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CERTAINTY IN CONTRACTS

That the question of certainty in the law of contracts is not one of merely academic interest is shown by the fact that the Decennial Digest for the decade ending in 1926 gives us no less than eighty-nine American decisions, nine of them in the state courts of New York alone, wherein the question of certainty was a vital, if not a determining factor. One can merely guess at the number of unreported cases and unlitigated controversies wherein certainty has been a matter of importance. Furthermore, in practice, there is probably no defense more frequently resorted to when an alleged agreement has been broken that the plea that the contract in question is so vague and uncertain in its terms that it is unenforceable; in other words, that the parties have never really come to any agreement.

There appears to be no escape from the fact that the term certainty is a relative, not an absolute term, as used in this connection. Thus, the courts have repeatedly declared that the thing required is "reasonable" certainty.¹ The intention of the parties must be ascertainable to a "reasonable degree of certainty".² In the field of philosophy, also, certainty has a relative rather than an absolute connotation. Hence we find in Baldwin's Dictionary of Philosophy and Psychology that "certitude or certainty" is defined as a term "employed to express degrees of conviction or belief. It is applied to all cases from a slight tendency to accept a proposition or fact up to complete certitude or knowledge. Certain authorities limit certitude to the highest degrees of assurance, where the possibility of doubt is excluded."

Is there one rule of certainty at law and another in equity? Suggestions to this effect are not wanting. In Oregon, the Supreme Court has said that "less particularity is required in the terms of an agreement where the proceeding is not a suit in equity but an action at law".³ And the New York Court of Appeals is authority for the rule that a contract, to be specifi-

¹ *Price v. Stipek*, 39 Mont. 426, 104 Pac. 195 (1909); *Central Mortgage Co. v. Mich. State Life Ins. Co.*, 43 Okl. 33, 143 Pac. 175 (1914); *De Pauw Univ. v. Ankeny*, 97 Wash. 451, 166 Pac. 1148 (1917).

² *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527 (1900).

³ *Olympia Bottling Wks. v. Olympia Brew. Co.*, 56 Ore. 87, 107 Pac. 969 (1910).

cally enforced must be certain and that, if it is not, "the plaintiff in such a case will be left to his remedy in an action for damages".⁴ Likewise, the Supreme Court in Virginia quotes with apparent approval the following statement from Ruling Case Law:⁵ "Where the relief sought is specific execution, it is essential that the contract itself should be specific. In other words, the certainty required must extend to all the particulars essential to the enforcement of the contract. But where there has been an entire breach, and compensation is asked in damages, it may be sufficient if there be certainty only as to the general scope and stipulations of the contract. It may well be doubted, however, whether there has been any practical recognition of any such distinction by the courts. However, the law does not favor, but leans against, the destruction of contracts because of uncertainty".⁶ It will be seen that the above evasive and self-contradictory statement gives some support to a distinction in this connection and it must be admitted that the rule of certainty in the law of damages is quite a different thing from certainty in the formation of a contract. Furthermore, there is no question but that damages may often be recovered at law on the basis of quasi-contractual liability after part performance of an alleged contract which is void for uncertainty.⁷ Aside from these considerations, neither of which is concerned with the question of certainty in the formation of a contract, there is no basis for any distinction between law and equity on this matter of certainty. Hence, the words of Miller, J., in an early case⁸ seem to be entirely sound: "It is inferable from the language used in reference to the degree of certainty required by courts of equity in order to induce them to compel specific performance of a contract that a greater degree of certainty is required than is necessary to render valid a contract in the courts of law. But I do not think that any such distinction was intended. The rules of construction are the same in both courts; and no reason can be assigned for demanding a greater degree of certainty in the one court than in the other."

⁴ *Stanton v. Miller*, 58 N. Y. 192, 200 (1874).

⁵ 6 R. C. L. 644.

⁶ *Maness-Owens Co. v. Owens*, 129 Va. 183, 105 S. E. 543 (1921).

