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OPEN PRICE IN CONTRACTS FOR THE SALE OF GOODS

By WILLIAM L. PROSSER *

It is familiar economic doctrine[1] that the chief function of the price term in a contract for the sale of goods is to shift, as between the parties, the risks of a fluctuating market. A prospective seller, who owns a thousand bushels of wheat, is necessarily subject to the risk that, before he sells, the market value of the wheat will decline, and he will receive less for it than it is now worth. A prospective buyer, who requires a thousand bushels of wheat, is correspondingly subject to the risk that before he buys the market will go up, and the wheat will cost him more than he would now have to pay. When the two agree upon a contract for the sale of the wheat at a price of one dollar per bushel, these risks are exchanged. It is now the seller who assumes the risk that the market will rise, and that he will have lost a profit; the buyer who assumes the risk that the market will go down, and the bargain prove to be a bad one. If the contract is for future delivery, the situation is the same, except that the seller doubtless feels more acutely the hardship of delivering wheat at one dollar, when its value has risen to one dollar and fifty cents, or the buyer regrets more poignantly his bad judgment if the market has fallen to fifty cents.

It frequently happens, however, that the parties to a contract for the sale of goods are not willing to agree to this particular exchange of risks. For sufficient reasons, they may desire to

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[1]Well stated in Llewellyn, Cases and Materials on the Law of Sales 1-6.

enter into a binding agreement. The seller may wish to be assured of a market for his product, immediately or at some future date, and yet be unwilling to risk a rising market after he has sold. The buyer may want to be certain of a supply of goods, and yet consider with reluctance the possibility of a decline. If delivery is to be in the future, both parties may be entirely uncertain as to what the price ought to be. The attempt to deal with this problem, to make a binding agreement, and at the same time to avoid or control this transfer of the risks of a changing market as between the parties, has led to a variety of business arrangements by which, in a contract for the sale of goods, the price is left open for future determination.

Obviously there is nothing contrary to public policy in such agreements. They are most commonly made when the market is fluctuating violently, and future prices are most uncertain.[3] The number of open price contracts which have reached the courts, and the uncharitable treatment which some of them have received there, suggest an examination of the legal principles involved, and an attempt to determine how far such practices may be effective.

The principal legal obstacle to an open price contract is the requirement of certainty. The price is an essential term of the contract; without it there is no sufficient consideration for the seller's promise, and no measure of the buyer's obligation to perform. It has been a settled rule, since the early civil law,[4] that

[2]"Elements of uncertainty, whether with respect to the goods themselves, or with respect to outside matters affecting market conditions and causing uncertainty or fluctuations in value may cause parties to desire to make a deal but at the same time to leave open some range of future adjustment. 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. Elasticity of arrangement, if permissible, may serve to carry into effect many productive business operations where absolute rigidity of contract terms from the outset would look so hazardous to one or the other party that the transaction would not be undertaken." Vold, Handbook of the Law of Sales 30.

[3]Witness the large number of such cases appearing in the courts during the years 1915-1923.

[4]The language of the Institutes was to the effect that, "Pretium autem constitui oportet, nam nulla emtio sine pretio esse potest; sed et certum pretium esse debet." Inst. 3, 23, 1. Justinian put an end to argument as to whether the requirement of a certain price rendered invalid an agreement that the price should be fixed by a third person, by a provision in the Code, 4, 38, 15, that the sale was conditional on the valuation being made: "Sin autem ille qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto, nulla conjectura . . . servanda utrum in personam certam, an in boni viri

the price must be fixed with reasonable certainty.[5] But this rule is subject to the qualification, which has caused endless confusion[6]

arbitrium respicientes contrahentes ad haec pacta venerint."

The Code Napoléon has adopted the same rules: By Article 1591, "Le prix de la vente doit être determiné et désigné par les parties." By Article 1592: "Il peut cependant être laissé à l'arbitrage d'un tiers: si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente."

[5]"It seems to be of the very essence of a sale that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense." Story, J., in Flagg v. Mann, (C.C. Mass. 1837) 2 Sumner 538, Fed. Cas. 4847.

"It is also essential to a valid sale or contract of sale that the parties thereto, either expressly or impliedly, agree upon and fix with reasonable certainty the price or consideration to be paid for the property sold, or provide some method or criterion by which it can be definitely ascertained." 55 C. J. 68.

"To constitute a sale the price must be definitely fixed or the agreement must contain such elements express or implied that the price can be ascertained therefrom. The price is one of the essential elements involved in the agreement, and there must be an agreement of the parties to the price, either express or implied, before there can be a completion of the sale or a binding executory contract therefor." 23 R. C. L. sec. 94, p. 1277.

[6]As an example, the decisions of the courts of New York speak for themselves. Apparently it is the law of New York that:

(1) A promise to pay a "fair share" of the profits of a business is too indefinite to be enforced. Varney v. Ditmars, (1916) 217 N. Y. 223, 111 N. E. 822; Bluemner v. Garvin, (1907) 120 App. Div. 29, 104 N. Y. S. 1009. (Contra, Noble v. Joseph Burnett Co., (1911) 208 Mass. 75, 94 N. E. 289). The same is true of a promise to pay a "reasonable amount" out of such profits, Canet v. Smith, (1914) 86 Misc. Rep. 99, 149 N. Y. S. 101, or an "appropriate percentage." Von Reitzenstein v. Tomlinson, (1928) 249 N. Y. 60, 162 N. E. 584.

(2) A promise to pay one-half of "all profits and revenues" of an exclusive selling agency, with no provision as to any obligations of the selling agent, is sufficiently certain to be enforced. Wood v. Lucy, Lady Duff-Gordon, (1917) 222 N. Y. 88, 188 N. E. 214.

(3) A promise to furnish "good security," with no time limit set, is sufficiently certain. Cowles v. Cole, (1930) 137 Misc. Rep. 491, 244 N. Y. S. 4.

(4) A promise to do work which shall be "satisfactory" to the adverse party is sufficiently definite. Duplex Safety Boiler Co. v. Garden, (1886) 101 N. Y. 387, 4 N. E. 749.

(5) An agreement to sell land at a price to be agreed upon is too indefinite to enforce. Ansorge v. Kane, (1927) 244 N. Y. 395, 155 N. E. 683.

(6) A contract for the sale of goods which is silent as to the price fails for uncertainty. Lambert v. Hays, (1910) 136 App. Div. 574, 121 N. Y. S. 80.

(7) A contract for the sale of goods which is silent as to the time of delivery is sufficiently certain. Pope v. Terre Haute Car & Mfg. Co., (1887) 107 N. Y. 61.

(8) A contract for the sale of goods which gives the buyer the privilege "to confirm more of the above if the seller can get more," with nothing said as to either the price or the time limit, is sufficiently certain to enforce. Cohen & Sons v. Lurie Woolen Co., (1921) 232 N. Y. 112, 133 N. E. 370.

(9) A contract to supply "30,000 to 40,000 tons" is sufficiently definite. De Grasse Paper Co. v. Northern New York Coal Co., (1919) 190 App.

in contract decisions, that in certain ill-defined situations[7] the court will remove all uncertainty by supplying an implication that the parties agree to do what is reasonable. The court insists that it cannot make a contract for the parties,[8] but it sometimes is willing to read into the agreement they have made a provision which is not visibly there. The problem of certainty is very largely a problem of whether the court will make the contract certain where the parties have not done so.

Opposed to this requirement of certainty is the obvious fact that in all open price contracts there is an intention to make a deal. The agreement is made by business men; it is meant to accomplish something.[9] It is not to be supposed that they have

Div. 227, 179 N. Y. S. 788.

(10) A contract to furnish a news service at "a sum not exceeding $300 a week" is too uncertain. United Press v. New York Press Co., (1900) 164 N. Y. 406, 58 N. E. 527.

(11) A contract to supply paper, "the price of the paper and the length of time for which such price shall apply to be agreed upon," with a definite maximum stated, fails for uncertainty, not because the price is left open, but because the time for which it is to apply is left open. Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1923) 235 N. Y. 338, 139 N. E. 470.

If there is any silver thread of consistency running through these decisions, it has escaped the observation of the writer.

[7]In this connection, Professor Williston's review of "Offers and agreements indefinite as to price" is of interest:

"It is by no means uncommon for those who offer or agree to employ others, or to buy goods, to make no statement as to the wages or price to be paid. The law invokes here (as likewise where an agreement is indefinite as to time) the standard of reasonableness. Accordingly the fair value of the services or property is recoverable. Sometimes, however, the terms of a promise exclude the supposition that the reasonable or market price was intended. In such a case no contract can arise. Thus a promise may attempt to define the price, but do so too indefinitely for enforcement, as by such words as 'Not exceeding $300 a week,' the cost plus a 'nice' profit, a division of profits 'upon a very liberal basis,' 'a reasonable amount from the profits,' 'a portion' of the promisor's estate, 'a part of the money,' 'to reduce the rent,' 'a due allowance,' 'money to enable them to carry on their business,' 'good wages,' 'the average price.' These have been held too indefinite for enforcement." 1 Williston, Contracts, sec. 41, p. 67.

It is at least arguable that there is no very visible reason why, in the illustrations given, there is any less ground to imply an agreement to do what is reasonable than where the parties have said nothing at all. If the contract says nothing, we invoke "the standard of reasonableness" and enforce it. If it attempts rather vaguely to suggest such a standard, we say that it fails for uncertainty.

[8]"There is need, it is true, of no high degree of ingenuity to show how the parties, with little change of language, could have framed a form of contract to which obligation would attach. The difficulty is that they framed another. We are not at liberty to revise while professing to construe." Cardozo, J., in Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1923) 235 N. Y. 338, 139 N. E. 470.

[9]"This option was drawn by merchants. We are persuaded that mer-

gone through the motions of making a contract with the intention that it shall be of no effect.[10] Neither is it to be presumed that either party intends anything unreasonable. The fact that some pains have been taken to make a contract, where the price cannot be fixed, indicates that considerable importance is attached to the terms upon which there has in fact been agreement. If the court, by invoking the "standard of reasonableness,"[11] can give effect to these terms, there is every reason why it should do so.

Furthermore, where the price is the term left open, we have a reasonable, readily ascertainable objective standard to which the contract may be referred—namely, the current market price of the goods at the time and place of performance named in the contract. This is the standard to which we are accustomed to refer in measuring damages when the contract is broken, by failure of the seller to deliver,[12] or refusal of the buyer to accept.[13] In determining the damages we deal with every difficulty which may arise in the application of such a standard.[14] If the court

chants reading it would not be doubtful of its meaning. It was meant to accomplish something." Cardozo, J., in Cohen & Sons v. Lurie Woolen Co., (1921) 232 N. Y. 112, 133 N. E. 370.

[10]"In the transactions of business life, sanity of end and aim is at least a presumption, albeit subject to be rebutted. The defendant, like the plaintiff, supposed that in signing these documents it was doing something understood to be significant and serious. It not only accepted the the plaintiff's order, but it asked the plaintiff to confirm the terms of the acceptance, and followed this with a cable of the order to its manufacurer abroad. Was it all sound and fury, signifying nothing?" Cardozo, C. J., in Outlet Embroidery Co. v. Derwent Mills, (1930) 254 N. Y. 179, 172 N. E. 463.

[11]Professor Williston's phrase. See footnote 7.

[12]2 Sedgwick, Damages, 9th ed., sec. 734, p. 1530; 2 Williston, Sales, 2d ed., sec. 599, p. 1478. The following measure of damages is adopted by the Uniform Sales Act, sec. 67 (3), Mason's 1927 Minn. Stat. sec. 8441 (3):

"Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

[13]2 Sedgwick, Damages, 9th ed., sec. 753, p. 1570; 2 Williston, Sales, 2d ed., sec. 582, p. 1434. The measure of damages adopted by the Uniform Sales Act, sec. 64 (3), Mason's 1927 Minn. Stat., sec. 8438 (3), is as follows:

"Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

[14]See 2 Sedgwick, Damages, 9th ed., sec. 739, p. 1545, and sec. 753, p. 1574; 2 Williston, Sales, 2d ed., sec. 583, p. 1437, and sec. 599, p. 1481, for a discussion of the situation where there is no market for the goods, or the market price is controlled and does not fairly represent their value.

is to imply an agreement to pay a reasonable price, then this is our reasonable price, for we cannot assume that it is intended that the buyer should pay more than the fair market value of the goods when he receives them, or that the seller should accept less.

With these considerations in mind, we may attempt to review[15] the methods by which the price may be left open, and the treatment which each has received from the courts.

1. The Contract Silent As to the Price

The simplest way to leave the price open is to say nothing about it. Where this occurs, there is the greatest uncertainty as to what the parties may have intended. There are numerous possibilities, among them the following:

(1) The parties may have forgotten entirely to agree upon a price.

(2) They may have intended that the price should be fixed by agreement at some future date, and that until such agreement the contract should not be effective.

(3) The buyer may have intended to pay any price up to a certain maximum, the seller to accept anything above a certain minimum.

(4) They may have intended that the price should be determined by some external standard, not expressed in the contract.

(5) They may have intended the market price at the time the contract was made.

(6) They may have intended the market price at the time of delivery.

There is nothing to indicate which of these possibilities, or others, was in fact intended. All appear to be about equally probable. If the parties intended (1), (2), or (3), then there has been no expression of mutual assent, and no contract. If it should be (4), we encounter difficulties of proof, such as the parol evidence rule. As between (5) and (6), the choice is between an agreement which shifts the risks of the market at the time it is made, and one which defers the exchange of risks until the goods are to be transferred. In this situation, where the contract is most indefinite, and there is least indication of what was actually intended, the courts have proceeded quite uniformly to enforce the contract at a "reasonable price."

[15]The best discussion of these cases is found in Llewellyn, Cases and Materials on the Law of Sales 1-37, and in a note in (1927) 27 Col. L. Rev. 708. See also the annotation, 53 L. R. A. 288.

The earliest cases involved only the sufficiency of a written memorandum to satisfy the statute of frauds. It was first decided[16] that if a price was agreed upon in an oral contract, a memorandum of the contract would not satisfy the statute unless it stated the price, since "the price agreed to be paid constitutes a material part of the bargain"—a decision which has since been followed almost without dispute.[17] In *Acebal v. Levy*,[18] the court then considered[19] the rule to be applied where no price is named in the oral agreement. While expressing its doubts on the question where the contract is still executory,[20] it concluded that where the goods have been delivered, the memorandum need not name a price if none has been agreed, since the law will imply an agreement to pay a reasonable price. It is clear that the court regarded this implication as quasi-contractual, and not as implied in fact.[21]

Three months later, in *Hoadly v. M'Laine*,[22] the same court considered an executory contract for the sale of a carriage, where neither the oral agreement nor the memorandum mentioned the price. Without referring to its previous doubts, the court held the memorandum sufficient, saying that where no price is fixed by the contract the law will imply an agreement to pay a reasonable price.[23] It is possible that the decision may have been influ-

[16]Elmore v. Kingscote, (1826) 5 B. & C. 583.

[17]Browne, Statute of Frauds, 5th ed., sec. 376, p. 511; 1 Williston, Sales, 2d ed., sec. 103, p. 186; Hanson v. Marsh, (1888) 40 Minn. 1, 40 N. W. 841. The cases are collected in annotations in 30 A. L. R. 1163, and 59 A. L. R. 1422.

[18](1834) 10 Bing. 376, 3 L. J. C. P. 98.

[19]This was dictum. The declaration pleaded a special contract for the sale of nuts, at "the then usual and common shipping price for nuts, at the port of Gijon, in the kingdom of Spain." The holding of the case was that a memorandum which said nothing about the price would not support the declaration. The court followed Elmore v. Kingscote, (1826) 5 B. & C. 583.

[20]"Whether in all cases of an executory contract of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to price, by inferring that the parties must have intended to sell and buy at a reasonable price, may be a question of some difficulty." Acebal v. Levy, (1834) 10 Bing. 376, 382, 3 L. J. C. P. 98.

[21]"Undoubtedly the law makes that inference where the contract is *executed* by the acceptance of the goods by the Defendants, in order to prevent the injustice of the Defendant taking the goods without paying for them . . . But it may be questionable whether the same reason applied to a case where the contract is *executory* only, and where the goods are still in the possession, or under the control, of the seller." Acebal v. Levy, (1834) 10 Bing. 376, 382, 3 L. J. C. P. 98.

[22](1834) 10 Bing. 482, 3 L. J. C. P. 162.

[23]"It is clear that a contract for the sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth. [Citing, from Bl. Com., b. 2, c. 30, a passage which seems to be concerned chiefly with quasi-contract] . . . . What is

enced by the court's reluctance to enforce the statute of frauds,[24] but it appears more probable that it was consciously extending the "implied promise" of quasi-contract to cover, in this situation, an executory agreement.[25] Subsequent English Law has approved the result.[26]

The rule established by these cases[27] is followed wherever the contract says nothing about the price. If the sale has been executed, by transfer of the property, the buyer is obligated to pay a reasonable price.[28] Occasionally it is said[29] that this obligation is

implied by law is as strong to bind the parties as if it were under their bond. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is really worth." Hoadly v. M'Laine, (1834) 10 Bing. 482, 487, 3 L. J. C. P. 162.

[24]It is suggested by the annotator in 32 L. R. A. (N.S.) 429, 433, that the court merely had in mind the question of the sufficiency of the memorandum to comply with the statute, and not the question as to the essential terms of the contract itself. The language quoted in footnote 23 certainly does not give this impression. Cf. also the New York court's interpretation of the case in United Press v. New York Press Co., (1900) 164 N. Y. 406, 58 N. E. 527.

[25]See footnote 23. Note also the statement of Park, J. that, "Putting the two writings together, it is impossible to say he did not undertake to pay on a *quantum meruit.*"

[26]Ashcroft v. Morrin, (1842) 4 Man. & G. 450, 11 L. J. C. P. 265 ("The order here is to send certain quantities of porter and other malt liquor, on 'moderate terms.' Why is not that sufficient? That is the contract between the parties"); see Valpy v. Gibson, (1847) 4 C. B. 837, 6 L. J. C. P. 241. The rule is now incorporated in the Sale of Goods Act, sec 8.

[27]Stated as follows in Benjamin, Sales, 7th ed., p. 272: "The rule of law, then, is that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing; and parol evidence is admissible to show that a price was actually agreed upon, in order to establish the insuffiiciency of a memorandum which is silent as to price."

Hence the anomaly of a rule which permits the defendant to defeat the contract, under a statute intended to prevent "frauds and perjuries," by introducing evidence that he did in fact make a contract and agree upon a price. The rule is well settled. See the notes in 30 A. L. R. 1163, and 59 A. L. R. 1422.

