goods. The monthly payment of \$100, referred