⁷ See *Hopedale Elec. Co. v. Elec. Storage Battery Co.*, 132 App. Div. 348, 116 N. Y. Supp. 859 (1909), aff'd 198 N. Y. 588, 92 N. E. 1086 (1910).

⁸ *Foot v. Webb*, 59 Barb. 38 (N. Y. 1866).

An examination will now be made of the leading principles in connection with the problem of certainty, and more particularly of the New York decisions.

1. The fact that extrinsic evidence must be resorted to in order to ascertain the extent of the rights and liabilities of the parties under the contract does not render it void for uncertainty. For example, an agreement to furnish all the coal needed by a vessel during a certain year at a certain price per ton is not void for uncertainty, merely because extrinsic evidence is necessary to determine the number of tons required.⁹ Likewise, a promissory note made payable thirty days or at any other fixed time after the maker's death is clearly not void for uncertainty though the time of the death must be fixed by extrinsic evidence. Furthermore, an agreement between a sub-contractor and contractor as to work on a building to be subsequently contracted for between the contractor and a school board is binding.¹⁰ In this case, no doubt, the first agreement would fail for lack of definiteness if the second turned out to be indefinite. This is illustrated by another situation wherein the parties agreed upon the giving of a ninety-nine year lease on the usual terms in such cases. When it was later established that there was no usual form in such cases in that locality, the entire agreement failed for want of certainty.¹¹ Moreover, there are many instances of utter incompleteness and obvious uncertainty which can not be cured by extrinsic evidence. Thus, an agreement to pay for services a sum not exceeding three hundred dollars a week is so utterly and palpably vague that parol proof can not be resorted to.¹² "If the meaning of an instrument is uncertain, the intention may be ascertained by extrinsic testimony, but it must be distinctly derived from a fair and rational interpretation of the words actually used. If it be incompatible with such interpretation the instrument will be void for uncertainty and incurable inaccuracy."¹³ A blank left in an instrument where a vital term of the agreement should have been inserted is so obviously incomplete and therefore uncertain that

⁹ *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142 (1891).

¹⁰ *Blaney v. Hoke*, 14 Ohio St. 292 (1863).

¹¹ *Goldstine v. Tolman*, 157 Wis. 141, 147 N. W. 7 (1914).

¹² *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527 (1900).

¹³ *Miller, J.*, in *Calkins v. Falk*, 39 Barb. 620, 624 (1862), *aff'd* 1 Abb. Ct. App. Dec. 291, 38 How. Pr. 62 (1869).

extrinsic evidence can not be invoked to supply the gap. Hence, a promise to pay another _____ dollars is of no consequence in law and parol evidence is of no avail.¹⁴

2. In many instances, a contract is saved from the sea of uncertainty by what are known as "implications of law" or the supplying of omitted terms by construction. Hence, a contract to pay for services cannot be attached for uncertainty because the compensation is not fixed in the contract itself. The law will imply that a reasonable charge was intended.¹⁵ And the same is equally true where the contract leaves the door open for future controversy by expressly stipulating that services are to be paid for by the giving of a "reasonable compensation".¹⁶ The same rule holds where words which are equivalent to a provision for reasonable compensation are used. Thus, an agreement to pay what is "right" and "satisfactory" has been held to be enforceable as an agreement merely to pay what is just under the circumstances.¹⁷ However, it must be admitted that we are here perilously near to the danger zone where certainty leaves off and uncertainty begins. This may be illustrated by the two cases following. In Massachusetts, the contract of a chemist who agrees to employ his time and skill for "a fair and equitable share of the net profits" of the business is not too indefinite to be enforceable, at least in so far as it has been executed.¹⁸ But in New York, a promise to pay a "fair share" of the profits of a business is too indefinite to be enforceable.¹⁹ The court declared, "A fair share of the defendant's profits may be any amount from a nominal sum to a material part according to the particular views of the person whose guess is considered. Such an executory contract must rest for performance upon the honor and good faith of the parties making it."²⁰ Is this point well taken? Who on earth would call a nominal sum a fair share? And why should a fair share not be a material part? The fact that views of different persons may be at variance is equally true where a reasonable sum is involved.