[28]Jenkins v. Richardson, (1831) 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; Taft v. Travis, (1883) 136 Mass. 95; Comstock v. Sanger, (1883) 51 Mich. 498, 16 N. W. 872; Peerless Glass Co. v. Pacific Crockery Co., (1898) 121 Cal. 641, 54 Pac. 101; Leist v. Dierssen, (1906) 4 Cal. App. 634, 88 Pac. 812; Smith v. State, (1911) 9 Ga. App. 227, 70 S. E. 969; Wilkins v. Jackson, (1924) 100 Okla. 143, 227 Pac. 882; Dickerman v. Ohashi Importing Co., (1923) 63 Cal. App. 101, 218 Pac. 458; Standard Coal Co. v. Stewart, (1928) 72 Utah 272, 269 Pac. 1014. See also James v. Muir, (1876) 33 Mich. 223, and Stout v. Caruthersville Hardware Co., (1908) 131 Mo. App. 520, 110 S. W. 619. The same rule applies where a price is actually fixed, but for any reason the agreement as to the price

in quasi-contract; but the same agreement is implied, and the contract is enforced, where it is still executory.[30] If the buyer accepts and retains the goods with knowledge that he is expected to pay a particular price, he may be taken to have assented to that price;[31] but in the absence of such special circumstances, he is required to pay a reasonable price. This rule is now incorporated in the Uniform Sales Act.[32]

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fails. Bradley v. Rea, (1869) 14 Allen (Mass.) 188, 4 Am. Rep. 524.

[29]1 Williston, Sales, 2d ed., sec. 171, p. 318; Albemarle Lumber Co. v. Wilcox, (1890) 105 N. C. 34, 10 S. E. 871.

[30]Burlington Grocery Co. v. Lines, (1923) 96 Vt. 405, 120 Atl. 169; S. F. Bowser & Co. v. F. K. Marks & Co., (1910) 96 Ark. 113, 131 S. W. 334, Ann. Cas. 1912B 357 and note, 32 L. R. A. (N.S.) 429 and note; Prenatt v. Runyon, (1859) 12 Ind. 174; H. T. Cottam & Co. v. Moises, (1921) 149 La. 305, 88 So. 916; see Reid v. Diamond Plate Glass Co., (C.C.A. 6th Cir. 1898) 85 Fed. 193; Hanson v. Marsh, (1888) 40 Minn. 1, 40 N. W. 841; Cameron v. Tompkins, (1893) 72 Hun 113, 25 N. Y. S. 305; James v. Muir, (1876) 33 Mich. 223; Stapleton v. Muscogee Guano Co., (1922) 29 Ga. App. 199, 114 S. E. 906. Cf. Burger v. Ray (Tex. Civ. App. 1922) 239 S. W. 257 (contract to thresh grain). Other cases involving contracts for services where no price is mentioned are collected in 1 Williston, Contracts, sec. 41, p. 67.

To the contrary is Lambert v. Hays, (1910) 136 App. Div. 574, 121 N Y. S. 80, which seems to have been overruled by sec. 9 of the Uniform Sales Act (see footnote 32), enacted in New York in 1911; also McNeely v. Bookmyer, (1928) 292 Pa. 12, 140 Atl. 542 (sale of corporate stock; as to whether the Uniform Sales Act applies to such sales, see (1931) 44 Harv. L. Rev. 998). Also a few cases involving options for the purchase of land. See Fogg v. Price, (1888) 145 Mass. 513, 14 N. E. 741; Folsom v. Harr, (1905) 218 Ill. 369, 75 N. E. 987; Wolf v. Lodge, (1913) 159 Iowa 162, 140 N. W. 429; Nichols v. Coppock, (1927) 124 Kan. 652, 261 Pac. 574.

In Long Syrup Refining Co. v. Corn Products Ref'g Co., (C.C.A. 9th Cir. 1912) 193 Fed. 929, the offeror expressly stated that it "made no condition relative to competitive prices or otherwise." The court regarded this as a disclaimer of any intention to be bound at a reasonable price, and held the contract ineffective.

[31]California Prune & Apricot Growers v. El Reno Whole. Groc. Co., (C.C.A. 8th Cir. 1926) 15 F. (2d) 839: D. S. Cage Co. v. Black, (1911) 97 Ark. 613, 134 S. W. 942; Ross Meehan Foundries v. Nashville Bridge Co., (1924) 149 Tenn. 693, 261 S. W. 674; Caskey v. Williams Bros., (Ky. App. 1928) 11 S. W. (2d) 991; West v. L. W. Sweet, (Tex. Civ. App. 1927) 292 S. W. 251; but see Duvall v. Ferwerda, (1906) 146 Mich. 13, 108 S. W. 1115 (acceptance of inferior grade of goods ordered). See also the annotation in 11 L. R. A. (N.S.) 254, on acceptance of the chattel as assent to the seller's price, and 15 L. R. A. (N.S.) 368, as to the effect of retention of the goods after notice of mistake in the quoted price.

[32]Section 9, Mason's 1927 Minn. Stat. sec. 8384:

"(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

. . .

(4) Where 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

In determining what is a reasonable price,[33] the courts have resorted to the familiar quantum meruit measure of the market price of the goods at the time and place fixed by the contract for their delivery.[34] In other words, we have adopted a standard which defers the shifting of market risks until it coincides with the actual transfer of the property. The risk of a decline in the market value does not pass to the buyer until he becomes the owner. But it was recognized from the outset that the standard cannot be inflexible. A reasonable price

> "may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."[35]

If there is no market, or if the market is monopolized, or for any other reason the market price is fictitious and unfair, the court does not hesitate to ignore it, and to take other evidence[36]

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particular case."

In Boyd v. Second-hand Supply Co., (1912) 14 Ariz. 36, 123 Pac. 619, the court said that under this section, in order to make an indivisible contract binding, the gross price, or any price, need not be stated in the contract.

The California Civil Code, sec. 1611, provides: "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained . . . . the consideration must be so much money as the object of the contract is reasonably worth." This appears to have been interpreted in Dickerman v. Ohashi Importing Co., (1923) 63 Cal. App. 101, 218 Pac. 458, to mean that an executory contract could be enforced at a reasonable price.

[33]See 1 Williston, Sales, 2d ed., sec. 172, p. 319, for a discussion of the meaning of this phrase.

[34]Henckley v. Hendrickson, (C.C. Ohio 1850) 5 McLean 170, Fed. Cas. 6348; Taft v. Travis, (1883) 136 Mass. 95; Deck v. Feld, (1890) 38 Mo. App. 674; Althouse v. Alvord, (1871) 28 Wis. 577 (evidence of cost not material where there is a market price); McEwen v. Morey, (1871) 60 Ill. 32; Wilkins v. Jackson, (1924) 100 Okla. 143, 227 Pac. 882; see Whitcomb v. Boston Dairy Co., (1914) 218 Mass. 24, 105 N. E. 554.

[35]Acebal v. Levy, (1834) 10 Bing. 376, 3 L. J. C. P. 98. See also James v. Muir, (1876) 33 Mich. 223.

[36]In Kountz v. Kirkpatrick, (1872) 72 Pa. St. 376, 13 Am. Rep. 687, the court said that an unnaturally inflated market price was not always evidence of actual value, and that the jury could determine from the market price before and after the particular date, and from other sources of information, the "actual market value." In Lovejoy v. Michels, (1891), 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770, Champlin, J. said that where there was no fair market value of manufactured goods, because the market was controlled, evidence to establish reasonable value must necessarily be the cost of production, including the cost of labor and materials, and a reasonable profit. Cf. Murray v. Stanton, (1868) 99 Mass. 345, where there was no market for railway bonds because there were no sales,

as to the reasonable value of the goods. The judgment of the jury is substituted for the agreement which the parties have not made. In effect, they are made to agree that they will come together on a price, or accept whatever may be found in court to be reasonable.

In the ordinary case, the adoption of the market price at the time of performance as a "reasonable price" results merely in nominal damages for breach of the contract.[37] The measure of damages is the difference between the contract price and the market price,[38] and if the two are the same, there can be no substantial recovery. It is only where there are special circumstances within the contemplation of the parties, such as the loss of a resale, or a particular use for the goods, that there may be consequential damages.[39] But it is precisely where such special circumstances are contemplated that the parties have most reason to make a binding agreement for the sale of the goods, where they cannot fix a price.

If the court will supply a reasonable intent where the contract has been left most uncertain by saying nothing, it might reasonably be supposed that the same course would be followed when by express provision the price is left open. This is not always the case.

2. Price to Be Agreed.

The contract may provide that the price shall be fixed by agreement of the parties at a future date. The purpose of such a provision of course is to delay the exchange of risks until both parties have more information as to future market prices. In the meantime, so far as they are able, they obviously intend to make a contract.

Our traditional attitude[40] toward an agreement of this kind is that it is illusory, and must fail. We say that the buyer promises to pay only what he shall agree to pay, and this means that he will pay only what he chooses, for he need agree to nothing that he does not choose.[41] Consequently his promise is not sufficient con-

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and evidence of the condition of the railroad was held admissible. See also cases cited in footnotes 97 to 102 inclusive.

[37]See Wire v. Foster, (1883) 62 Iowa 114, 17 N. W. 174; Hill v. McKay, (1892) 94 Cal. 5, 29 Pac. 406; Indiana Tie Co. v. Phelps, (Ky. App. 1910) 124 S. W. 833.

[38]See footnotes 12 and 13.

[39]2 Sedgwick, Damages, 9th ed., secs. 742, 742a; 2 Williston, Sales, 2d ed., sec. 599a-599d.

[40]Benjamin, Sales, 7th ed., 159; 1 Williston, Sales, 2d ed., secs. 167, 168.

[41]This argument is well stated in Livingston Waterworks v. City of

sideration, and there is no contract. If the parties subsequently agree upon a price, it may be enforced,[42] otherwise not.

The earliest cases[43] dealt with contracts for services in which compensation was left entirely to the employer. At one time it was held,[44] even in this situation, that there was a promise implied in the contract to pay a reasonable amount; but the dissenting opinion of Baron Parke[45] ultimately prevailed,[46] to the effect that there was no such obligation.[47] Following these decisions, it is generally held that a contract for the sale of goods at a price left to future agreement is not binding unless the parties later agree.

If the goods are delivered to the buyer, title may pass to him,[48] notwithstanding the failure of the contract, and he may be required to pay a reasonable price;[49] but the obligation is quasi-

Livingston, (1916) 53 Mont. 1, 162 Pac. 381: "An agreement to renew on terms to be agreed upon is simply not enforceable, because the court cannot compel the parties to agree nor make an agreement for them; but the uncertain terms can be made certain by agreement of the parties, and, if they choose to agree, the difficulty is surmounted and the agreement is complete. In such a case no need exists for thrusting into the contract a condition not expressed by the parties, nor—in our judgment—implied by them, since they reserve to themselves the right to bargain; and the right to bargain means the right to negotiate for and settle upon terms which a court might or might not consider entirely 'fair and equitable.' Any other conclusion vests with courts the power to make contracts for parties in every instance."

42Speirs v. Union Drop Forge Co., (1899) 174 Mass. 175, 54 N. E. 497, 180 Mass. 87, 61 N. E. 825. Apparently parol evidence is admissible to show such an agreement. See Becher v. National Cloak & Suit Co., (1908) 128 App. Div. 423, 112 N. Y. S. 439.

43Taylor v. Brewer, (1813) 1 M. & S. 290 ("such remuneration shall be made as shall be deemed right" [by the employer]); Bryant v. Flight, (1839) 5 M. & W. 114 ("the amount of payment I am to receive I leave entirely to you"); Roberts v. Smith, (1859) 28 L. J. Ex. 164 ("any remuneration for my time and labor you may think me deserving of").

44By the majority in Bryant v. Flight, (1839) 5 M. & W. 114. Cf. Jewry v. Bush, (1814) 5 Taunt. 302. See also Hyderabad Co. v. Willoughby, [1899] 2 Q. B. 530 (insurance premium "to be hereafter arranged").

45In Bryant v. Flight, (1839) 5 M. & W. 114: "I own my impression is, that it amounts to a mere honorary obligation on the part of the defendant; and I cannot distinguish this case from that of Taylor v. Brewer."

46It was approved on the facts in Roberts v. Smith, (1859) 28 L. J. Ex. 164, the court distinguishing Bryant v. Flight, (1839) 5 M. & W. 114, where a distinction obviously was impossible. See footnote 43.

47Apparently it was not definitely decided until 1902 in England that an agreement for a price "to be mutually arranged between us" was ineffective. Loftus v. Roberts, (1902) 18 T. L. R. 532.

481 Williston, Sales, 2d. ed., sec. 167, p. 310. See also the cases cited in footnote 49. Early cases in Michigan and North Carolina disputed even this obvious proposition. Foster v. Lumbermen's Mining Co., (1888) 68 Mich. 188, 36 N. W. 171; Wittkowsky v. Wasson, (1874) 71 N. C. 451.

49Valpy v. Gibson, (1847) 4 C. B. 837, 6 L. J. C. P. 241; McEwen v.

contractual, rather than in contract.[50] The executory contract cannot be enforced by either party.[51] The same rule is followed where the terms of payment[52] or the security[53] are left to be agreed, and in the analogous situation of a lease containing a provision for renewal at a rent to be agreed.[54]

The basic assumption of these decisions would seem to be that the parties are expressly reserving to themselves the right to do something unreasonable. The buyer reserves the right to agree only to a price so low that the seller, as a reasonable man, could not accept it; the seller, the right to accept only a price so high that the buyer could not reasonably pay. If nothing were said about the price, the law would imply an intention to fix a reasonable one. The effect of the provision that the price is to be agreed is to negative this intention.

The soundness of this assumption may perhaps be questioned. The parties have made what purports to be a binding contract. The buyer intends to buy the goods, for that is his agreement. The normal inference would be that he intends to pay their reasonable value. If the provision were that the price should be "satisfactory" to either party, the law might require him to act

Morey, (1871) 60 Ill. 32; United States v. Wilkins, (1821) 6 Wheat. (U.S.) 134; Shealy and Finn v. Edwards, (1882) 73 Ala. 175, 49 Am. Rep. 43; Greene v. Lewis, (1888) 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; Hanson v. Knutson Hardware Co., (1924) 182 Wis. 459, 196 N. W. 831. See also Leist v. Dierssen, (1906) 4 Cal. App. 634, 88 Pac. 812; Stout v. Caruthersville Hardware Co., (1908) 131 Mo. App. 520, 110 S. W. 619.

[50]1 Williston, Sales, 2d ed., sec. 167, p. 312.

[51]Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1923) 235 N. Y. 338, 139 N. E. 470; Elmore, Quilliam & Co. v. Parish, (1911) 170 Ala. 499, 54 So. 203; Van Meeuwen v. Swanson, (1913) 121 Minn. 250, 141 N. W. 112; Jules Levy & Bro. v. A. Mautz & Co., (1911) 16 Cal. App. 666, 117 Pac. 936; Booth v. A. Levy & J. Zentner Co., (1913) 21 Cal. App. 427, 131 Pac. 1062; Boatright v. Steinite Radio Corp., (C.C.A. 10th Cir. 1931) 46 F. (2d) 385; Dayton v. Stone, (1896) 111 Mich. 196, 69 N. W. 515; Watts v. Weston, (C.C.A. 2d Cir. 1894) 62 Fed. 136. See also Livingston Waterworks v. City of Livingston, (1916) 53 Mont. 1, 162 Pac. 381; D. S. Cage Co. v. Black, (1911) 97 Ark. 613, 134 S. W. 942; Summit Lumber Co. v. Sheppard, (1912) 102 Ark. 88, 143 S. W. 100; Bigger v. Johnson, (1912) 106 Ark. 89, 152 S. W. 291. Cf. Gunn v. Newcomb, (1891) 82 Iowa 468, 48 N. W. 989, where the court construed an agreement to pay the "inventory price of the goods at the time said stock is to be invoiced" as requiring a supplemental agreement. Also Schreiner v. Shanahan, (1921) 105 Neb. 525, 181 N. W. 536 ("the best price obtainable").

[52]Monahan v. Allen, (1913) 47 Mont. 75, 130 Pac. 768.

[53]Williams v. Stewart, (1879) 25 Minn. 575; Leslie v. Mathwig, (1915) 131 Minn. 159, 154 N. W. 941. The cases are collected in a note in 49 A. L. R. 1464.

[54]Cases are collected in a note in 30 A. L. R. 572.

reasonably.[55] Unless the contract makes it clear that it is not intended to be binding until the price is agreed,[56] or such a meaning is attached by business usage to the particular terms used,[57] why is it not to be implied, when the parties agree to agree upon a price, that they are to agree upon a reasonable one? Cases in which other terms of the contract, such as the quantity of the goods or the time of delivery, are left to be agreed[58] are not exactly analogous, since in the case of the price term there is a definite objective standard to which the contract may be referred. Ordinarily there is no such thing as a standard market quantity, or a standard time for delivery, but there is a current market price, which must at least have been within the contemplation of the parties. Their intention primarily is to make a deal, and the price is a subsidiary matter; why should we defeat the real object of the transaction for the sake of an item which they consider of secondary importance?[59] A few cases,[60] including a decision of

[55]1 Williston, Contracts, sec. 44, pp. 74-76. See also 12 MINNESOTA LAW REVIEW 411.

[56]St. Regis Paper Co. v. Hubbs & Hastings Paper Co., (1923) 235 N. Y. 30, 138 N. E. 495 (price for the balance of the year to be arranged by mutual consent; if the parties fail to arrange a price, the contract to terminate).

[57]In some industries, such as the sale of canned foods, it is customary to sell "S. A. P." . . . subject to approval of price when named by the seller. These contracts are regarded as options under which the buyers may later purchase stated quantities of goods if the price is satisfactory. Converse, Marketing Methods and Policies, p. 573, says that the reason for making contracts of this kind is that the banks are unwilling to advance money for the season's operations unless the canners can show that they have agreements for the sale of a large part of their packs; and that buyers sometimes object to this method of naming prices, claiming that it allows the sellers to name high prices which the buyers practically have to accept, since few canners will sell below the opening prices.

[58]See cases cited in 1 Williston, Contracts, sec. 45, p. 78.

[59]Cf. Spiritusfabriek Astra v. Sugar Products Co., (1917) 176 App. Div. 829, 163 N. Y. S. 516, where the contract was for the delivery of 6,000 to 12,000 tons of molasses, "buyer's option," to be delivered within three years at times to be arranged between buyer and seller. The contract was held enforceable, as an agreement "to do what the law would require to be done in case the clause was absent from the contract, that is, to deliver within a reasonable time after demand."

[60]In Abrams v. George E. Keith Co., (C.C.A. 3d Cir. 1929) 30 F. (2d) 90, the seller agreed to sell and deliver shoes to the buyer "at such prices as might be agreed from time to time." A counterclaim for breach of this contract was ordered stricken. The order was reversed, the court saying: "This contract was perfectly good in law. Being indefinite as to its terms, either party might terminate it upon reasonable notice. No such notice was given here. If the facts were as the counterclaim avers, plaintiff was guilty of breach of the contract." See comments on this case in Llewellyn, Cases and Materials on the Law of Sales, 19.

In Central Trust Co. v. Wabash, St. L. & P. Ry. Co., (C.C. Mo. 1886) 29 Fed. 546, the suit was for specific performance of an agreement the Supreme Court of the United States,[61] have followed this line of reasoning, and have held such contracts to be valid, but they are very much in the minority.[62]

The curiously ambiguous language of section 9 of the Uniform Sales Act,[63] which deals with open price contracts. sheds no particular light upon the rule to be followed in these cases. The section provides:

"(1) The price may be fixed in the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealings between the parties.

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to permit the use of a right of way "under such reasonable regulations and terms as may be agreed upon." The court held the contract valid, saying: "The stipulation provided for use under such reasonable terms and regulations, and for such reasonable compensation as should be agreed upon. It cannot be that the mere whim and caprice of the one party—a blind refusal to come to any agreement—can nullify the entire force of the stipulation. It would make the right of the interveners a mere barren right. It would nullify the entire stipulation, and operate simply to give the respondents that which without it they had—the privilege of permitting other roads to enter. It would be mockery to call such a provision a stipulation for a right."

In Young v. Nelson, (1922) 121 Wash. 285, 209 Pac. 515, the court granted specific performance of an agreement to renew a lease at such rental "as may be agreed upon." This was regarded as the equivalent of a provision for a price "satisfactory" to both parties, which would require a reasonable rental. See the discussion of this case in 30 A. L. R. 572.

[61]United States v. Swift & Co., (1926) 270 U. S. 124, 46 Sup. Ct. 308, 70 L. Ed. 497. This case involved a claim for the government's refusal to accept deliveries of meat under a contract, by the terms of which prices were to be determined by agreement at or near the first of each month, for the product to be furnished during that month. Under the regulations of the Food Administration, the seller's profit could not exceed 9% of its investment, or 2½% of its gross sales. The court held the contract enforceable. Concerning the open price, Taft, C. J. said briefly: "Under ordinary conditions, a valid agreement can be made for purchase and sale without the fixing of a special price. In such a case a reasonable price is presumed to have been intended. . . . We find, therefore, that, by the writings and documents, all the necessary details making a valid contract were set forth in writing."

In the ordinary case, enforcement of the contract at a "reasonable price" would result merely in nominal damages for breach. Smith v. Loag, (1890) 132 Pa. St. 301, 19 Atl. 137; see also cases cited in footnote 37. But in the extraordinary cases, where the usual measure of damages is inapplicable, it becomes of importance whether the contract is to be held binding. In United States v. Swift & Co., supra, the evidence showed that the seller could not resell the meat without affecting the market, and causing serious loss both to itself and to the government. The court said that: "Under these conditions, there was no standard by which the usual rule of damages, namely, the difference between the contract price and the market price, could be the measure of Swift & Company's loss through the failure of the government to receive the bacon. This was a case where the only standard could be the contract price and the amount realized at actual sale by diligent effort."

[62]See cases cited in footnote 51.

[63]Mason's 1927 Minn. Stat. sec. 8384.

"(4) Where 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."

There is little reason to doubt that the Commissioners who drew this section intended it to state the common law rule.[64] But the wording is certainly open to a different interpretation. What is meant, in (1), by "may be left to be fixed in such manner as may be agreed?"[65] Agreed in the contract, or subsequently agreed by the parties? And what is meant in (4) by "determined in accordance with the foregoing provisions?" Does this mean that the price may be left to be fixed by agreement, and that if it is not so "determined"—that is, if the parties ultimately do not agree—the buyer must pay a reasonable price? Does it mean that wherever the price is not (a) fixed by the contract, or (b) left to be fixed in an objective manner definitely agreed by the parties, or (c) determined by the course of dealing—then the reasonable price is to be paid? It is astonishing, after twenty-five years of the Sales Act, with innumerable open price contracts before the courts, to find no satisfactory construction of this section. In the one case in which such construction has been attempted, the supreme court of Ohio used language which is quite as ambiguous as the statute itself.[66]

[64]Professor Williston's interpretation is set forth in 1 Williston, Sales, 2d ed., secs. 167, 168, pp. 309-314. The language quoted in the text is taken substantially from sec. 8 of the English Sale of Goods Act. 1 Uniform Laws Annotated 51. In Solter v. Leedom & Worrell Co., (C.C.A. 4th Cir. 1918) 252 Fed. 133, the court said that subdivision (1) of this section was "a formulated statement of the recognized rule."

[65]Section 8 of the Sale of Goods Act reads "may be left to be fixed in manner thereby agreed." Professor Williston explains that the wording of the American Act was substituted, in order that the manner of fixing the price need not be named "thereby"—that is, by the contract. See 1 Williston, Sales, 2d ed., pp. 308, 309.

[66]Domhoff & Joyce Co. v. Hamilton Furnace Co., (1923) 108 Ohio St. 25, 140 N. E. 485. In this case the contract was for monthly deliveries of coke from March 1 to December 31, inclusive. A price was fixed, but the contract provided that: "Should the United States government cease to regulate prices during the life of this contract, then the price of coke covered by this contract, but not then delivered, shall be subject to a revision to a figure to be mutually agreed upon by purchaser and seller." On March 31 the government ceased to regulate coke prices. Deliveries continued through May. The seller brought an action for the coke delivered, and the buyer counterclaimed for failure to deliver beyond May. Concerning this counterclaim, the court said: "In view of the situation, what became the legal obligations of the parties? By the rider it was their duty to mutually agree upon a new price after March 31, 1920, and if such price could not be agreed upon, and shipments continued, *the seller and buyer were under obligations, respectively, the seller to ship the*

From the point of view of the business man, it appears desirable that there should be one rule of law for all open price agreements. The Sales Act seems to lend itself to that interpretation.

3. Alternative Prices.

The contract may state the price in the alternative. Assuming that the two prices stated are not in reality the same,[67] and that no method is provided for determining which is to be paid, it has been argued that such a contract should fail for uncertainty.[68] There seems to be no justification for such a result. It appears to be well settled that, in the absence of an agreement to the contrary, a promise to do one of several alternatives will leave the choice of which is to be done to the party who is to perform.[69] Applying this rule, it follows that the contract should be enforced at the price most favorable to the party who promises to pay, which is to say the buyer.[70] He has agreed to pay at least that amount, and the seller has agreed to deliver the goods in return for such a promise.

More often, however, the contract provides that the price shall depend on some contingency not within the control of either party. Where this occurs, the court must first of all decide

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coke, and the buyer to pay a reasonable price therefor." (Italics ours).

What is the meaning of this? If the contract fails, how can the seller be under any obligation to ship the coke, or the buyer to pay? But why such an obligation only "if shipments continued?"

The court then quoted the Sales Act, and continued: "On the showing that the parties were unable to agree upon a new price during the deliveries in April and May it became the duty of the court to ascertain what the reasonable market was, and render judgment accordingly." Judgment for the seller for the reasonable price of the coke delivered in April and May? Or judgment also for the buyer for breach of the executory contract?

The actual holding of the case is that it was error to enter judgment on the basis of the original contract price, which ceased to be in effect on March 31st. Beyond this, it is a problem what the case means.

[67]As, for example, a statement of one price f.o.b. point X, and another f.o.b. point Y, the difference being one of freight rates. Cf. McCaull Dinsmore Co. v. Heyler, (1925) 48 S. D. 211, 203 N. W. 505.

[68]See McGowin Lumber & Export Co. v. R. J. & B. F. Camp Lumber Co., (1915) 192 Ala. 35, 68 So. 263 (prices quoted "f.o.b.f.a.s. vessel Clarabelle"); Clark Warehouse & Imp. Co. v. Jacques & Edmond Weil, (1922) 152 La. 707, 94 So. 326 ("to pay the sum of $10,750 in cash or its equivalent, or notes on the delivery of the above merchandise").

[69]3 Williston, Contracts, sec. 1407, p. 2497.

[70]Wright v. McCormack, (1923) 99 Conn. 145, 121 Atl. 467 (sale of tractor for "$1600 to $1700"); cf. Kramer v. Ewing, (1900) 10 Okla. 357, 61 Pac. 1064 (promise to pay $50 or $60 for finding purchaser for land); Burstein v. Phillips, (1913) 154 Wis. 591, 143 N. W. 679 (sale of a specified quantity of rags, to be made up of two qualities; held that the seller had the right to determine the quantity of each, provided a substantial quantity of each was furnished, and the total quantity made up.)

whether the contract is intended as a wager upon the contingency named. Such a contract, of course, would be contrary to public policy and void. The courts have adopted the practical test, whether the contingency upon which the price is made to depend so affects the value of the goods sold as to justify the price alternative. If so, the contract is valid.[71] If not, the contract is a wager and cannot be enforced.[72]

4. Price Depending on the Market.

Instead of naming definite alternatives, the contract may provide that the price shall depend upon the state of the market at a particular time and place. This contingency is beyond the control of either party; its relation to the value of the goods is evident, and, so long as an actual delivery is contemplated, rather than a settlement based on fluctuations in the market price,[73] there is clearly no wager. The purpose of such an arrangement

[71]Ferguson v. Coleman, (1846) 3 Rich. Law (S.C.) 99 (promise to pay $902 for land if cotton should rise to 8c by Nov. 1st, if not, to pay $500); Ames v. Quimby, (1877) 96 U. S. 324, 24 L. Ed. 635 (price to be increased or decreased with rise or fall in value of gold, with a proviso that a rise or fall of 25% should not change the contract price unless it continued sufficiently long to affect the general price of merchandise); Montague v. Lumpkin & Perry, (1919) 178 N. C. 270, 100 S. E. 417 ($1000 for a crop of tobacco if there should be 3000 pounds, otherwise $900); Moore v. Zita Bennitt & Co., (1921) 147 Ark. 216, 227 S. W. 753 (price dependent on whether cotton delivered in two lots or one); Manley v. Pacific Mill & Timber Co., (1926) 79 Cal. App. 641, 250 Pac. 710; Newell v. Smith, (1885) 53 Conn. 72, 3 Atl. 674; Deyo v. Hammond, (1894) 102 Mich. 122, 60 N. W. 455; cf. Phillips v. Gifford, (1898) 104 Iowa 458, 73 N. W. 1033.

The contingency must, however, be an objective one, ascertainable with reasonable certainty. Thus in Guthing v. Lynn, (1831) 2 B. & Ad. 232, the buyer of a horse promised that "if the horse was lucky to him, he would give £5 more, or the buying of another horse." This was held too uncertain.

[72]Givens v. Rogers, (1847) 11 Ala. 543; Craig v. Andrews, (1858) 7 Iowa 17; Hizer v. State, (1859) 12 Ind. 330; Lucas v. Harper, (1873) 24 Ohio St. 328; Merchants' Sav. Co. v. Goodrich, (1874) 75 Ill. 554; Bates v. Clifford, (1875) 22 Minn. 52; Davis v. Leonard, (1879) 69 Ind. 213; Harper v. Crain, (1881) 36 Ohio St. 338; First Nat'l Bank of Creston v. Carroll, (1890) 80 Iowa 11, 45 N. W. 304; Lynch v. Rosenthal, (1896) 144 Ind. 86, 42 N. E. 1103; cf. Comer v. Powell, (Tex. Civ. App. 1916) 189 S. W. 88.

Even though the contingency has some bearing upon the value of the property, if the difference in price is out of all reasonable proportion, the contract is a wager. Brogden v. Marriott, (1836) 3 Bing. N. C. 88 (sale of a horse for £200 if he trotted 18 miles in an hour, but for 1 shilling if he failed to do so); Rourke v. Short (1856) 5 El. & Bl. 904 (wager on price of previous sales, forgotten by the parties). But see Deyo v. Hammond, (1894) 102 Mich. 122, 60 N. W. 455; Carlill v. Carbolic Smoke Ball Co., [1892] 2 Q. B. 484, [1893] 1 Q. B. 256.

[73]Gaming contracts where no delivery is contemplated are discussed in 2 Williston, Sales, 2d ed., sec. 664, pp. 1673-1680.

is to provide a future point at which the risks of the market shall be shifted. Until that time the seller takes all the risk of a decline in price, the buyer all the risk of an advance.

The courts have shown no reluctance to enforce such contracts. The agreement often provides that the buyer is to pay the market price at a date[74] or a place[75] to be selected, within certain reasonable limits, by one of the parties. In such a case the party named is given an option, with a range of selection and an opportunity to follow the market which may be of considerable practical advantage. A common transaction of this type is the "call" contract, frequently used in the sale of cotton, grain and similar products, on their way from the grower to a central exchange. The goods are delivered to the buyer upon his agreement to pay the market price current on any day the seller may select before a specified time limit. Occasionally, but infrequently, the choice is to be made by the buyer, or either party may be given the right to name the day.[76] Usually the contract is to pay the price on a particular exchange[77] on the date selected. The price is finally fixed by "calling" the contract, by notice[78] to the other party.

A transaction of this kind is a sale,[79] with the price left

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[74]See footnote 84.

[75]McNeely v. Carter, (1840) 23 N. C. 141.

[76]Burgson & Co. v. Williams, Smithwick & Co., (1929) 155 Miss. 351, 121 So. 817.

[77]McConnell v. Hughes, (1872) 29 Wis. 537; Jones v. Kemp, (1882) 49 Mich. 9, 12 N. W. 890; Barnes v. McCrea, (1888) 75 Iowa 267, 39 N. W. 392; South Carolina Cotton Growers Coop. Ass'n v. Weil, (1929) 220 Ala. 568, 126 So. 637; Burgson & Co. v. Williams, Smithwick & Co., (1929) 155 Miss. 351, 121 So. 817.

In Maxwell Planting Co. v. A. P. Loveman & Co., (1924) 212 Ala. 228, 102 So. 45, the contract was that the seller should call for payment on any date between October 1 and May 1, on the basis of the market value of strict middling cotton in New Orleans on that day, less express from Tuscaloosa to New Orleans. Evidence of a custom that such prices were to be fixed by official spot quotations of the New Orleans cotton exchange was held admissible.

[78]As to what constitutes sufficient notice, see Smith v. Duncan, (Tex. Civ. App. 1914) 167 S. W. 233, aff'd (Tex. Comm'n App. 1919) 209 S. W. 140.

[79]McConnell v. Hughes, (1872) 29 Wis. 537 (if the property is destroyed, the seller may still call the contract, and is entitled to payment); Richardson v. Olmstead, (1874) 74 Ill. 213; Jones v. Kemp, (1882) 49 Mich. 9, 12 N. W. 890; Handwerk v. Oswood, (1886) 23 Ill. App. 282; Barnes v. McCrea, (1888) 75 Iowa 267, 39 N. W. 392.

In Burke v. Boulder Milling & Elevator Co., (1925) 77 Colo. 230, 235 Pac. 574, the agreement was that the buyer might use the seller's wheat, and either pay at a date and price fixed by the seller, or return grain of the same kind and quantity. This was held, on the peculiar facts of the case, to be a bailment.

open, to be determined in a manner definitely agreed.[80] Against the objection that it is a gaming contract, since it enables the seller to speculate upon the future of the market, the courts have held that there is no illegality,[81] because the goods are actually delivered, and the future market price clearly has a bearing upon their value. In a line of Texas cases,[82] in which advances were made on the purchase price at the time of delivery, it has been held that there was a wagering element involved, on the theory that the contract consisted of two parts, a completed sale for a fixed price, and a gamble in market futures; but the soundness of these decisions seems open to some question.[83] There appears to be no obvious public policy to prevent a seller from disposing of his goods, and reserving the right to determine later the

[80]Cf. Section 9 of the Uniform Sales Act: ". . . or may be left to be fixed in such manner as may be agreed. . . ." See footnote 32.

[81]Kirkpatrick v. Bonsall, (1872) 72 Pa. St. 155; Smith v. Duncan, (Tex. Civ. App. 1914) 167 S. W. 233, aff'd (Tex. Comm'n App. 1919) 209 S. W. 140; South Carolina Cotton Growers Coop. Ass'n v. Weil, (1929) 220 Ala. 568, 126 So. 637; Burgson & Co. v. Williams, Smithwick & Co., (1929) 155 Miss. 351, 121 So. 817. Cf. also H. Seay & Co. v. Moore, (Tex. Civ. App. 1921) 228 S. W. 610, (Tex. Comm'n App. 1924) 261 S. W. 1013, 265 S. W. 376.

[82]In Burney v. Blanks, (Tex. Civ. App. 1911) 136 S. W. 806, the contract recited that the buyer bought at a price of "10.80c lb. straight," but there was to be an "additional settlement at the market any day until April 30." The market went down, and the buyer sued to recover part of the payment made. The court denied recovery, holding that the executory part of the contract was a wager.

In Wolfe v. Andrews, (Tex. Civ. App. 1917) 192 S. W. 266, the buyer bought at "14.39c, your option of fixing the price . . . by giving notice." The court considered this the same kind of contract as in the Burney case.

Both decisions relied on Heidenheimer v. Cleveland, (Tex. 1891) 17 S. W. 524 where the contract was for future deliveries of bacon at a fixed price, with a provision that either party should cover the other with margins on price fluctuations pending delivery. The court left it to the jury whether this was a gaming contract, the instructions turning on whether actual delivery was contemplated.

[83]In Carter v. McNeely, (1841) 23 N. C. 448, the court saw nothing wrong with a contract for the sale of cotton for the market value at the time of delivery, with the power given the seller to vary the price by designating that of another date and place, within a certain period.

See also H. Seay & Co. v. Moore, (Tex. Civ. App. 1921) 228 S. W. 610, (Tex. Comm'n App. 1924) 261 S. W. 1013, 265 S. W. 376, where cotton was delivered to the buyer "on consignment," the buyer advancing the then market price, with the right given the seller to "sell outright" at any date within a certain period, the price to be finally adjusted according to the market at that date. The court upheld the transaction, distinguishing the Burney and Wolfe cases because there title had passed immediately. See also Smith v. Duncan, (Tex. Civ. App. 1914) 167 S. W. 233, (Tex. Comm'n App. 1919) 209 S. W. 140, where the amount advanced by the buyer was less than the market value at the time of delivery, and the court enforced the contract. Llewellyn, Cases and Materials on the Law of Sales 34-36, considers these distinctions merely a form of words.

precise date at which he will surrender the possibility of profit from a rising market.

If the seller calls the contract, it will be enforced on the basis of the market price of the selected date.[84] If he fails to exercise his privilege within the time limit set, there is more difficulty. It has been suggested that the contract fails, and that the seller is entitled only to the reasonable value at the time of delivery.[85] Another possible interpretation is that the contract is automatically called, and the price fixed, as of the last day of the period set.[86] It necessarily is implied in the contract that the seller has no right to select any past date, after the market has declined, since this would permit him to transfer, not a risk, but a certainty of loss to the buyer.[87]

The contract may provide that the buyer is to pay the "market price,"[88] without specifying any time or place. In the absence of any circumstances indicating a contrary intention,[89] the court

[84]McConnell v. Hughes, (1872) 29 Wis. 537; Jones Cotton Co. v. Snead, (1910) 169 Ala. 566, 53 So. 988; Smith v. Duncan, (Tex. Civ. App. 1914) 167 S. W. 233, (Tex. Comm'n App. 1919) 209 S. W. 140; Maxwell Planting Co. v. A. P. Loveman & Co., (1924) 212 Ala. 228, 102 So. 45; South Carolina Cotton Growers Coop. Ass'n v. Weil, (1929) 220 Ala. 568, 126 So. 637; Burgson & Co. v. Williams, Smithwick & Co., (1929) 155 Miss. 351, 121 So. 817. See also Barnes v. McCrea, (1888) 75 Iowa 267, 39 N. W. 392; Kirkpatrick v. Bonsall, (1872) 72 Pa. St. 155; Carter v. McNeely, (1841) 23 N. C. 448; H. Seay & Co. v. Moore, (Tex. Civ. App. 1921) 228 S. W. 610, (Tex. Comm'n App. 1924) 261 S. W. 1013, 265 S. W. 376; Rose & Dasher v. Taylor, Lowenstein & Co., (1921) 26 Ga. App. 700, 106 S. E. 922; Jensen v. Turner Bros., (Mo. App. 1929) 16 S. W. (2d) 742.