¹⁴ *Vandervoort v. Dewey*, 42 Hun. 63 (N. Y. 1886); *Eaton v. Wilcox*, 42 Hun. 61 (N. Y. 1886), rev'd on other grounds sub nom *Eaton v. Allegheny Gas Co.*, 122 N. Y. 416, 25 N. E. 981 (1890).

¹⁵ *Perkins v. Hasbrouck*, 155 Pa. 494, 26 Atl. 695 (1893).

¹⁶ *Wehner v. Bauer*, 160 Fed. 240.

¹⁷ *Silver v. Graves*, 210 Mass. 26, 95 N. E. 948 (1911).

¹⁸ *Noble v. Joseph Burnett Co.*, 208 Mass. 75, 94 N. E. 289 (1911).

¹⁹ *Varney v. Ditmars*, 217 N. Y. 223, 111 N. E. 822 (1916).

²⁰ Chase J., at page 228.

Guessing, it is submitted, is just as much in evidence in determining what is reasonable as in deciding what is fair. And is there any material difference in such matters between the terms fair and reasonable? Honesty, justice and sweetness, to borrow Matthew Arnold's epithet, are as much the attributes of the one as the other. Let us pass now to the position of the same court five years later in *Cohen & Sons v. Lurie Woolen Co.*²¹ Here, the defendant sold the plaintiff a quantity of cloth at a certain price per yard and agreed to give the plaintiff the "privilege . . . to confirm more of the above if [the defendant] can get more." The five judges of the Appellate Division, First Department, were unanimous in condemning the above clause as indefinite and uncertain. Greenbaum, J., denounced it as such, pointing out that "it fails to state what quantity of goods plaintiff is entitled to buy under the exercise of its privilege. It does not appear whether the option is limited to as many pieces of the goods as defendant might be able to procure, or only to as many as plaintiff cares to avail itself of. It is uncertain as to the limit of time during which the privilege is to be exercised. Is the privilege to continue for a week, a month, a year, a lifetime? May it be exercised once, or as often as plaintiff wishes? It is also silent as to the price at which plaintiff is entitled to exercise its option."²² As thus interpreted by the Appellate Division, how could any agreement be more uncertain than the one before it? Yet the Court of Appeals, notwithstanding the fact that the word "fair" in *Varney v. Ditmars*²³ caused it to condemn that agreement for uncertainty, held the agreement in *Cohen v. Lurie Woolen Co.*²⁴ to be sufficiently certain to be enforced. Cardozo, J., declared that the seeming uncertainties as to subject-matter, time and place were not impenetrable. "They will be found to be unreal. It is said that we cannot tell whether the buyer, in exercising the option, must make demand for all that the seller can supply, or is free to call for less. We think the implication plain that the buyer is to fix the quantity, subject only to the proviso that quantity shall be limited by ability to supply. It is said the option does not state the time within which election is to be announced. We think a reasonable

²¹ 232 N. Y. 112, 133 N. E. 370 (1921).

²² 197 App. Div. 797, 139 N. Y. Supp. 380 (1921).

²³ *Supra*, note 19.

²⁴ *Supra*, note 21.

time is a term implied by law. . . . It is said the option does not embody a statement of the price. We think a 'privilege to confirm more' imports a privilege to confirm at the price of the initial quantity." Crane, J., alone of the seven judges dissented from the opinion. And it is worth noting that Cardozo, J., who wrote the opinion in *Cohen v. Lurie Woolen Co.*²⁵ dissented in *Varney v. Ditmars*²⁶ on this matter of certainty. If both of these cases are sound and consistent, several curious consequences follow. An employer who promises a workman a *fair* share of the profits of the business is not bound to keep his promise, though he may be held to his agreement if he merely promises a share of the profits or a reasonable share of the profits. The law is willing to supply omissions of time, quantity and price, where none of these is mentioned and will imply that all are to be reasonable, but if any one of these is expressly designated as "fair", the whole agreement falls to the ground for lack of certainty. Since the above decisions were handed down, Cardozo, J., has expressly followed *Varney v. Ditmars*,²⁷ from which opinion, it will be recalled, he dissented, and has held that a promise to pay "an appropriate percentage" of the benefits, if any, accruing from the labor of an employe, in addition to regular wages, is too indefinite to be enforceable as more than a promise to pay the reasonable value of the services rendered.²⁸ In other words, the plaintiff was denied the recovery of his stipulated wages as a minimum plus a portion of the benefits in question and was confined to a recovery merely of the reasonable value of the work performed. The court declared, "The case is to be disposed of as founded on a common count for service rendered at request." This means that the word "appropriate" has followed into limbo the word "fair". In *Varney v. Ditmars*,²⁹ no recovery could have been had in quasi-contract for work performed for the reason that but little, if any, had been performed. In *Cohen & Sons v. Lurie Woolen Co.*,³⁰ the court said that the option in question "was drawn by merchants. We are persuaded that merchants reading it would not be doubtful of its meaning. It was meant to accomplish

²⁵ *Supra*, note 21.

²⁶ *Supra*, note 19, at 233.

²⁷ *Supra*, note 19.

²⁸ *Von Reitzenstein v. Tomlinson*, 249 N. Y. 60, 162 N. E. 584 (1928).

²⁹ *Supra*, note 19.

³⁰ *Supra*, note 21.

something." But was not the same thing true in the other two cases? Was not the promise of a share of the profits intended to stimulate the efforts of the workmen? And is it not fair to assume that it had the desired effect? Let us discuss the matter no further, reminding ourselves only that what is fair and appropriate is very different in legal effect from what is reasonable or devoid of any qualifying word.

3. Though an agreement may be void at the outset by reason of some element of uncertainty in it, the agreement may become binding when the uncertain element has been rendered certain. Hence, a contract calling for the conveyance of land but containing a defective description of it may be made binding by the subsequent location of the land and the procuring of a plot and survey thereof.³¹ Likewise, where machinery is purchased subject to a test the terms of which are to be agreed upon, when the parties subsequently agree upon the terms of the test the element of uncertainty disappears from the original agreement.³²

4. Though a contract is void for uncertainty and hence is not binding in so far as it is executory, if benefits have been conferred by one of the parties upon the other in pursuance of the agreement believed to exist, recovery will be allowed in quasi-contract for the reasonable value of such benefits.³³ This proposition is so just and beyond dispute that further discussion is unnecessary. Obviously, the contract can not be enforced by either party, but this is a different matter from the receipt of benefits thereunder and allowing the party benefited to escape all liability.

In conclusion and by way of summary, it may be said that the law does not require mathematical or absolute certainty in the terms of a contract to make it enforceable. The written document must express clearly the intention of the parties, but there is no rule of law which requires it to be a work of art.³⁴ If there were a distinction between the certainty required at law and in equity, it would, of course, be necessary to have two rules

³¹ *Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927 (1912).

³² *Hopedale Electric Co. v. Electric Storage Co.*, 96 App. Div. 344, 89 N. Y. Supp. 325 (1904), aff'd 184 N. Y. 356, 77 N. E. 394 (1906).

³³ *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527 (1900).

³⁴ *Jackson v. Rogers*, 111 S. C. 49, 96 S. E. 692 (1918).

on the subject. But such distinction appears to be without foundation in reason or on authority. It is not necessary that the intention of the parties be fully determinable from an examination of the instrument which they have signed. The necessity of certainty does not preclude the resort to extrinsic evidence, if only the contractual obligation is certain when such evidence is resorted to. It is by reason of the power of the courts to invoke implications of law and the uncertainty in the application of rules of construction that much of the litigation over the question of uncertainty has resulted. If, in the cases of *Varney v. Ditmars*³⁵ and *Cohen & Sons v. Lurie Woolen Co.*,³⁶ the parties could have determined the matters of construction and implication in advance, the litigation might have been avoided. But this it is impossible to do. These are matters which must inevitably be left to the decision of the court in each case. Our perplexity in these situations is evidenced by the decisions cited above wherein we learn that "reasonable" is unobjectionable on the ground of certainty, though "fair" and "appropriate" are fatal. Many other words, such as "just", "honest", "decent", "satisfactory", and the like, might be suggested, though we may be compelled to confess our inability to say what treatment they will receive by the courts. The lack of certainty at the outset may be removed and that which is uncertain rendered certain by the subsequent course of conduct of the parties. In this case, an enforceable contract comes into existence only when the ambiguity is removed. Finally, be it noted that uncertainty is often an effective obstacle to recovery in the case of the executory contract alone. After execution on one side, recovery in quasi-contract is possible when benefit has been conferred and such recovery is frequently the same in dollars and cents as a recovery on the original and express contract would have amounted to, but for the defect of uncertainty.