[85]Spencer v. Treanor, (1922) 79 Ind. App. 578, 137 N. E. 566; Carter v. McNeely, (1841) 23 N. C. 448. In the latter case the court said that the special contract must be regarded to the extent that the seller could not recover a higher price than the contract would have allowed him.

[86]Lang v. Leonard, Crosset & Riley, (1928) 242 Mich. 473, 219 N. W. 610.

[87]Spencer v. Treanor, (1922) 79 Ind. App. 578, 137 N. E. 566; McNeely v. Carter, (1840) 23 N. C. 141.

[88]Or similar terms, such as "prevailing prices," New York Overseas Co. v. China, Japan & S. A. Trading Co., (1923) 206 App. Div. 242, 200 N. Y. S. 449, or "as much as the goods are reasonably worth." Hill v. Hill, (1794) 1 N. J. L. 261. In Hoff v. Lodi Canning Co., (1921) 51 Cal. App. 299, 196 Pac. 779, the court said: "The terms 'market price,' 'current price,' and 'going price' mean substantially the same thing."

In Duff v. Thrall, (1908) 35 Pa. Super. Ct. 136, the contract provided that the price should be ½ cent per lb. less than the price of the new crop then nearly ready for market. The agreement was enforced.

The price may be made to depend on the market price of other goods. See Landeche Bros. Co. v. New Orleans Coffee Co., (1931) 173 La. 701, 138 So. 513 (price of pan syrup to depend on market price of sugar).

[89]In Shipman v. Straitsville Central Mining Co., (1895) 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015, and Corbett v. Winston Elkhorn Coal Co., (C.C.A. 6th Cir. 1924) 296 Fed. 577, the contract was to sell goods to an

will interpret this to mean the market price at the time and place of delivery.[90] In other words, we consider that the parties have adopted for themselves the same standard that the court would have applied if they had said nothing about the price at all.[91]

The only uncertainty in such cases lies in the meaning of the term "market price."[92] It is the same difficulty which we encounter in determining the "reasonable value" of goods sold, or the measure of damages for breach of the contract.[93] The definition of market price, or market value, is a familiar one: it is "that reasonable sum which the property would bring on a fair sale by a man willing but not obliged to sell, to a man willing but not obliged to buy."[94] The assumption is that there is a free market, on which similar goods can readily be bought and sold. If such sales are actually being made, they establish the price, and other evidence, such as the cost of the article, or opinions as to its value, will not be material.[95] It is not necessary that there be daily traffic, or that the goods be bought and sold on the streets, or even that there be frequent dealings of merchants. It is enough if they are occasionally the subject of sale or exchange, so as to fix at different times a customary price.[96]

But very often there is no such free market. There may be no market at all, because there are no goods to be sold, or there is no demand, or because sellers and buyers cannot agree upon a price.[97] Or the market may be so monopolized that it becomes

agent at the market price, the agent to resell to customers. It was held that the price intended must be the market price on the date of resale, since any other interpretation would defeat the purpose of the contract. In Hughes Mfg. & Lbr. Co. v. Parker & Ball Lbr. Co., (1909) 53 Wash. 516, 102 Pac. 433, parol evidence was held admissible to prove a custom as to the place. See also Memphis Furniture Mfg. Co. v. Wemyss Furniture Co., (C.C.A. 6th Cir. 1924) 2 F. (2d) 428 ("prices prevailing at time of shipment").

[90]See footnotes 95 to 109 inclusive.

[91]See footnote 34 and text.

[92]See the annotation in 55 A. L. R. 268 as to the meaning of this term.

[93]2 Sedgwick, Damages, 9th ed., sec. 734, p. 1530, sec. 753, p. 1570; 2 Williston, Sales, 2d ed., sec. 582, p. 1434, sec. 599, p. 1478.

[94]Winslow, C. J., in Allen v. Chicago & N. W. Ry., (1911) 145 Wis. 263, 129 N. W. 1094. Cf. Holmes, C. J., in Bradley v. Hooker, (1900) 175 Mass. 142, 55 N. E. 848: "The market value is at least the highest price that a normal purchaser not under peculiar compulsion will pay at the time and place in question in order to get the thing." See also In re Estate of Farson, (1914) 187 Ill. App. 318.

[95]Webber v. Preller, (1845) 5 L. T. (O.S.) 346; Althouse v. Alvord, (1871) 28 Wis. 577; Deck v. Feld, (1890) 38 Mo. App. 674; Wagoner Undertaking Co. v. Jones, (1908) 134 Mo. App. 101, 114 S. W. 1049.

[96]Deck v. Feld, (1890) 38 Mo. App. 674.

[97]McCormick & Co. v. Hamilton, Wood & Co., (1873) 23 Grat. (Va.) 561; South Gardiner Lumber Co. v. Bradstreet, (1902) 97 Me. 176, 53 Atl.

clear that the prices quoted are not the result of free bargaining.[98] In such cases the court does not permit the contract to fail, but supplies a "market value" on the basis of such evidence as may be available—including, for example, the cost of the goods,[99] offers made by or to individual dealers,[100] and prices at the nearest time or place where there is a free market.[101] So far from being disturbed by any uncertainty here, one court[102] has said:

"The words 'market price' have no hard and fast meaning. There is no magic in the term. When it becomes a subject of legal controversy, it will be given that meaning which will best serve the purpose and intent of those who use it in their contracts."

Even where there is an untrammeled market, there may be more than one price. A few sellers may offer low figures which others are unwilling to meet.[103] A few buyers may pay more

1102; New York Overseas Co. v. China, Japan & S. A. Trading Co., (1923) 206 App. Div. 242, 200 N. Y. S. 449; Murray v. Stanton, (1868) 99 Mass. 345; see also Nash v. Classon, (1896) 163 Ill. 409, 45 N. E. 276. In Union Naval Stores Co. v. Patterson, (1912) 179 Ala. 525, 60 So. 807, and Maxwell Planting Co. v. A. P. Loveman & Co., (1924) 212 Ala. 228, 102 So. 45, the official exchange quotations indicated that the market was "nominal," with no trading; but because of the court's interpretation of the contract, it was held that it would be enforced at the prices quoted.

[98]Kountz v. Kirkpatrick, (1872) 72 Pa. St. 376; Lovejoy v. Michels, (1891) 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770; McGarry v. Superior Portland Cement Co., (1917) 95 Wash. 412, 163 Pac. 928. But see Smith v. Griffith, (1842) 3 Hill (N.Y.) 333, 38 Am. Dec. 639, where the court awarded damages on the basis of the factitious market value, upon the theory that "this makes him whole, because the fund recovered enables him to go into the market and supply himself with the goods of which he has been deprived."

[99]Lovejoy v. Michels, (1891) 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770. In New York Overseas Co. v. China, Japan & S. A. Trading Co., (1923) 206 App. Div. 242, 200 N. Y. S. 449, there was a contract for the sale of paper at "prevailing prices." There was no market price in 1,000 ream lots. The paper could be obtained from only one manufacturer. The court said: "'Prevailing price' must then mean, since there was but one source from which to procure the paper, such price as was set by that source in the usual course of business, without undue enlargement of costs, and with a reasonable profit in addition." Damages for non-acceptance were held to be the manufacturer's price to the seller, plus the seller's reasonable profit, less the manufacturer's price.

[100]McGarry v. Superior Portland Cement Co., (1917) 95 Wash. 412, 163 Pac. 928; Harrison v. Glover, (1878) 72 N. Y. 451. In Hafner Mfg. Co. v. Lieber Lumber & Shingle Co., (1909) 127 La. 348, 53 So. 646, a printed list of a lumber association which controlled a large part of the market was held admissible as showing current market prices. The only issue was damages.

[101]McCormick & Co. v. Hamilton, Wood & Co., (1873) 23 Grat. (Va.) 561; South Gardiner Lumber Co. v. Bradstreet, (1902) 97 Me. 176, 53 Atl. 1102; Kountz v. Kirkpatrick, (1872) 72 Pa. St. 376; see Nash v. Classon, (1896) 163 Ill. 409, 45 N. E. 276.

[102]McGarry v. Superior Portland Cement Co., (1917) 95 Wash. 412, 163 Pac. 928.

[103]Ford v. Norton, (1927) 32 N. M. 518, 260 Pac. 411, 55 A. L. R.

than the rest.[104] Discounts may be allowed to certain customers, or to those who buy in quantity.[105] On the same market, at the same time, goods may be changing hands at half a dozen different prices. The contract may dispose of the difficulty by providing that the buyer shall pay the highest market price,[106] or that some more or less official quotation shall control.[107] But in the absence of some such provision, there seems to be no very uniform method of dealing with the problem. Sometimes special prices are considered[108] in determining the "market price," sometimes not,[109] apparently according to the court's opinion as to whether

261; cf. Paxton & Gallagher Co. v. Pellish, (1931) 43 Wyo. 182, 299 Pac. 708.

[104]Hoff v. Lodi Canning Co., (1921) 51 Cal. App. 299, 196 Pac. 779; Spang v. Rainey, (C.C.A. 2d Cir. 1897) 79 Fed. 250; Taylor Oil & Gas Co. v. Pierce-Fordyce Oil Ass'n, (Tex. Civ. App. 1920) 226 S. W. 467. For a discussion of the uniformity of market prices, see Copeland, Principles of Merchandising (1924) 335.

[105]Orchard v. Simpson, (1857) 2 C. B. (N.S.) 299; Abshire v. Smith, (1927) 86 Ind. App. 354, 156 N. E. 408; McGarry v. Superior Portland Cement Co., (1917) 95 Wash. 512, 163 Pac. 928; Charrington v. Wooder, [1914] A. C. 71. Trade and quantity discounts are discussed in Copeland, Principles of Merchandising, (1924) pp. 353-357.

[106]Daniel v. Hannah, (1898) 106 Ga. 91, 31 S. E. 734 ("its highest market price in Thomaston on November 10, 1896"); Stern v. Ladew, (1900) 47 App. Div. 331, 62 N. Y. S. 267.

[107]American Car & Foundry Co. v. East Jordan Furnace Co., (C.C.A. 7th Cir. 1921) 275 Fed. 787 (price quoted in the Iron Age); Boret v. L. Vogelstein & Co., (1919) 188 App. Div. 605, 177 N. Y. S. 402 (prices published in the Engineering & Mining Journal); Le Blanc v. Godchaux Co., (1922) 152 La. 405, 93 So. 201 (prices quoted by secretary of sugar exchange); Union Naval Stores Co. v. Patterson, (1912) 179 Ala. 525, 60 So. 807 (Savannah Board of Trade quotations); Maxwell Planting Co. v. A. P. Loveman & Co., (1924) 212 Ala. 228, 102 So. 45 (custom to take New Orleans cotton exchange official quotations).

[108]In Ford v. Norton, (1927) 32 N. M. 518, 260 Pac. 411, the contract was to buy gasoline "at current market prices." There was a gasoline war, and the seller refused to meet lower prices of competitors who had been encouraged by the buyer. It was held that the "market price" was the lower figure fixed by the competitors while their supply lasted. See also Hoff v. Lodi Canning Co., (1921) 51 Cal. App. 299, 196 Pac. 779; McGarry v. Superior Portland Cement Co., (1917) 95 Wash. 412, 163 Pac. 928. In Taylor Oil & Gas Co. v. Pierce-Fordyce Oil Ass'n, (Tex. Civ. App. 1920) 226 S. W. 467, the contract was to pay "the regularly established and published market quotations for the highest grade crude oil, as grades are now established in the Electra market." One buyer posted a bona fide higher price. It was held for the jury whether this was a regularly established market quotation.

[109]In Orchard v. Simpson, (1857) 2 C. B. (N.S.) 299, and in Abshire v. Smith, (1927) 86 Ind. App. 354, 156 N. E. 408, it was held that the buyer was not entitled to the benefit of quantity discounts given to certain purchasers. In Charrington v. Wooder, [1914] A. C. 71, where there was one market price on beer for "tied" houses, and another for "free" houses, it was held that the buyer was not entitled to the lower "free" price.

See also Spang v. Rainey, (C.C.A. 2d Cir. 1897) 79 Fed. 250, where the price was fixed, "to continue until there may be a general advance in such prices would have affected the contract between the particular parties, if they had been bargaining at the time.

Notwithstanding all these difficulties, the contract to pay the "market price" is regarded as reasonably certain, and is enforced.

5. Price Depending on Cost.

The price may be made to depend on the cost of the goods to the seller. The effect of such a contract is to shift all the risks and opportunities of the market immediately to the buyer. The seller receives a small but assured profit, usually in the form of a percentage of the cost. If there is any greater profit, it goes to the buyer; if there is any loss, it is his.[110] "Cost plus" arrangements are very common in building contracts,[111] and in recent years they have become more frequent in the sale of goods. They provide a convenient method for arriving at a fair price for new commodities, or other goods which have no market price; but they have the marked disadvantage that the seller is under no incentive to keep down the cost.[112]

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the market price of coke. Then and in that event the price shall be the lowest rate at which coke is sold to the larger and better consumers of coke in the market." In determining whether there had been a "general advance" in the market price, the court said that proper consideration must be given to all the different ways in which coke was bought and sold, but that the advance must be a "general" one according to trade acceptation, and not a special advance by a limited number of dealers to a special class of customers. The jury was at liberty to disregard continued deliveries to old customers at the former prices.

In Cobbs & Mitchell v. Boyne City Tanning Co., (1913) 178 Mich. 88, 144 N. W. 487, the price was to be based on the average price of the tanners in Chicago, Kenosha, Milwaukee, or other principal tanning points when they were making their first large contracts for the current year. It was held that only prices on Lower Peninsula goods similar to those sold by the seller were to be considered, and not prices on Upper Peninsula goods of an inferior grade.

[110]In Paper Mill Supply Co. v. Container Corp. of America, (1930) 301 Pa. St. 62, 131 Atl. 588, the court distinguished a contract under which the seller was to supply all the waste paper it could collect, the paper and hauling to be paid for at temporary rates; if these rates did not cover the cost to the seller, the buyer was to make good whatever losses the seller suffered. This was held not to be a "cost" or "cost plus" contract, since in such a contract the seller's profit is limited to a certain amount; here, if there is any profit, the seller keeps it, and the buyer cannot profit at all. "It is difficult to imagine a more jughandled contract than this would be." It was held that the contract failed, because it was too indefinite and uncertain as to the liability imposed.

But why? Once the cost to the seller is determined, what uncertainty remains? And, if he so agrees, why should not the buyer assume all risk of loss, without a corresponding opportunity for profit?

[111]Building contract cases are collected in annotations in 2 A. L. R. 126 and 27 A. L. R. 48.

[112]See 2 Harvard Business Review 370. The writer points out that

A court with such a contract before it is invited to determine the "cost" of the goods to the seller. If the seller is merely reselling what he has previously bought, the problem is relatively simple. Only such items as the purchase price, freight, and expenses of handling or installation are involved,[113] and there is seldom any difficulty. But where the seller manufactures the goods himself, the court is plunged at once into questions of cost accounting, and the distribution of various overheads,[114] where the precise intent of the parties becomes in the highest degree uncertain. The "cost" of a manufactured article is a very indefinite

on a falling market the price in a "cost plus" contract will be higher than the market price. Also that every such contract tends to reduce the cost, because of increased production, but that the saving will be spread over the entire output. See also Llewellyn, Cases and Materials on the Law of Sales 29.

[113]Lund v. McCutchen, (1891) 83 Iowa 755, 49 N. W. 998 (price plus freight); Boaz v. Owens, (1898) 20 Ky. L. Rep. 257, 45 S. W. 876 (price plus freight and expense of putting up machine); J. W. Finn & Co. v. Culberhouse, (1912) 105 Ark. 197, 150 S. W. 698 ("wholesale cost" held to include price, freight and drayage charges, in the light of local custom); Swisher v. Dunn, (1913) 89 Kan. 412, 131 Pac. 571 ("invoice purchase price" held to mean what the seller paid when he bought, rather than what it would cost to buy from wholesalers at the time of sale).

In McCoy v. Hastings & Bradley Co., (1894) 92 Iowa 585, 61 N. W. 205, a stock of goods was sold at "64 cents on the dollar on cost price of said property, inventory to be taken as soon as possible." It was held that the buyer was not entitled to the benefit of cash discounts, the time for which the seller had allowed to expire. In Eagan v. Claskey, (1887) 5 Utah 154, 13 Pac. 430, "original cost" to the seller was held not to include the cost of his loans to the party from whom he bought. In Braverman v. Naso, (1927) 203 Iowa 1297, 214 N. W. 574, evidence of the condition of the goods three years after the sale was held to have no bearing on the cost.

In Knopfler v. Flynn, (1917) 135 Minn. 333, 160 N. W. 860, an action for deceit, representations as to the "invoice price" were held to have reference to the cost price, rather than the actual inventory value. In Sell v. Lenz, (1921) 149 Minn. 200, 183 N. W. 135, "invoice price" was interpreted in the light of the conduct of the parties to mean the retail or inventory price, rather than the wholesale price, as a basis for computing the contract price.

See also Metropolitan Nat. Bank v. Gopher Lath & Fuel Co., (1927) 170 Minn. 288, 212 N. W. 459 ("market replacement value").

In Dwight Brothers Paper Co. v. Ginzburg, (1925) 238 Ill. App. 21, the contract provided: "The maximum price at which this paper is to be billed to you is 5½c per lb. net cash 30 days from date of invoice, sidewalk delivery. We are to give you the benefit of any reduction in price which the mill makes during the life of this contract." The court refused to permit recovery on this contract for paper delivered, saying that the price could not be ascertained with certainty. The particular "mill" intended, and the extent of the deduction from the maximum price were not stated. The case was remanded for evidence on the basis of quantum meruit.

[114]See John Maurice Clark, Studies in the Economics of Overhead Costs, (1923).

term,[115] depending almost entirely upon the accounting system adopted.[116] Not all the difficult questions presented in connection with "cost plus" building contracts[117] have arisen as yet in cases of the sale of goods, but there seems to be no reason why they should not be involved—including, for example, the apportionment of salaries and wages, financing costs, interest and carrying charges, depreciation of equipment, taxes and general office expenses, and the question of how far the cost has been kept down to a reasonable figure. Unless the contract expressly limits the cost to particular items, such as "labor, materials and supplies,"[118] the court must necessarily decide how far these factors are to be considered.[119]

In at least three cases the court has been compelled to face these issues. In Massachusetts it was held[120] that "actual cost" was made up of items "substantially if not exactly the same as the items to be deducted from gross receipts to ascertain net profits," and therefore included shrinkage of materials, insurance, depreciation of plant, rent, and services of personnel. The Penn-

[115]"We are all familiar with the seemingly insuperable difficulty of ascertaining the cost, for example, of producing a pound of cotton or of making a yard of cloth; and perhaps no two persons engaged on the problem would agree on the prime elements of the calculation, as none of the parties, witnesses, or the master could agree on them in this case. Even in the simpler application to mere bargain and sale of a thing already in existence, and not to be manufactured, the term is ambiguous, and so much so that it is not impossible that often it will be found to avoid the contract for incurable uncertainty, though I have not found it necessary to go into that subject." Hammond, J., in Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co., (C.C. Tenn. 1896) 72 Fed. 317.