More recently the New York Court of Appeals has handed down another decision on the question of certainty, namely the case of *Nassau Supply Co. v. Ice Service Co.*³⁷ It appears that the defendant, the Ice Service Co., had agreed to sell to the plaintiff, the Supply Co., one hundred tons of ice each day for

³⁵ *Supra*, note 19.

³⁶ *Supra*, note 21.

³⁷ 252 N. Y. 277 (1929).

a calendar year at a stated price, and the Supply Co. agreed to purchase from the Ice Co. "all the ice used by them up to one hundred tons. Payments for same daily." Crane, J., delivered the unanimous opinion of the court affirming the judgment of the Appellate Division, first department, which reversed a judgment for the plaintiff and dismissed the complaint. The court declared that "on the face of this paper agreement there appears to be a sufficient consideration for a contract, or, in other words, mutual binding promises, a mutuality of consideration." But the court held that the contract implies certain things, at least that the purchaser at the time of performance would use ice as a going concern and that a supply had to be furnished on or about the time set for performance to begin up to the termination of the contract. The exact language of the court is, "We do not mean to say that the failure to take ice every day would be a breach of the contract. What we do say is that these words carry with them the idea of something substantial; convey the meaning that the plaintiff was a business enterprise in existence, using ice which, in the contemplation of the parties, might be required daily." The court then proceeded to give a summary of the facts in the case, the important points being as follows: That the Supply Co. was not in the ice business but the coal business; that when it made the contract it had no use for ice and might never have any use for it; that it had no place of business at the address given in the contract; that it had no license to engage in the retail ice business and was not engaged in such business; that when the time set for performance arrived, namely May 1, 1924, the plaintiff ordered no ice nor had any use for ice; that the plaintiff ordered no ice until the latter part of June when it asked the defendant to sell ice to one Williams who had purchased ice from the defendant but had been refused further credit. The plaintiff, however, agreed to pay for such ice supplied to Williams. The plaintiff claimed that it had taken over Williams' business. The court emphasizes the fact that, both at the time the contract was made and when performance was to begin, there was no trade or custom or use or demand or business existing which would in any way whatever measure a supply, a requirement or a need. "There was no fact or circumstance by which the use or need of the plaintiff's requirements could be measured or made reasonably certain. In all the New

York cases cited, where a contract has been [made] to supply goods for the needs or requirements of another's business, there has been a going business with the need of a supply and it was only the uncertainty as to the extent of this need or the amount of the supply required which was left for future determination." In conclusion, the court said, "We find that the intention of these parties was that the seller agreed to sell and the buyer to take the buyer's normal or ordinary needs up to the limit mentioned subject to the variation of its business. This is not a case where the buyer agrees to take all that he may subsequently want or may choose to buy, or the promise of a buyer not to buy except from a particular seller. We would then have a different question. . . . The Nassau Supply Co., Inc., as before stated, impliedly represented that it was either in the ice business or would be in the ice business with a market for ice in May or June, and would require ice daily, not to exceed one hundred (100) tons. It was not in such business, did not establish such business and made no bona fide demand for any ice under its contract. In other words it had no need for ice."