[116]See 2 Harvard Business Review 370.

[117]See the annotations in 2 A. L. R. 126, and 27 A. L. R. 48, for discussion of the various items making up "cost."

[118]Kann v. Wausau Abrasives Co., (1925) 81 N. H. 535, 129 Atl. 374. See also Thuman v. Clawson & Wilson Co., (1925) 211 App. Div. 507, 207 N. Y. S. 565 ("The above quotations . . . shall increase or decrease in proportion to future fluctuations in the cost of labor or findings and materials at the mills"), and also Humphrey v. Holden, (1909) 157 Mich. 481, 122 N. W. 103 ("10% above cost of manufacture, said cost to include cost of raw material, running of plant, management, labor, salaries, taxes, insurance, etc.")

[119]"It would be comparatively easy to measure or weigh the materials used in these boilers, count the price or value of it, keep account of the hours of labor, and its value or price, and find these two primary factors of the problem, and also quite easy to avoid all the rest by counting these and ordinary freight and charges as the only cost; but that is hardly fair to the plaintiff, and so far from merely cutting away its 'profit,' which was agreed to be surrendered, would probably entail a loss." Hammond, J., in Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co., (C.C. Tenn. 1896) 72 Fed. 317.

[120]Fillmore v. Johnson, (1915) 221 Mass. 406, 109 N. E. 153. This was a contract for the manufacture of toilet paper tissue, at "cost of tissue, plus 5% and actual cost of finishing."

sylvania court in one case[121] refused to deduct the value of by-products from the cost of manufacture, but in another,[122] where the issue was merely the determination of damages upon the basis of cost, conceded that by-products were to be considered but refused to include fixed charges for labor, salaries, office expenses, taxes, insurance, legal fees, interest on indebtedness, and depreciation.[123] Mr. Justice Washington once plaintively lamented[124] that any court should ever be called upon to interpret "expressions of such doubtful import, without a clue to ascertain with precision what was the real intention;" but apparently no court has ever permitted a contract to fail because of the indefinite meaning of "cost."[125]

[121]Baeder-Adamson Co. v. F. W. Tunnell & Co., (1926) 285 Pa. St. 356, 132 Atl. 172. A contract for the sale of glue, at "the per pound cost of manufacture as shown by the books of the seller, this cost to be based on all charges entering into the manufacture of glue . . . plus the cost per pound of stock used in the manufacture of the glue, plus a fixed profit at the rate of 2 cents per pound." The court was somewhat influenced by practical construction of the contract.

[122]Jessup & Moore Paper Co. v. Bryant Paper Co., (1929) 297 Pa. St. 483, 147 Atl. 519.

[123]The following passage illustrates the court's argument: "Perhaps no better illustration can be given of the error of the rule applied by the court below than by calling attention to the fact that, under it, the profits of a particular contract are made to depend on whether or not it is to be performed by an individual (whose general indebtedness never would be considered in such cases) or by a corporation, and, if by the latter, upon whether or not it has a general corporate indebtedness. The additional material required to carry out the contract, plus the value of the by-products obtainable, were properly considered, but there would have been no increase in labor or deterioration of machines, and the general corporate expense for the five mills would not have varied."

See also the following decisions of the War Department, Board of Contract Adjustment: In re Claim of American Process Co., (1920) 4 War Dept. Board of Contract Adjustment 221 (allowing as cost items bonus payments to employees and others, and depreciation on patents and patterns, but disallowing salary of an absent executive, commissions paid to officers, and advertising charges); In re Claim of Crown Cork & Seal Co., (1920) 4 War Dept. Board of Contract Adjustment 136 (extra costs due to inexperience of manufacturer disallowed); In re Claim of American Steel and Wire Co., (1920) 5 War Dept. Board of Contract Adjustment 426 (same); In re Claim of Van Dorn Iron Works Co., (1920) 8 War Dept. Board of Contract Adjustment 284 (factory management and general administrative expense).

[124]In Goodwin v. United States, (C.C. Pa. 1811) 2 Wash. C. C. 493, Fed. Cas. No. 5,554.

[125]In Buckmaster v. The Consumers Ice Co., (1874) 5 Daly (N.Y.) 313, the contract was for the delivery of ice at a price to afford the seller a "net profit not to exceed one dollar per ton." It was held that the contract failed because the margin of profit was not definitely fixed. As an additional reason, the court mentioned the difficulty of determining the cost to the seller on which the net profit was to be based. See also the dictum in Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co., (C.C. Tenn. 1896) 72 Fed. 317, quoted in footnote 115.

Once the cost is settled, there remains the seller's margin of profit. Generally this is fixed by the contract, but occasionally it is left open. In one case, where the agreement was to pay the "original cost, plus cost of handling, and a 'nice' or reasonable profit," the court held the contract unenforceable, upon the ground that a reasonable return for the seller's skill and the risks assumed could not be ascertained by permissible methods of trial.[126] The decision seems unfortunate; there is usually no more difficulty in arriving at a "reasonable profit" than at a "reasonable price." There is some little authority in favor of the validity of such a contract.[127]

Rather than the entire cost, the price may be made to depend on particular items. Common examples are the "sliding scale" contracts, in which it is agreed that the price of a manufactured article shall go up or down in accordance with stipulated changes in the market price of the basic raw material. The price of steel is made to depend on that of pig iron; the price of tin cans varies with that of tin plate.[128] The wisdom of such contracts, for an entire industry, has been doubted,[129] but they are likely to

[126]Gaines & Sea v. R. J. Reynolds Tobacco Co., (1915) 163 Ky. 716, 174 S. W. 482. The court argued that a reasonable profit would involve reasonable compensation for the shrewdness, energy and skill of a tobacco buyer, as well as due return on the financial investment hazarded. "These inquiries are of such nature that their determination would lead so far afield, into the realm of surmise, that the processes by which their establishment might be attempted to be effected would not meet with the sanction of recognized principles of procedural law."

See also Buckmaster v. The Consumers Ice Co., (1874) 5 Daly (N.Y.) 313, where the contract was for a price on ice to give the seller a "net profit not to exceed one dollar per ton." See footnote 125.

[127]In Lanford v. United States Wooden-Ware Co., (1901) 127 Mich. 614, 86 N. W. 1033, prices were quoted, with the provision: "If it shall appear that the prices named herein will not leave us a fair margin, we wish to avail ourselves to offer you another proposition as to price." It was held that the seller could enforce the contract. "The fact that the plaintiff reserved the right to abandon the contract under certain conditions made it none the less binding on the defendant, if it chose to contract on those terms."

See also New York Overseas Co. v. China, Japan & S. A. Trading Co., (1923) 206 App. Div. 242, 200 N. Y. S. 449, where, in default of a market price, the contract was enforced at cost, "with a reasonable profit in addition"—the court thus adopting voluntarily the standard which was considered too uncertain in the Gaines Case, (1915) 163 Ky. 716, 174 S. W. 482, supra n. 126. Also Twist v. Roane, (1927) 174 Ark. 35, 294 S. W. 62, where a materialman furnishing goods at "cost" on cash terms was held entitled to add 15% ("allowable and justifiable to add a reasonable profit, and we do not think the added amount is unreasonable") for failure to pay cash.

[128]Converse, Selling Policies, (1928) p. 279; Copeland, Problems in Marketing, (1923) p. 742.

[129]Copeland, Problems in Marketing, (1923) p. 742, quotes the Iron

be used when production costs are uncertain and the cost of the goods depends to a large extent on that of the raw material. Ordinarily there is no difficulty in the enforcement of such contracts, since the market price of the raw material is a sufficiently objective standard. On the same basis, the contract price may be made to depend on wages, on the cost of labor and materials together, or on such elements of cost as the tariff.[180] Unless the ratio between these factors and the contract price is definitely fixed, there would seem to be much the same difficult problem of accounting as in a "cost plus" contract, but the courts appear to have had no such difficulty.[181]

6. PRICE DEPENDING ON RESALE PRICE.

Sometimes the goods are sold under an agreement that the buyer is to resell them, and the contract price is to depend on the price of resale. The situation then is the converse of the

Age on the undesirable effect of such contracts, in carrying the contract out of line with the market for the manufactured article, and increasing fluctuations. The Iron Age mentions a case where so much tonnage was under contracts depending on the market that the market became unreliable, and settlements had to be made upon some other basis. See discussion in Llewellyn, Cases and Materials on the Law of Sales, 21-22.

[180]D. R. Vivion Mfg. Co. v. Robertson, (1903) 176 Mo. 219, 75 S. W. 644 ("if there was a rise or fall as much as ten percent in the market price of the materials of which the attachments were made, there was to be a corresponding rise or fall in the price of the attachments"); Downey v. Shipston, (1923) 206 App. Div. 55, 200 N. Y. S. 479 ("All orders are based on present mining and day wage scale, and any change therefrom shall affect price herein named accordingly"); Kann v. Wausau Abrasives Co., (1925) 81 N. H. 535, 129 Atl. 374 ("labor, material and supplies"); Thuman v. Clawson & Wilson Co., (1925) 211 App. Div. 507, 207 N. Y. S. 565 ("labor or findings and materials"); Urquhart Lindsay & Co. v. Eastern Bank, [1922] 1 K. B. 318 ("cost of labor or wages"); Detrick v. Balfour, (C.C. 1881) 7 Sawy. 348, 8 Fed. 468 (tariff—"any change in duty to be for or against the purchasers"); see Outlet Embroidery Co. v. Derwent Mills, (1930) 254 N. Y. 179, 172 N. E. 462 (tariff); Cub Fork Coal Co. v. Fairmount Glass Works, (C.C.A. 7th Cir. 1929) 33 F. (2d) 420 (wages). See also (1929) 8 Decisions of Comptroller General of U. S. 512, 671 (wages).

[181]In Cub Fork Coal Co. v. Fairmount Glass Works, (C.C.A. 7th Cir. 1929) 33 F. (2d) 420, the contract read: "It is expressly understood that the price or prices named herein are based on existing rates of pay for all mine labor and the price or prices will be subject to readjustment in the event existing rates of pay are changed." Concerning this provision the court said: "Had the seller exercised its right to raise the price, the readjustment would have been merely a mathematical problem. The increase would have been the sum which measured the increased cost of labor. This was sufficiently definite so that it would not have necessitated another 'meeting of the minds' of the contracting parties. The new price would have been the contract price plus the new item, which was definite or capable of being made definite."

"cost plus" arrangement: it is now the buyer who is assured a small profit, generally in the form of a commission, and the seller who has the risk of loss, and any opportunity for additional gain. Such provisions are very common in consignment contracts, but they may accompany an outright sale.

If the buyer does resell the goods, the contract price becomes easily ascertainable, and there is no difficulty. But while the transaction is still entirely executory, it is disputed whether the contract can be enforced by either party. A few vigorous opinions have held that the agreement fails.[132] Their argument is that the buyer is under no obligations as to the price for which he may resell, and therefore there is no mutuality.[133] Here again the assumption apparently is that the right is reserved to the buyer to act unreasonably. He is to be free to dispose of the goods at a price so far below the market that it will be unfair to the seller. It is scarcely conceivable that any two business men would ever intentionally make such a contract. It seems necessarily implied that the buyer is to resell the goods in a reasonable manner, that is to say, at the best price reasonably obtainable upon the market.[134] This is no more difficult to ascertain than any other "reasonable price."

In a number of cases in which the contract provided that the buyer should resell for the "best price obtainable," and pay over the proceeds, minus his commission, to the seller, the contract has

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[132]Foster v. Lumbermen's Mining Co., (1888) 68 Mich. 188, 36 N. W. 171; Puryear-Meyer Grocer Co. v. Cardwell Bank, (Mo. App. 1928) 4 S. W. (2d) 489; Brooks v. Federal Surety Co., (1928) 58 D. C. App. 56, 24 F. (2d) 884, annotated in 57 A. L. R. 747.

[133]"According to the provisions of the contract, the coal, when delivered to plaintiffs, would become their exclusive property. The mining company then would have no control over it, nor over the price for which plaintiffs might sell it. The plaintiffs would be entitled to accept any price for it satisfactory to themselves, and in effect the transaction would be the same as if the mining company had agreed to sell and deliver the coal to plaintiffs, leaving it to them alone to determine the price to be paid for it. Such an agreement lacks mutuality, and cannot be enforced. . . . The contract in the instant case does not stipulate that the price of the coal shall be governed by the market price thereof, and the court cannot import such a provision into the contract. It is true that the plaintiffs would not be permitted to make fraudulent sales for price-fixing purposes, but that rule cannot take the place of an agreement of the parties in regard to price." Brooks v. Federal Surety Co., (1928) 58 D. C. App. 56, 24 F. (2d) 884, 57 A. L. R. 745.

[134]Cf. Wood v. Lucy, Lady Duff-Gordon, (1917) 222 N. Y. 88, 118 N. E. 214, holding that by acceptance of an exclusive agency, on the basis of one-half of "all profits and revenues," the agent impliedly promises to use all reasonable effort to market the product.

been enforced.[135] Cooperative marketing contracts very often contain such a provision.[136] Unless we are to assume that the agreement was meant to be an unfair one, or to accomplish nothing, it would seem that such terms are to be implied in every contract of this type.

7. AGREEMENTS TO MEET THE PRICES OF COMPETITORS.

Another very common provision is that one party is to meet whatever prices may be offered by his competitors. The agreement may have reference to a particular competitor,[137] or to a particular group,[138] or it may cover any prices that may be offered. It may be limited to a fixed maximum or minimum.[139] The pur-

[135]Eighme v. Holcomb, (1915) 84 Wash. 145, 146 Pac. 391; Rose v. U. S. Lumber & Box Co., (1923) 107 Or. 513, 215 Pac. 171 ("in effect, the agreement is that the [buyer] shall pay what is the market price at the time and place of delivery, less 2% discount for cash, and 5% commission"); Texas Farm Bureau Cotton Ass'n v. Stovall, (1923) 113 Tex. 273, 253 S. W. 1101, reversing (Tex. Civ. App. 1923) 248 S. W. 1109; Hollingsworth v. Texas Hay Ass'n, (Tex. Civ. App. 1923) 246 S. W. 1068; see Brown v. Georgia Cotton Growers Coop. Ass'n, (1927) 164 Ga. 712, 139 S. E. 417. See also Hunter W. Finch & Co. v. Zenith Furnace Co., (1910) 245 Ill. 586, 92 N. E. 521, affirming (1909) 146 Ill. App. 257; Brown & Sons v. Lincolnshire Beet Sugar Co., (1929) 45 T. L. R. 199.

In Texas Farm Bureau Cotton Ass'n v. Stovall, (1923) 113 Tex. 273, 253 S. W. 1101, the court said: "We think the price to be paid under this contract is definite and certain. . . . Under the contract, the [buyer] must resell the cotton. The amount obtained from this resale is to be determined, not by any further negotiations between the parties to the contract, but by external standards, that is, market conditions. . . . The deductions are named and specified in the contract, and may be easily ascertained. This method of determining the net proceeds of goods sold on consignment or commission is a familiar one, and no reason has been given why it should not be used to ascertain the price of goods delivered under a contract providing therefor. The liberty of contract is not to be lightly restrained by technical rules."

[136]See the notes in 25 A. L. R. 1118, 33 A. L. R. 251, 47 A. L. R. 942; Texas Farm Bureau Cotton Ass'n v. Stovall, (1923) 113 Tex. 273, 253 S. W. 1101, reversing (Tex. Civ. App. 1923) 248 S. W. 1109; Hollingsworth v. Texas Hay Ass'n, (Tex. Civ. App. 1923) 246 S. W. 1068; Brown v. Georgia Cotton Growers Coop. Ass'n, (1927) 164 Ga. 712, 139 S. E. 417. See also Dairymen's League Coop. Ass'n v. Holmes, (1924) 207 App. Div. 429, 202 N. Y. S. 663; Rifle Potato Growers Coop. Ass'n v. Smith, (1925) 78 Colo. 171, 240 Pac. 937.

In Minn. Wheat Growers Coop. Marketing Ass'n v. Huggins, (1925) 162 Minn. 471, 203 N. W. 420, reference to the Record, p. 10, discloses that the contract contained such a provision. The contract was sustained against the contention that it was lacking in mutuality of obligation.

[137]Matthews Glass Co. v. Burk, (1904) 162 Ind. 608, 70 N. E. 371 ("at a discount which will be five percent lower than the lowest price made by the American Window Glass Company").

[138]Solter v. Leedom & Worrell Co., (C.C.A. 4th Cir. 1918) 252 Fed. 133, affirming (D.C. Md. 1917) 244 Fed. 483 (prices guaranteed against decline of eight named standard packs of tomatoes to date of shipment).

[139]In Holly Sugar Corp. v. Fritzler, (1931) 42 Wyo. 446, 296 Pac.

pose of this method of dealing is of course to assure to one of the parties the best available price, and to this extent the other party assumes all risks. In one or two cases[140] it has been held that such an agreement does not provide a practicable method of ascertaining the price, and therefore fails for uncertainty; but it should be at least as easy to determine the price offered by competitors as the "market price," and the weight of authority holds such a contract effective.[141]

A similar problem is presented by the practice of "guarantee against price decline." The contract may fix a definite figure, but provide that the seller will guarantee the buyer against lower prices. The guarantee may be[142] against a decline in the market,[143] or a decline in the prices of competitors;[144] or it may be against

206, the buyer agreed to pay as high a price for sugar beets as any competing company, provided such price would not be ruinous; a new price received for 50% of the sugar in the bag produced from the beets to be considered ruinous; the buyer in no event to pay less than $6 per ton. In a declaratory judgment construing this contract, it was held enforceable; also that the motive of the competitor in fixing ruinous prices was not material.

[140]In Stout v. Caruthersville Hardware Co., (1908) 131 Mo. App. 520, 110 S. W. 619, the contract was to sell at "as low prices as the goods could be bought for anywhere else." It was held that the contract failed: "What were the lowest prices at which they could be bought 'anywhere' even if we circumscribe the meaning of 'anywhere' so as to include only markets which might be deemed accessible to plaintiff or his agent . . . is an inquiry a court will not enter on because it cannot be answered with certainty on a reasonable investigation." But, since the goods had been delivered, it was held that the buyer must pay their reasonable value, the liability being in quasi-contract.

In Bromley v. Jefferies, (1700) 2 Vern. 415, the agreement was to pay 1500 pounds less than any other purchaser would give for an estate. The contract was held invalid, upon the argument that if the estate was not to be sold to any other purchaser, it was impossible to determine what such a purchaser would give.

There are also a number of cases involving real estate, where an option was given to buy or lease the premises for "as much as anyone else will pay." Sometimes it is held that such an option is invalid. Gelston & Meyenberg v. Sigmund, (1867) 27 Md. 334; Hayes v. O'Brien, (1894) 149 Ill. 403, 37 N. E. 73. Authority is divided. The cases are collected in an annotation in 30 A. L. R. 575.

[141]Matthews Glass Co. v. Burk, (1904) 162 Ind. 608, 70 N. E. 371; Van Horn v. Kemena, (1924) 281 Pa. St. 579, 127 Atl. 233; Alling v. John V. Lee & Sons, (1921) 148 Ark. 655, 230 S. W. 1; Holly Sugar Corp. v. Fritzler, (1931) 42 Wyo. 446, 296 Pac. 206; Hagins v. Combs, (1897) 102 Ky. 165, 43 S. W. 222; Baker v. Guinn, (Tex. Civ. App. 1893) 23 S. W. 604; see Stern v. Ladew, (1900) 47 App. Div. 331, 62 N. Y. S. 267; Texas Co. v. Berry Garage, (Cal. App. 1932) 9 P. (2d) 241. See also the cases involving guarantee against price decline, cited in footnote 156.

[142]See White and Hayward, Marketing Practice, (1924) p. 459.

[143]Wing v. Wadhams Oil & Grease Co., (1898) 99 Wis. 248, 74 N. W. 819; Paxton & Gallagher Co. v. Pellish, (1931) 43 Wyo. 182, 299 Pac. 708.

[144]See White and Hayward, Marketing Practice, (1924) p. 459.

the seller's own lower prices,[145] in which event an additional question is involved, which is considered below.[146] Prices may be guaranteed only until the time of delivery, or until a specified later date.[147] The guarantee may cover all the goods sold, or merely the stock remaining on the buyers' hands at the date named.[148] Such guarantees are largely employed in lines where business is seasonal,[149] or the goods to be sold are widely advertised standard brands.[150] In the same manner, the buyer may guarantee the seller against higher prices.[151]

It is a subject of considerable dispute[152] whether price guarantees are economically sound. It is contended that they encourage buying in advance, especially in slack seasons, or when the market is declining or uncertain; that they enable the buyer with limited capital to obtain a stock of goods at a minimum of risk, and so relieve the manufacturer of the necessity of maintaining large floor space and extensive stock; that they tend to place buyers of "futures" on a par with buyers of "spots," and so to stabilize the market; and that they enable the manufacturer to plan his production ahead and operate his plant more steadily. On the other hand, it is contended that they are a severe hardship on

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[145]See Copeland, Principles of Merchandising, (1924) p. 342.

[146]See footnotes 176 to 178 and text.

[147]See Copeland, Principles of Merchandising, (1924) pp. 342-346.

[148]See Converse, Selling Policies, (1928) p. 302; Copeland, Principles of Merchandising, (1924) pp. 344-345. The manufacturer here incurs the additional risk of unfair claims by the dealer, and of overstocking the dealer on a falling market with goods that cannot be sold.

[149]Such as clothing, shoes, agricultural implements, and various kinds of canned goods. Converse, Selling Policies, (1928) p. 300.

[150]Especially groceries, canned vegetables, tinned milk, paint, and similar articles. See Federal Trade Commission, Digest of Replies Relative to the Practice of Giving Guarantee Against Price Decline, (May, 1920).

A similar guarantee may even be given by a retailer to the customer. For example, the following advertisement of Frederick Loeser & Company, Inc., of Brooklyn, is quoted in White and Hayward, Marketing Practice, (1924) p. 462:

"We guarantee the price of everything we sell to be as low as, or lower than, the same article or pattern can be bought anywhere else. If in a day or a month later you find the same thing lower elsewhere, make a claim on us and it will be allowed at once. What broader guarantee can be given? It covers every line of merchandise we sell and under any circumstances the patron of Loeser's is protected."

[151]Providence Ice Co. v. Bowen, (1921) 44 R. I. 173, 114 Atl. 186; Salem King's Products Co. v. Ramp, (1921) 100 Or. 329, 196 Pac. 401.

[152]See Federal Trade Commission, Digest of Replies Relative to the Practice of Giving Guarantee Against Price Decline, (May, 1920); Copeland, Principles of Merchandising, (1924) pp. 342-346; White and Hayward, Marketing Practice, (1924) pp. 459-460; Converse, Marketing Methods and Policies, (1922) pp. 574-576; Converse, Selling Policies, (1928) pp. 299-304; Lincoln, Applied Business Finance, (1922) pp. 642-644; Journal of Commerce, April 30, 1921; Printers' Ink, October 14, 1926.

the small manufacturer with limited capital; that they encourage jobbers and dealers to take undue risks, and promote speculative buying and dangerous overproduction; that they tend to keep prices up, or to prolong a depression; and that they furnish an unfair method of competition by which the seller may be coerced. A few years ago the Federal Trade Commission made several complaints of unfair practices in connection with price guarantees, but discontinued prosecutions because it could not be proved that they were an unmitigated evil.[153]

It should be noted that in a guarantee against price decline the seller assumes the double risk of either a rise or a fall in the market. If the market goes up, he stands to lose, since he is limited to the contact price; if it goes down, he is required to meet it.[154] But, since a bona fide[155] offer from a competitor is a contingency beyond the control of either party, and the price to be paid is always ascertainable with certainty, such contracts quite uniformly are held enforceable.[156] The provisions of the Uni-

[153]See White and Hayward, Marketing Practice, (1924) p. 459; Federal Trade Commission v. St. Louis Wholesale Grocers Ass'n, (1923) 7 Fed. Trade Comm., Dec. No. 1; Federal Trade Commission v. Wisconsin Wholesale Grocers Ass'n, (1924) 7 Fed. Trade Comm., Dec. No. 489.

[154]Converse, Selling Policies, (1928) p. 299.

[155]It would seem that notice of such an offer should be required, with a reasonable opportunity to determine its good faith. See Henning's Case, (1617) Cro. Jac. 432, (promise to pay as much for goods as every other pays; where the person is certain, the seller is not bound to give notice of what he pays, but where altogether uncertain, such notice must be given); also Holmes v. Twist, (1615) Hob. 51.

But in Providence Ice Co. v. Bowen, (1921) 44 R. I. 173, 114 Atl. 186, where the contract was that "in the event that [the seller] receives, in writing, a bona fide offer or offers of $1.50 per ton, or more . . . it is agreed that [the buyer] will pay to [the seller] one-half of the increase in price, in addition to $1 per ton, for so much of its ice as [the seller] is able to dispose of at the increased price," it was held that the seller was not bound to submit offers received for inspection.

In Paxton & Gallagher Co. v. Pellish, (1931) 43 Wyo. 182, 299 Pac. 708, the price was guaranteed against decline. The buyer was quoted lower prices by a competitor of the seller, who believed that the particular type of article would soon become obsolete. Other manufacturers did not lower prices. The court held that the contract contemplated only a decline in the market prices: "It did not mean the same thing as a reduced price offered sporadically and specially by some one who wanted to get rid of a limited quantity for a special purpose, as in the case at bar."

[156]Minnesota Lumber Co. v. Whitebreast Coal Co., (1895) 160 Ill. 85, 43 N. E. 774; Wing v. Wadhams Oil & Grease Co., (1898) 99 Wis. 248, 74 N. W. 819; Semon, Bache & Co. v. Coppes, Zook & Mutschler Co., (1905) 35 Ind. App. 351, 74 N. E. 41; Providence Ice Co. v. Bowen, (1921) 44 R. I. 173, 114 Atl. 186; Paxton & Gallagher Co. v. Pellish, (1931) 43 Wyo. 182, 299 Pac. 708; L. C. Morgan Co. v. Christenson, (1924) 65 Cal. App. 474, 224 Pac. 141; Beymer Banman Lead Co. v. Haynes, (1888) 81 Me. 27, 16 Atl. 326; see C. W. Hull Co. v. Westerfield, (1922) 107 Neb. 705, 186 N. W. 992, 29 A. L. R. 105. Cf. also Jessup & Moore Paper

form Sales Act[157] are consistent with such a result.[158]

In many cases the seller seeks to protect himself against the possibility of too great a loss by reserving the right to cancel the contract if competing prices go so low that he cannot meet them. The contract then takes the form of an agreement for a sale at a fixed price, with a provision that if the buyer receives a better offer, the seller shall have the option of meeting it, or of terminating the contract, and permitting the buyer to purchase from the competitor.[159] This is an entirely reasonable arrangement, and, since the right of cancellation depends upon a contingency which neither party can control, it is generally recognized that such a provision does not render the contract illusory.[160]

Co. v. Bryant Paper Co., (1925) 283 Pa. St. 434, 129 Atl. 559.

See also In re Charles Wacker Co., (D.C. Md. 1917) 244 Fed. 483, where the court said: "In many lines it is necessary, or at all events highly expedient to contract for goods months before they are to be delivered. Under such circumstances the seller frequently guarantees to protect the buyer against a decline in the price of some leading producer or producers. Many millions of dollars of business are annually done under contracts containing such guaranties. There is nothing immoral in them nor are they contrary to any public policy. Business men have use for them, and the courts should sustain them if legally possible."

[157]Section 9 of the Sales Act is set out in footnote 32.

[158]In Solter v. Leedom & Worrell Co., (C.C.A. 4th Cir. 1918) 252 Fed. 133, affirming In re Charles Wacker Co., (D.C. Md. 1917) 244 Fed. 483 (see footnote 156), the contract was to sell canned tomatoes, at a fixed price, "Prices guaranteed against decline of the following packs of standard tomatoes to date of shipment [naming eight brands]." The court quoted Section 9 of the Sales Act, and said: "This statute is a formulated statement of the recognized rule. The clear meaning of the instrument, in the light of the admissions in the stipulation, was that [the seller] sold the tomatoes for the price stated, but agreed to an abatement to any lower price that the purchaser might be able to show the standard brands mentioned had reached during the life of the contract. . . . The contract as to price was thus in effect fixed at the prices stated for goods of a recognized market grade, subject to reduction in price to the lowest point reached in the price of such goods within the period."

[159]In Jessup & Moore Paper Co. v. Bryant Paper Co., (1925) 283 Pa. St. 434, 129 Atl. 559, the contract was for the sale of bleached soda pulp, at a price to be fixed by the seller on the last day of each month for the next succeeding month. If the buyer could submit a bona fide offer from a responsible manufacturer at a lower price, the seller must meet it, or the buyer was not bound during that month. If no such offer submitted, the seller's price to be binding. The court held the contract valid, saying: "Here plaintiff in effect says: 'I will sell pulp to you each month at the price which I will specify; if it is higher than the best price you can obtain elsewhere, I will either meet that price or you may fill your requirements from the lowest bidder thus obtained,' and defendant says, 'I will buy from you on those terms.' We see nothing illegal or unenforceable in such an agreement. It is not an unusual mercantile contract, was especially fair to defendant . . . and hence, as defendant was not left to the mercy of plaintiff, we need not consider the numerous cases cited by defendant, which deal with the results growing out of that character of contract." The court cited section 4 of the Uniform Sales Act (the statute of frauds) but made no mention of Section 9, dealing with the price.

8. Agreements to Make the Same Price As That Made to Others

A very similar method of leaving the price open is to provide that it shall be the same as the price made by one of the parties to others with whom he deals. Thus it may be agreed that the price shall be the same as that allowed by the seller to other buyers.[161] It is sometimes difficult to distinguish such a transaction from an agreement on the part of the buyer to meet competing prices;[162] but in theory, at least, there is a distinction, because—still in theory—the prices made by the seller to other buyers are entirely within his own control. The purpose of such a contract is a legitimate one, since it operates merely to put the buyer upon an equal footing with the seller's other customers purchasing at the same time; but the subjective element involved has given the courts considerable difficulty. One very common illustration of such a contract is the "seller's opening price" agreement,[163] by which, in a seasonal industry, goods are sold before the opening of the season for future delivery, at a price to be

[160]Minnesota Lumber Co. v. Whitebreast Coal Co., (1895) 160 Ill. 85, 43 N. E. 77; C. W. Hull Co. v. Westerfield, (1922) 107 Neb. 705, 186 N. W. 992, 29 A. L. R. 105; Van Horn v. Kemena, (1924) 281 Pa. St. 579, 127 Atl. 233; Matthews Glass Co. v. Burk, (1904) 162 Ind. 608, 70 N. E. 371; Jessup & Moore Paper Co. v. Bryant Paper Co., (1925) 283 Pa. St. 434, 129 Atl. 559; Semon, Bache & Co. v. Coppes, Zook & Mutschler Co., (1905) 35 Ind. App. 351, 74 N. E. 41; Paxton & Gallagher Co. v. Pellish, (1931) 43 Wyo. 182, 299 Pac. 708; Rutledge v. McAfee, (1890) 72 Md. 28, 18 Atl. 1103.

The same principle was involved in Lanford v. U. S. Wooden-Ware Co., (1901) 127 Mich. 614, 86 N. W. 1033 (see footnote 127); Outlet Embroidery Co. v. Derwent Mills, (1930) 254 N. Y. 179, 172 N. E. 462 (price "subject to change pending tariff revision"); Hunt v. Stimson, (C.C.A. 6th Cir. 1928) 23 F. (2d) 447 (privilege of cancelling "if the complaint cannot be satisfactorily adjusted"); Wood County Grocer Co. v. Frazer, (C.C.A. 8th Cir. 1922) 284 Fed. 691 (if seller finds it necessary to ask buyer to pay more than a stated minimum, the price shall be optional with the buyer, who need not accept shipment); Meurer Steel Barrel Co. v. Martin, (C.C.A. 3d Cir. 1924) 1 F. (2d) 687 (contract terminable on notice). See also the annotation, 29 A. L. R. 112.

[161]Or that allowed by the buyer to other sellers. Libby, McNeil & Libby v. Busse, (1926) 138 Wash. 548, 244 Pac. 963; Casein Co. of America v. Van Dam, (C.C.A. 2d Cir. 1909) 168 Fed. 45; see Salem King's Products Co. v. Ramp, (1921) 100 Or. 329, 196 Pac. 401 (price guaranteed against rise).

[162]For example, suppose an agreement that the buyer is to pay "as much as every other pays." Henning's Case, (1617) Cro. Jac. 432. Is this an agreement that the buyer shall meet competing offers, or that the seller shall allow him the same price that he makes to his other customers?

[163]See Copeland, Problems in Marketing, (1923) p. 737; Converse, Marketing Methods and Policies, (1922) p. 574; Federal Trade Commission, Report on Canned Foods (Dec. 1918). Such contracts apparently were very useful under war conditions.

announced by the seller at or shortly before the date of the season's first shipments. Sometimes the buyer is given the privilege of cancelling the contract if this price is unsatisfactory,[164] in which case there is at most an option to the buyer; but in many cases the contract is "firm at opening prices,"[165] and purports to be absolutely binding.

In the case of *Weston Paper Mfg. Co. v. Downing Box Co.*,[166] which attracted a great deal of attention, a federal circuit court of appeals held such a contract invalid for uncertainty. The agreement was for the sale of a quantity of strawboard, to be delivered in monthly installments, at a price to be fixed by the seller in advance for each three months' deliveries, by notice to the buyer, "which price shall be the seller's market price then existing under this the seller's standard form of quarterly price fixing contract." In so far as this contract remained executory, the court found it illusory and ineffective:

"We see nothing in this contract which takes from the seller the absolute right to fix the price in the future. Certainly defendant buyer had no voice in fixing this price. Nor did any third party have any immediate influence upon plaintiff in determining the price. True, plaintiff may, in acting, have been governed by a desire to hold future business, or have been prompted by other laudable motives. But plaintiff could have arbitrarily changed the price each quarter, and from such arbitrary fixation defendant had no appeal. Upon the ground of uncertainty, and also for want of consideration, we conclude the agreement as drawn was unenforceable."

This decision[167] presupposes the intention of the contract to be that the seller shall be entirely free to act unreasonably—that is, to name as high a price as he likes. Even granting this interpretation, it may be questioned whether, as a practical matter, there is any serious danger of unfairness to the buyer. The

[164]Booth v. A. Levy & J. Zentner Co., (1913) 21 Cal. App. 427, 131 Pac. 1062 ("subject to confirmation by the purchaser when opening price is named by the shipper"); National Can Co. v. Robert Gair Co., (1921) 138 Md. 330, 113 Atl. 858.

[165]California Prune & Apricot Growers v. Wood & Selick, (D.C. N.Y. 1924) 2 F. (2d) 88.

[166](C.C.A. 7th Cir. 1923) 293 Fed. 725. See, in accord, (1925) 5 Decisions of the Comptroller General of U. S. 186.

[167]In the note in (1927) 27 Col. L. Rev. 708, 713, in commenting on this case, it is suggested that "the terms of the printed form gave every possible advantage to the seller, and the buyer seems only to have signed on the dotted line. This may have been in the court's mind when it denied the seller recovery and commented on the fact that no third party had any immediate influence upon the seller in determining the price." Is this the realistic approach?

seller is a business man. Quite apart from "laudable motives," it may be supposed that he will act with some business sense. Manufacturers and wholesalers who are in a position to set prices substantially higher than the market value of the goods to all their customers are remarkably few. If the price is too high, there will be no business. Even assuming that most of the seller's customers are tied up by similar contracts, he is not free to fix prices at will, if he has any expectation of ever selling them again. The likelihood that the seller will fix an unreasonably high price, in order to take advantage of the buyer, is not appreciably greater than the possibility that he will shut down his business in the cases where he has contracted to sell the output of his plant, or that the buyer will do the same where he has agreed to buy his requirements.[168]

But does the contract mean that the seller is to be entirely free to name a price? Are we to suppose that the buyer intends a promise to pay whatever outrageous price the seller may ask? Or that the seller expects anything more than the buyer's obligation to accept the goods, provided the figure set is reasonable? The presumption is that reasonable conduct and fair dealing are intended; is it not implied in such a contract that the seller's price shall be a "market price," at which the goods are capable of being sold to customers on the open market?[169] The follow-

[168]Note, (1927) 27 Col. L. Rev. 708, 713; note, (1926) 26 Col. L. Rev. 726; 1 Williston, Contracts, sec. 104, p. 217; 2 Williston, Sales, 2d ed., sec. 464, pp. 1170, 1171. See also Pittsburgh Plate Glass Co. v. Paine & Nixon Co., (1931) 182 Minn. 159, 224 N. W. 453, 455, overruling Bailey v. Austrian, (1873) 19 Minn. 535 (Gil. 465), and comment in 15 MINNESOTA LAW REVIEW 469.

[169]An ingenious argument to this effect is found in Kings County Packing Co. v. Sunland Sales Coop. Ass'n, (1929) 100 Cal. App. 126, 279 Pac. 1036. The contract was that the "buyer shall pay hereunder for two-crown loose Muscats per pound the price quoted by seller on 15-ounce seeded cartons less four cents." It was held that the seller was bound to fill orders at its general market price, rather than at a higher price quoted to four of its seventeen divisional sales offices. The court said:

"All of the dictionaries . . . concur that the definition of the term 'quoted' is to name or give the current market price. 'Market price means the current price.' Sloan v. Baird, 162 N. Y. 327, 56 N. E. 752. 'Market price' and 'market value' when applied to any article mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business . . . 'Market value' is the price at which goods are freely offered in the market to all the world . . . It is clear, then, that the term 'price quoted' in the contract was intended to mean the price quoted in the general market, and not in a few particular localities."

See also Salem King's Products Co. v. Ramp, (1921) 100 Or. 329, 196 Pac. 401, where the contract was to purchase loganberries. "If [the buyers] raise their buying price to other growers in 1918 or thereafter, this contract will automatically conform to that price." It was held that ing is the answer of a lower federal court[170] to the reasoning of the *Weston Case*:

"In construing contracts in which persons seek to cover the contingencies and uncertainties of crops that are yet to mature, provisions reasonably adapted to that end should not be made futile and meaningless, because they contain some element of the 'will, wish or want' of one of the parties. Into each such stipulation the law will inject the requirement of good faith and fair dealing. Better it is that there should be some indefiniteness and uncertainty in contracts such as these than that the growers of commodities, and the merchants who deal in them, should be told that, unless they are able accurately to foretell what nature holds in store they cannot safely make contracts which will in some degree be dependent upon future events."