Without going outside of the court's opinion, this decision leaves much room for comment. It is true that a coal company pure and simple has no need for ice. No ice is needed to keep the coal from spoiling or burning in the summer time. But what is more common in these days when unemployment is so much to be avoided than a company which keeps its workers engaged in delivering coal in winter and supplying ice in summer? Climate makes the one the complement of the other. It may be true that the Supply Co. had no need for ice when the contract was made and might never have any, but is there any reason for suspecting its motives in taking over Williams' business? It may be, as the court says, that Williams had but three or four wagons though the extent of his business did not appear. Let us remember that one hundred tons a day was merely the maximum, not the minimum. Doubtless in many of these cases, the maximum is never demanded on any day. Furthermore, the fact that a maximum was fixed is an element certainly not present in many of the cases wherein the contract has been held sufficiently certain.

The next question raised but which is not now discussed is this,—What effect has the giving of a fictitious address by a

party to a contract? Does this in itself give the other party the right to treat the contract as at an end, if he calls at this address and cannot locate his co-contractor?

We dismiss as indeed a matter of very minor importance the fact that the Supply Co. had no license to engage in the retail ice business. What is there that can be obtained with less difficulty than such a license?

It is admitted that before the end of the second month of this twelve-month contract, the plaintiff asked the defendant to supply ice to Williams and debit the plaintiff. Is it not possible that the first month may have been a cold one when the ice business was dull; that the plaintiff may have spent the month of May looking about as to the best way of starting up the ice business? Clearly there is no objection to having the ice delivered to Williams provided only that the plaintiff is willing to pay for it. How can there possibly be any legal objection to my having some one else call for merchandise which I have purchased? And may not the best way of getting started in the business be by means of taking over the business of an established dealer whose financial position is none too stable? Is there not greater certainty in respect to need when an established business is taken over than when the business is started from the ground up?

The court emphasizes the fact that in the earlier New York cases wherein agreements of the character now under discussion have been upheld, there was already a going business with the need of a supply. If this is to be the basis for our distinction between such agreements which are enforceable and those which are not, we cannot escape the conclusion that whether the agreement is void for uncertainty or not cannot be determined from the face of the contract itself. We must inquire in the surrounding circumstances, particularly with reference to the nature of the plaintiff's business and determine whether it is a going concern or not.

The court says, "This is not a case where the buyer agrees to take all that he may subsequently want or may choose to buy, or the promise of a buyer not to buy except from a particular seller". It must be confessed that we cannot see how the court arrived at these conclusions unless it has erroneously quoted the contract earlier in its opinion. The plaintiff "agrees to purchase

from the said Ice Service Co., Inc., all the ice used by them up to (100) One Hundred tons". The court says, if this were the case, "We would then have a different question". This it is difficult to explain. Was it not the very question before the court?

The court also says that the Nassau Supply Co. was not in the ice business, "did not establish such business and made no bona fide demand for any ice under its contract. In other words it had no need for ice." Here again, the opposite conclusion seems possible. Did not the Supply Co. establish an ice business by taking over that of Williams? Why question the bona fides of the demand for ice so long as the Supply Co. expressed its willingness to pay for it? And what more is necessary to establish a need for ice than a demand for the same? From aught that appears, the only objection of the defendant to Williams was based on his inability to pay his bills. This element seems to have been supplied by the plaintiff.

This decision is, in the main, in line with the earlier decisions of *Wells v. Alexandre*³⁸ and *Schlegel Mfg. Co. v. Cooper's Glue Factory*.³⁹ However, it appears to add this limitation to these earlier decisions: while an agreement to purchase all of an article needed in a certain business during a certain time in consideration of the seller's agreeing to supply such articles at a stated price is not void for uncertainty if the purchaser during the time of performance is a going concern in need of the article in question, such an agreement is void for lack of certainty if the purchaser has no such business when performance is to begin, though the agreement may be saved from the objection of uncertainty if the purchaser, very shortly after performance begins, makes a bona fide attempt to establish a going concern in need of the article in question. It would indeed be rash to assert that, as time goes on, the rule of certainty is itself becoming more simple or certain.

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³⁸ *Supra*, note 9.

³⁹ 231 N. Y. 459, 132 N. E. 148, 24 A. L. R. 1348 (1921).