In a number of cases in which the seller did in fact set a reasonable price, it has been held that the contract could be enforced.[171] The price to which the buyer is entitled is the price

the buyers were required to have a good faith price to other growers, and that it was the intention of the parties that the buyers should pay the market price. The contract was construed against the buyers, who drew it.

170California Prune & Apricot Growers v. Wood & Selick, (D.C. N.Y. (1924) 2 F. (2d) 88.

171California Prune & Apricot Growers v. Wood & Selick, (D.C. N.Y. 1924) 2 F. (2d) 88; Beardsley v. Smith, (1895) 61 Ill. App. 340 (seller's "lowest jobbing prices"); Libby, McNeil & Libby v. Busse, (1926) 138 Wash. 548, 244 Pac. 963; Moore v. Shell Oil Co., (Or. 1931) 6 P. (2d) 216; Standard Oil Co. of Louisiana v. Petroleum Products Storage Co., (Tenn. 1931) 44 S. W. (2d) 317; Kings County Packing Co. v. Sunland Sales Coop. Ass'n, (1929) 100 Cal. App. 126, 279 Pac. 1036; Plymouth Cordage Co. v. Pennsylvania Wood Co., (1902) 203 Pa. St. 206, 52 Atl. 245; Casein Co. of America v. Van Dam, (C.C.A. 2d Cir. 1909) 168 Fed. 45; Standard Oil Co. v. Wright Oil Service Co., (C.C.A. 4th Cir. 1928) 26 F. (2d) 895.

In Memphis Furniture Mfg. Co. v. Wemyss Furniture Co., (C.C.A. 6th Cir. 1924) 2 F. (2d) 428, the contract was for a sale of furniture to be manufactured by the seller, at "prices prevailing at time of shipment." The court said: "Whether the price to be paid was the market price at the time of delivery, as claimed by defendant, or the price fixed by plaintiff at its factory, as plaintiff asserts, the data for determining the price was present, and easily ascertainable."

In Jessup & Moore Paper Co. v. Bryant Paper Co., (1925) 283 Pa. St. 434, 129 Atl. 559, the contract provided that on the last day of each month, the sellers were to fix the price for each succeeding month; if this was unsatisfactory, the buyer was to submit a bona fide offer from a competitor at a lower price, which the seller must meet or cancel. If no such offer was submitted, the seller's price was to be binding on both parties. The court held that the contract was valid, saying that there was no arbitrary right in the seller, and that good faith was required.

In Shell Oil Co. of California v. Wright, (Wash. 1932) 9 P. (2d) 106, the contract was for the sale of gasoline at the seller's tank wagon price for commercial gasoline as determined and posted at the seller's depot at Tacoma. The court said: "Appellants also complain because the determination of the posted tank wagon price was left to respondent. This was a matter of contract into which they deliberately entered. The price of all real and personal property may be fixed by contract . . . The charged the seller's other customers who buy at the same time, in like amounts, and under the same conditions.[172] It must be the price at which sales are actually made, rather than any published quotations.[173] If the unexpected occurs, and the seller makes no sales, it has been held that the contract is defeated;[174] but in one case, where the seller, instead of endeavoring to market his corn, fed it to his hogs, it was decided that the contract could be enforced upon the basis of its market value at the time he so disposed of it.[175]

Much the same situation is presented when the contract fixes a definite price, but the seller guarantees the buyer against any lower prices which he may subsequently make to other customers.[176] There is the same theoretical possibility of unfairness to the buyer, since the seller is under no obligation to reduce his prices with the market. Practically, this is of very little importance, unless the seller has tied up most of his customers on similar contracts; and even in such a case, one court[177] has held

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tank wagon price at Tacoma was . . . not an arbitrary or fictitious price as claimed by appellants. The prices were sent from the main office of respondent to their managers, fixing the price throughout Washington, Oregon, and other Pacific Coast territory."

[172]Plymouth Cordage Co. v. Pennsylvania Wood Co., (1902) 203 Pa. St. 206, 52 Atl. 245 (buyer held not entitled to the same price as another customer received under a prior contract); Casein Co. of America v. Van Dam, (C.C.A. 2d Cir. 1909) 168 Fed. 45 (where buyer, doing a local business, sold out to a large concern doing business in several states, which assumed his contracts, the seller was only entitled to highest price paid under the original buyer's contracts).

[173]Standard Oil Co. of Louisiana v. Petroleum Products Storage Co., (Tenn. 1931) 44 S. W. (2d) 317; Standard Oil Co. v. Wright Oil Service Co., (C.C.A. 4th Cir. 1928) 26 F. (2d) 895. See also Kings County Packing Co. v. Sunland Sales Coop. Ass'n, (1929) 100 Cal. App. 126, 279 Pac. 1036.

But see Shell Oil Co. of California v. Wright, (Wash. 1932) 9 P. (2d) 106, where the fact that the seller was voluntarily allowing certain discounts to other dealers was held not to entitle the buyer to a similar reduction.

[174]Canadian National Ry Co. v. George M. Jones Co., (C.C.A. 6th Cir. 1928) 27 F. (2d) 240.

[175]Keime v. Thum, (1925) 238 Ill App. 519. Corn was sold to the buyer, the price to be what the seller received for the balance of his corn on hand. The court held that there was a breach of an implied promise to sell the balance of the corn, and that the seller was bound by the market price at the time of feeding to the hogs, which was lower than the price at the time of delivery to the buyer.

[176]See also the discussion of "guarantee against decline" of market prices and prices of competitors, footnotes 142-159, and text.

[177]Salem King's Products Co. v. Ramp, (1921) 100 Or. 329, 196 Pac. 401. The buyer, operating a fruit and vegetable dehydrating plant, contracted for the purchase of loganberries, at 4c per lb., "if [buyers] raise their buying price to other growers in 1918, or thereafter, this contract will automatically conform to that price." The court admitted parol evidence

that there is an obligation to set a price not unreasonably out of line with the market. Guarantees against the seller's own decline in price generally are held to be valid,[178] apparently because the price to be paid can always be determined with certainty, without any regard to any question of fairness to the buyer.

It is interesting to consider the consistency of these various results in open price cases. If the parties say nothing about the price, the contract will be enforced at a reasonable price, upon the supposition that that is what they have intended. If they leave the price to be agreed, the contract fails, apparently upon the theory that they do not intend to agree upon a reasonable price. If the price is left to be fixed by one party only, in the course of his dealings with others, the contract is enforced, upon the tacit assumption that the price fixed will be a reasonable one, and that there is sufficient consideration.

9. Maximum and Minimum Prices

Either the buyer or the seller may limit the risk he is to assume under an open price contract by setting a maximum or a

that agents of the buyer had represented to sellers that the buyer would meet market prices, and held that it was the intention of the parties that the buyer should pay the market price, with a minimum of 4 cents.

[178]Twitchell-Champlin Co. v. Radovsky, (1910) 207 Mass. 72, 92 N. E. 1038; Gratz v. M. M. Graves Co., (1927) 222 App. Div. 697, 225 N. Y. S. 436; Iowa Canning Co. v. F. S. Ainsa Co., (Tex. Civ. App. 1924) 267 S. W. 540 ("price guaranteed against seller's own decline"—parol evidence that this was intended to mean price guaranteed against a general market decline not admissible); California Prune & Apricot Growers v. Wood & Selick, (D.C. N.Y. 1924) 2 F. (2d) 88 (coupled with "seller's opening price" agreement); Salem King's Products Co. v. Ramp, (1921) 100 Or. 329, 196 Pac. 401 (buyer guarantees against rise).

In Rutledge v. McAfee, (1890) 72 Md. 28, 18 Atl. 1103, the contract provided that, should any of the seller's pack be sold for less, the buyer should have the advantage of such abatement. This was held not to apply to a lower price subsequently made by the seller to the same buyer. "It cannot be supposed that the appellees were securing a guaranty that the vendor would never sell them at a lower price . . . it would seem very clear that what the appellees were exacting and securing was protection against the sale to other people at a less price than to the appellees, in order that the appellees might not be undersold."

In Great Northern Paper Co. v. New York Times Co., (1918) 184 App. Div. 26, 171 N. Y. S. 751, the contract was to sell white news print paper; should the seller thereafter contract to supply its paper to others at a lower price, the buyer to be entitled to the reduction. This was held to cover a subsequent contract made by the seller to supply another buyer with pink paper, produced at the same cost, but not to apply to an option which the buyer did not take up.

Compare also Scott v. T. W. Stevenson Co., (1915) 130 Minn. 151, 153 N. W. 316, where the seller wrote the buyer: "Prices guaranteed to March 1st, 1910, after that we are to give thirty days notice before we minimum price. This may be coupled with a definite provision for the determination of the price—as, for example, an agreement that the buyer is to pay the market price at the time of delivery, not exceeding a stipulated maximum.[179] In such cases there is no difficulty. But in a few instances, the contract has contained no provision as to the price except the stated maximum or minimum. The agreement may be merely to pay "not over $100." Where this occurs, there are three possible interpretations which may be placed upon the contract.

First, the provision may be construed to mean that the buyer is to pay a reasonable price, or in other words the market price, limited only by the maximum or minimum set. This would appear to be the most obvious interpretation, and the fairest, since it probably approximates the actual intent of the parties. They intend to make a contract. If nothing were said about the price, we should imply an intention to fix a reasonable one. There is surely nothing about the fixing of a maximum or minimum limit to do away with this implication, or to suggest that the price is intended to be unreasonable, or the contract to fail. But apparently this view has been adopted in only one case. In *Burlington Grocery Co. v. Lines*,[180] the Vermont court held that a memorandum of a contract for the sale of sugar, reading "Price, not over 26 cents per lb." was sufficient to satisfy the statute of frauds. The court said briefly:

"It is not claimed that the price is not here stated according to the agreement of the parties. By proper construction, it is a stipulation for a reasonable price, to be determined by market conditions existing at the time of delivery, but not, in any event, to be more than the maximum named. Such an agreement is valid and enforceable."

Second, it is possible to regard the contract as an option. The buyer may be given the option to purchase at the maximum price stated, or the seller to sell at the minimum. This represents at least a part of what the parties intend, and results in a definite contract if the option is exercised. The difficulty lies in finding any consideration for the option. If the provision is that the buyer shall pay "not over $100." where is the consideration for

advance price." This was held to mean that the seller was not to advance prices until after March 1st, but that there was no guarantee until April 1st.

[179] Compare Mitchell v. Canadian Realty Co., (1922) 121 Me. 512, 118 Atl. 373 ("$17.50, if price goes up you to have it, dollars per cord"). Also Wass v. Canadian Realty Co., (1922) 121 Me. 516, 118 Atl. 375.

[180] (1923) 96 Vt. 405, 120 Atl. 169.

his right to purchase at $100? Consideration may perhaps be found in other portions of the contract,[181] or in the execution of part of the transaction. Or, if both a maximum and a minimum price are set, the seller's option to sell at the minimum in any event may be consideration for the buyer's option to buy at the maximum, and both may be enforceable as binding obligations. This result actually was reached in two federal decisions.[182]

Where both a maximum and a minimum are fixed, it is an interesting question whether there is any option to enforce the contract at intermediate prices. A parallel may be found in the case of contracts for the sale of a minimum to maximum quantity—such as 2,000 to 3,000 tons.[183] In such cases it seems generally agreed that one party is to have an option as to the amount to be furnished, and the courts have expended a great deal of ingenuity in determining which party is to have it. Various tests have been suggested: the quantity is to be fixed by the party who made the original offer, since by proposing the maximum-minimum clause he indicated an intention that it should be for his benefit, and the offer was accepted upon those terms;[184] it is to be fixed by the "first actor," the party who by the terms of the contract is to do the first act with reference to the indeterminate quantity, such as furnishing shipping directions;[185] or the court may look at the

[181]Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1922) 201 App. Div. 3, 193 N. Y. S. 698. The case was reversed, but not on this point, in (1923) 235 N. Y. 338, 139 N. E. 470. See footnote 193.

[182]In Wood County Grocer Co. v. Frazer, (C.C.A. 8th Cir. 1922) 284 Fed. 691, a contract for the sale of sugar set both a maximum and a minimum price ("not less than 16.12c nor more than 22.12c per lb. f.o.b. Omaha"). It was held that the seller could enforce the contract at the minimum price. The court said: "The contract could have been enforced by the [seller] in any event at the minimum price. It could have been enforced by the [buyers] in any event at the maximum price. The testimony shows that the sugar called for in the four contracts was actually tendered by the [seller] at the minimum price, and was refused by [the buyers]. At that time the price of sugar had fallen below the minimum price named in the contracts. This was doubtless the reason why [the buyers] would not accept it. They adopted the view that the contracts were not enforceable, which view we regard as untenable."

In Fraser v. Des Moines Wholesale Grocer Co., (C.C.A. 8th Cir. 1924) 298 Fed. 930, cert. denied, 266 U. S. 605, the contract fixed a similar maximum and minimum price on sugar. It was held that the minimum was intended to be flexible, varying with changes in freight rates affecting the cost to the seller. The court apparently did not doubt the validity of the contract.

[183]Discussed in (1924) 2 New York L. Rev. 81.

[184]Farquhar Co. v. New River Mineral Co., (1903) 87 App. Div. 329, 84 N. Y. S. 802; Pennsylvania Sugar Co. v. Czarnikow-Rionda Co., (C.C.A. 3d Cir. 1917) 245 Fed. 913; Crystal Paper Co. v. Robertson Co., (C.C.A. 6th Cir. 1923) 289 Fed. 16.

[185]2 Mechem, Sales, sec. 1170; Crystal Paper Co. v. Robertson Co.,

situation of the parties and the circumstances surrounding the contract, and endeavor to determine for whose advantage the provision was inserted.[186] But if we attempt to apply these rules by analogy to an agreement for a maximum and minimum price, we find that they are reduced at once to an absurdity. If the buyer, for example, is to be given the option of naming any price between the maximum and minimum, he will always name the minimum. If his option is merely to accept a price to be fixed by the seller, or to cancel the contract,[187] neither party is bound to anything until a price has been agreed. The difficulty in the application of the option interpretation suggests that it does not represent the true intention of the parties, and that a reasonable price should be implied.

Third, it is possible to construe the contract to mean that it is not intended to be binding until the parties have subsequently agreed upon a price within the maximum or minimum set. It is difficult to see why anybody should want to make such a contract; unless the figure set is at least intended as an option, the agreement does not affect the complete freedom of action which the parties had without it. But one important New York decision adopted such a construction. In *United Press v. New*

(C.C.A. 6th Cir. 1923) 289 Fed. 15; Highlands Chemical & Mining Co. v. Matthews, (1879) 76 N. Y. 145; Dambmann Bros. & Co. v. Lorentz & Rittler, (1889) 70 Md. 380, 17 Atl. 389; E. I. Dupont de Nemours Co. v. United Zinc & Chemical Co., (1914) 85 N. J. L. 416, 89 Atl. 992; Hunt v. Stimson, (C.C.A. 6th Cir. 1928) 23 F. (2d) 447; Wheeler & Co. v. New Brunswick R. R. Co., (1884) 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341.

[186] Southern Pub. Ass'n v. Clements Paper Co., (1918) 139 Tenn. 439, 201 S. W. 745; Taggert v. Brimfield, (C.C.A. 3d Cir. 1922) 281 Fed. 830; Wheeler & Co. v. New Brunswick R. R. Co., (1884) 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341; De Grasse Paper Co. v. Northern New York Coal Co., (1919) 190 App. Div. 227, 179 N. Y. S. 788; Crystal Paper Co. v. Robertson Co., (C.C.A. 6th Cir. 1923) 289 Fed. 15; Hunt v. Stimson, (C.C.A. 6th Cir. 1928) 23 F. (2d) 447; Lee v. National Box Co., (1930) 170 La. 1065, 129 So. 638.

[187] In Wood County Grocer Co. v. Frazer, (C.C.A. 8th Cir. 1922) 284 Fed. 691, the contract, after fixing a maximum and a minimum price, provided: "In case [the seller] should find it necessary to ask [the buyer] to pay more than the minimum price herein shown, then said price shall be optional with [the buyer] and [the buyer] need not accept shipment of sugar." Concerning this provision, the court said: "If [the seller] should have asked more than the minimum price, and [the buyers] should have been willing to take the sugar at some price greater than the minimum, then it might have been necessary to introduce parol testimony. That, however, would not have affected the liability. It would have affected only the extent of the liability."

In Fraser v. Des Moines Wholesale Grocer Co., (C.C.A. 8th Cir. 1924) 298 Fed. 930, cert. denied, 266 U. S. 605, the contract contained a similar provision, but it was not in question.

York Press Co.,[188] the seller contracted to furnish the buyer with a news service, at "a sum not exceeding $300 during each and every week that such news service is received by [the buyer] until the first day of January in the year 1900." What the parties probably intended was pretty clearly indicated by the further provision that after 1900 the buyer should have the right to continue the news service, "at a price which shall be fair and equitable to both of the parties thereto: provided, that such price shall not be more than any other daily morning newspaper of New York shall be required to pay"—in short, a reasonable price, subject to a maximum limit. Upon breach of the agreement by the buyer, the seller sought to recover "the reasonable value of the news service for the unexpired term of the contract, less the cost of performance." The court refused to permit such recovery, apparently misconceiving the significance of the early English decisions under the statute of frauds,[189] and said:

"The effect upon the instrument of its indefiniteness or uncertainty as to the price to be paid was to make it operative only so long as the parties chose and were able to agree upon the price per week; in other words, whether it should have contractual force would depend upon the subsequent agreement of the parties, and manifestly, if anything remained to be done by them relating to the subject-matter of the contract, it was an incomplete and unenforceable instrument."

The court then proceeded, with complacent inconsistency, to approve a directed verdict for nominal damages for breach of an agreement which was not "operative," and had no "contractual force."[190]

[188](1900) 164 N. Y. 406, 58 N. E. 527. The contract was made in July, 1892, and broken by the buyer on January 1, 1894. See also Prince v. Thomas, (1854) 15 Ark. 378 (not less than $125 nor more than $150 to repair a carriage).

[189]The court quoted the doubts of Chief Justice Tindal in Acebal v. Levy, (1834) 10 Bing. 376, 3 L. J. C. P. 98 (see footnotes 20, 21 and text), and said that this opinion was unaffected by the subsequent case of Hoadly v. M'Laine, (1834) 10 Bing. 482, 3 L. J. C. P. 162 (see footnotes 22 to 25 and text): "The facts of that case were such as naturally to take it out of the statute. . . . It is evident from this opinion, as it is from the other opinions, that the facts in the subsequent writings and conduct of the defendant were regarded as evidencing his undertaking to pay for the carriage quantum valebat."

[190]The trial court directed a verdict for six cents. Plaintiff appealed. The judgment was affirmed, together with an additional allowance of costs to the defendant because the recovery was less than $50. The court said: "The defendant committed a technical breach of its agreement to receive the news reports from the appellant, but, because of the indefiniteness of the obligation, only nominal damages were recoverable. There was no price fixed by the contract, and the defect could not be supplied by parol. There

This unfortunate decision was followed[191] by Cardozo, J., in *Sun Printing & Pub. Ass'n v. Remington Paper & Power Co.*[192] The contract was for the sale of 1000 tons of paper per month, at a definite price for the last four months of 1919; for 1920,

"the price of the paper and length of terms for which such price shall apply shall be agreed upon . . . fifteen days prior to the expiration of each period . . . the price in no event to be higher than the contract price charged by the Canadian Export Paper Company to the large consumers."

The seller refused to make deliveries in 1920, and the buyer brought suit, claiming as damages the difference between the Canadian Company's price and what it was compelled to pay in the New York market. The appellate division[193] was of the opinion that the buyer had an option to enforce the contract at the Canadian Company's monthly price; and the court of appeals conceded[194] that such an option might be found, if the price alone had been left open for adjustment. But the decision was reversed, and the contract defeated, because of the provision that the parties

was lacking, therefore, any basis for establishing any measure of damages."

[191]"We are told that the defendant was under a duty, in default of an agreement, to accept a term that would be reasonable in view of the nature of the transaction and the practice of the business. To hold it to such a standard is to make the contract over. The defendant reserved the privilege of doing its business in its own way, and did not undertake to conform to the practice and beliefs of others. United Press v. New York Press Co., 164 N. Y. 406 . . ." Cardozo, J., in Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1923) 235 N. Y. 338, 139 N. E. 470.

See also Lambert v. Hays, (1910) 136 App. Div. 574, 121 N. Y. S. 80.

[192](1923) 235 N. Y. 338, 139 N. E. 470, reversing (1922) 201 App. Div. 3, 193 N. Y. S. 698.

[193]Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1922) 201 App. Div. 3, 193 N. Y. S. 698. The court distinguished the case of United Press v. New York Press Co., (1900) 164 N. Y. 406, 58 N. E. 527 (see footnotes 188 to 190 and text) upon the ground that in that case there was no consideration for the option given; "there was no price agreed to be paid for the option, and no part of the contract was enforceable against the party to whom the option was given." But in the United Press case, the option, if any, must certainly be to the buyer, who was exercising it by refusing to accept deliveries. And if there was no consideration, why the directed verdict for nominal damages?

[194]"If price and nothing more had been left open for adjustment, there might be force in the contention that the buyer would be viewed, in the light of later provisions, as the holder of an option. . . . This would mean that, in default of an agreement for a lower price, the plaintiff would have the privilege of calling for delivery in accordance with a price established as a minimum. The price to be agreed upon might be less, but could not be more, than 'the contract price for news print charged by the Canadian Export Paper Company to the large consumers'." Cardozo, J., in Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1923) 235 N. Y. 338, 139 N. E. 470.

should agree upon the term during which the price was to apply.[195]

By this decision the intention of the parties, which must obviously have been to make a binding agreement[196] which would insure delivery of 1000 tons of paper to the buyer every month, at some reasonable price, not to exceed the Canadian figures as a maximum, is rendered nugatory, because of an item left open which neither party could have regarded as anything but a minor detail. The seller is permitted to withdraw from its obligations, and leave the buyer to shoulder all the losses of the market which it had sought to avoid, when by invoking the "standard of reasonableness," and implying an obligation to agree upon a reasonable price, or indeed by any of a number of other possible constructions,[197] the contract might easily be sustained. In view of the

[195]"The difficulty is, however, that ascertainment of this price does not dispense with the necessity for agreement in respect of the term during which the price is to apply. Agreement upon a maximum payable this month or today is not the same as an agreement that it shall continue to be payable next month or tomorrow. . . . Election by the buyer to proceed with performance at the price prevailing in one month would not bind it to proceed at the price prevailing in another. Successive options to be exercised every month would thus be read into the contract. Nothing in the wording discloses the intention of the seller to place itself to that extent at the mercy of the buyer." Cardozo, J., in Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1923) 235 N. Y. 338, 139 N. E. 470.

[196]"Surely these parties must have had in mind that some binding agreement was made for the sale and delivery of 16,000 ton rolls of paper, and that the instrument contained all the elements necessary to make a binding contract. It is a strain upon reason to imagine the paper house, the Remington Paper & Power Company, Incorporated, and the Sun Printing & Publishing Association, formally executing a contract drawn up upon the defendant's prepared form which was useless and amounted to nothing. We must, at least, start the examination of this agreement by believing that these intelligent parties intended to make a binding contract. If this be so, the court should spell out a binding contract, if it be possible." Crane, J., dissenting, in Sun Printing & Pub. Ass'n v. Remington Paper & Power Co., (1923) 235 N. Y. 338, 139 N. E. 470.

[197]Crane, J., dissenting in this case, pointed out the following possible constructions, by which defendant could be held to the contract: (1) On December 15th, 1919, when defendant deliberately broke its contract, the buyer might have the option of fixing the price of the Canadian Company at that date for all deliveries—there being nothing before the court to show that the price of paper fluctuated after that date. (2) The defendant might be held to deliver 1,000 tons each month at the price of the Canadian Company on the 15th of the preceding month. (3) Since the "contract price" of the Canadian Company is to control, the period adopted by the Canadian Company in its contracts might control. (4) Failing any other alternative, "the law should do here what it has done in so many other cases—apply the rule of reason and compel parties to contract in the light of fair dealing. It could hold this defendant to deliver its paper as it agreed to do, and take for a price the Canadian Export Paper Company contract price for a period which is reasonable under all the circumstances and conditions as applied in the paper trade."

liberal attitude of the New York courts toward open contract terms in other cases,[198] the decision is a disappointment.

10. Price to be Fixed By a Third Party.

The contract may provide that the price is to be fixed by some third party. The usual interpretation of the courts in such a case is that this is a contract for a sale at a valuation. Instead of promising to pay a specified price, or a reasonable price, the buyer promises to pay only such a price as the third party shall name. The valuation is therefore a condition precedent to the existence of any binding obligation to purchase the goods. If the third party does not set a price, and the valuation fails, without the fault of either party to the contract, it follows that there is no agreement which can be enforced.[199] Both the civil law[200] and the common law have rejected the idea that the contract, in naming a particular valuer, intends merely to designate a reasonable man, and that it will serve the purpose quite as well if any other reasonable man is substituted by the court.[201]

The question first arose in equity, where the suit was for specific performance of a contract to sell land, at a price to be named by a third party. Originally[202] no difficulty was found in enforcing the contract of sale, with some equally fair and effectual method of determining the value to be chosen by the court.

[198]See for example Cohen & Sons v. Lurie Woolen Co., (1921) 232 N. Y. 112, 133 N. E. 370; Wood v. Lucy, Lady Duff-Gordon, (1917) 222 N. Y. 88, 188 N. E. 214; Moran v. Standard Oil Co., (1914) 211 N. Y. 187, 105 N. E. 217; Duplex Safety Boiler Co. v. Garden, (1886) 101 N. Y. 387, 4 N. E. 749; United States Rubber Co. v. Silverstein, (1920) 229 N. Y. 168, 128 N. E. 123; De Grasse Paper Co. v. Northern New York Coal Co., (1919) 190 App. Div. 227, 179 N. Y. S. 788. But see also footnote 6.

[199]Burdick, Sales, 3d ed., p. 39; 1 Williston, Sales, 2d ed., sec. 174, p. 320, 321.

[200]See footnote 4. Also Moyle, Contract of Sale 70; Pothier, Contract of Sale, sec. 24.

[201]1 Williston, Sales, 2d ed., sec. 175, p. 323.

[202]Hall v. Warren, (1804) 9 Ves. 605. In this case the defendant vendor had become insane, which prevented any valuation. Prior to this time, in Mitchell v. Harris, (1793) 2 Ves. Jr. 129, it had been held that a clause providing for arbitration of differences did not bar an action at law. But in Street v. Rigby, (1802) 6 Ves. 815, Lord Eldon said that no case was to be found of a decree for specific performance of an agreement to name arbitrators, and that he had known no discussion of it in twenty-five years of experience. He referred to an earlier case, Price v. Williams, (1790) 3 Bro. C. C. 163, (1791) 1 Ves. 365, in which he had been counsel, where Lord Thurlow had been of the opinion that specific performance of such an agreement would not be granted.

But in *Milnes v. Gery*,[203] it was held that the court was without power either to compel a valuation, or to substitute the judgment of any other individual for that of the person in whom the parties had reposed confidence. Specific performance was denied. This decision was followed in several later chancery cases.[204] It is generally held that equity will not grant relief where the valuation fails,[205] even though it is intentionally made to fail by one of the parties,[206] except in cases where the provision as to valuation or

[203](1807) 14 Ves. 400. The court said: "The price is of the essence of a contract of sale. In this instance the parties have agreed upon a particular mode of ascertaining the price. The agreement, that the price shall be fixed in one specific manner, certainly does not afford an inference, that it is wholly indifferent in what manner it is to be fixed. The Court, declaring that the one shall take and the other shall give, a price, fixed in any other manner, does not execute any agreement of theirs; but makes an agreement for them; upon a notion, that it may be as advantageous as that which they made for themselves . How can a man be forced to transfer to a stranger that confidence, which upon a subject, materially interesting to him, he has reposed in an individual of his own selection?"

The court explained Hall v. Warren, (1804) 9 Ves. 605 (see footnote 202) as assuming, rather than deciding, that some means might be found to carry the contract into execution.

[204]Blundell v. Bettargh, (1810) 17 Ves. 232; Agar v. Maclew, (1825) 2 Sim. & St. 418; Wilks v. Davis, (1817) 3 Mer. 507; Firth v. Midland Co., (1852) L. R. 20 Eq. 100; Morgan v. Milliman, (1853) 3 De G. M. & G. 124; Eads v. Williams, (1854) 4 De G. M. & G. 674. See Fry, Specific Performance, 6th ed., secs. 356 ff.

The Common Law Procedure Act of 1854 and the Arbitration Act of 1889 compelled the English courts to distinguish between an agreement to fix a price by the valuation of a third person and an agreement to arbitrate, since if one party refused to appoint an arbitrator, the statute authorized the arbitrator appointed by the opposing party to act alone. The theoretical distinction adopted was that there is an arbitration agreement if an inquiry in the nature of a judicial inquiry is to be held, and decided upon evidence; but there is a valuation if a person is appointed in advance to determine some matter for the purpose of preventing some difficulty from arising. See Benjamin, Sales, 7th ed., p. 161; Collins v. Collins, (1858) 26 Beav. 306, 28 L. J. Ch. 184; Bos v. Helsham, (1866) L. R. 2 Ex. 72, 36 L. J. Ex. 20; In re Dawdy, (1885) 15 Q. B. D. 426, 54 L. J. Q. B. 574; In re Carus Wilson, (1886) 18 Q. B. D. 7, 56 L. J. Q. B. 530; In re Hammond, (1890) 62 L. T. 808.

[205]The cases are collected in Hayes, Specific Performance of Contracts for Arbitration or Valuation, (1916) 1 Cornell L. Q. 225, and in the annotation, 47 L. R. A. (N.S.) 366. There are a few decisions to the contrary, including Lester Agricultural Chemical Works v. Selby, (1904) 68 N. J. Eq. 271, 59 Atl. 247; Kaufmann v. Liggett, (1904) 209 Pa. St. 87, 58 Atl. 129; Bales v. Gilbert, (1900) 84 Mo. App. 675. See also City of Fayetteville v. Fayetteville Water Co., (C.C.N.C. 1905) 135 Fed. 400, and Castle Creek Water Co. v. City of Aspen, (C.C.A. 8th Cir. 1906) 146 Fed. 8, where the price was considered a subsidiary matter.

[206]Wilks v. Davis, (1817) 3 Mer. 507; Vickers v. Vickers, (1867) L. R. 4 Eq. 529; Darbey v. Whitaker, (1857) 4 Drew. 134, 5 W. R. 772; Fry, Specific Performance, sec. 361. But in Morse v. Merest, (1821) 6 Mad. 26, and Smith v. Peters, (1875) L. R. 20 Eq. 511, 44 L. J. Ch. 613, the court granted an injunction to prevent interference with the arbitration.

arbitration relates to some subsidiary and incidental matter of detail, not essential to the contract.[207]

When the question arose in actions at law, the chancery rule was followed;[208] but it was modified to the extent of holding that where one of the parties is responsible for the failure of the valuation, he may be liable in damages.[209] This is upon the theory that there is an implied promise to co-operate, by selecting a valuer and submitting the property for valuation, and that if either party fails to do so, he has broken his contract.[210] A further relaxation of the rule is found in some American courts, in the case of building contracts providing that payment shall be made only after a certificate has been obtained from an architect or engineer. Recovery is permitted on the contract without the certificate, where the architect or engineer fails to examine the work, or unreasonably refuses to exercises an honest judgment.[211] In

[207]Hayes, Specific Performance of Contracts for Arbitration or Valuation, (1916) 1 Cornell L. Q. 225; note, 47 L. R. A. (N.S.) 369; Binham v. Bradford, (1870) L. R. 5 Ch. 518; Richardson v. Smith, (1870) 5 Ch. 648; Jackson v. Jackson, (1853) 1 Sm. & Gif. 154; Paris Chocolate Co. v. Crystal Palace Co., (1854) 3 Sm. & Gif. 119; Union Pacific Co. v. Chicago Co., (C.C.A. 8th Cir. 1892) 51 Fed. 309; Joy v. St. Louis, (1890) 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Burton v. Landon, (1894) 66 Vt. 361, 29 Atl. 374; Kipp v. Laun, (1911) 146 Wis. 591, 131 N. W. 418; Black v. Rogers, (1882) 75 Mo. 441.

Pomeroy, Specific Performance of Contracts, sec. 151, finds a tendency in the later English decisions to consider stipulations for determination of the price by third persons as matters of form rather than substance, and to construe them as incidental to the main object of the agreement. This conclusion is disputed by Hayes, Specific Performance of Contracts for Arbitration or Valuation, (1916) 1 Cornell L. Q. 225, 229.

[208]Ess v. Truscott, (1837) 2 M. & W. 385; Thurnell v. Balbirnie, (1837) 2 M. & W. 786; Cooper v. Shuttleworth, (1856) 25 L. J. Ex. 114; cf. Morgan v. Birnie, (1833) 9 Bing. 672.

[209]Thurnell v. Balbirnie, (1837) 2 M. & W. 786; Clarke v. Westrope, (1856) 18 C. B. 765, 25 L. J. C. P. 287; Livingston v. Ralli, (1855) 5 El. & Bl. 132, 24 L. J. Q. B. 269; Humaston v. Telegraph Co., (1873) 20 Wall. (U.S.) 20, 22 L. Ed. 279.

[210]1 Williston. Sales, 2d ed., sec. 176, p. 324. Professor Williston points out that it may be difficult to fix upon any actual damage, since presumably if the valuers had acted properly they would have fixed a valuation identical with the market value or real value of the property, and explains on this basis the contrary decisions in Elberton Hardware Co. v. Hawes, (1905) 122 Ga. 858, 50 S. E. 964, and Stern v. Farah, (1913) 17 N. M. 516, 133 Pac. 400.

The same result is reached in the case of an architect's or engineer's certificate on a building contract, where it is held that production of the certificate will be excused if the failure to obtain it is due to the fault of the adverse party. 2 Williston, Contracts, sec. 794, pp. 1521, 1522.

[211]2 Williston, Contracts, sec. 794, p. 1522. The English rule appears to be contra. Clarke v. Watson, (1865) 18 C. B. (N.S.) 278; In re Noth and Cardiff Corporation, [1918] 2 K. B. 146. Cf. Hayday v. Hammermill Paper Co., (1929) 176 Minn. 315, 223 N. W. 614.

such cases the courts have taken the position that the judgment of other reasonable men may be substituted.

A contract for the sale of goods at a price to be fixed by a third party is sufficient to satisfy the statute of frauds.[212] If the person selected does in fact name a price, there is no difficulty; the price fixed becomes the contract price, and is conclusive, in the absence of a showing of fraud or mistake.[213] Even if the third party does not act, if the property in the goods has already been transferred to the buyer, there may be recovery of their reasonable value in quasi-contract.[214] But if the valuation fails while the contract is still executory, without the fault of either party to the contract, it cannot be enforced.[215] Both the Sale of

[212]Norton v. Gale, (1880) 95 Ill. 533, 35 Am. Rep. 173.

[213]Norton v. Gale, (1880) 95 Ill. 533, 35 Am. Rep. 173; New England Trust Co. v. Abbott, (1894) 162 Mass. 148, 38 N. E. 433; Wilcox v. Young, (1887) 66 Mich. 687, 33 N. W. 765; American Car & Foundry Co. v. East Jordan Furnace Co., (C.C.A. 7th Cir. 1921) 275 Fed. 787; Le Blanc v. Godchaux Co., (1922) 152 La. 405, 93 So. 201; Union Naval Stores Co. v. Patterson, (1912) 179 Ala. 525, 60 So. 807; Maxwell Planting Co. v. A. P. Loveman & Co., (1924) 212 Ala. 228, 102 So. 45; American Refining Co. v. Staley, (Tex. Civ. App. 1925) 274 S. W. 272; Luetkemeyer v. Murdock, (C.C.A. 6th Cir. 1920) 267 Fed. 158. A mistake as to the meaning of the contract on the part of the valuers may be set aside by the court. Swisher v. Dunn, (1913) 89 Kan. 412, 131 Pac. 571.

[214]Clarke v. Westrope, (1856) 18 C. B. 765, 25 L. J. C. P. 287; Mershants Grocery Co. v. Talladega Grocery Co., (1928) 217 Ala. 334, 116 So. 356.

[215]Ess v. Truscott, (1837) 2 M. & W. 385; Thurnell v. Balbirnie, (1837) 2 M. & W. 786; Cooper v. Shuttleworth, (1856) 25 L. J. Ex. 114; Fuller v. Bean, (1857) 34 N. H. 290; Elberton Hardware Co. v. Hawes, (1905) 122 Ga. 858, 50 S. E. 964; Stern v. Farah, (1913) 17 N. M. 516, 133 Pac. 400; Louisville Soap Co. v. Taylor, (C.C.A. 6th Cir. 1922) 279 Fed. 470; Turman Oil Co. v. Sapulpa Refining Co., (1926) 124 Okla. 150, 254 Pac. 84; Ross Lumber Co. v. Hughes Lumber Co., (C.C.A. 5th Cir. 1920) 264 Fed. 757.

In National Importing & Trading Co. v. Clark, (C.C.A. 2d Cir. 1920) 270 Fed. 54, the contract was for the sale of sardines, at a "price to be fixed by the government, f.o.b. Eastport, Maine; it is understood and agreed that whatever price the government deems proper to fix shall be acceptable to the buyer." The time limit set for deliveries was March 1st. The government set a maximum price, but on January 10th withdrew its fixed price and terminated its control over food prices. On February 26th the buyer informed the seller that the contract was void. The seller sued for damages for non-acceptance of six carloads remaining undelivered. It was held that a verdict should have been directed for the buyer, since the government had not fixed the price; "nor can the court read into the contract a fixed price, when no price has been fixed by a third party, whom [sic] it has been agreed upon should fix the price." But the opinion contains very peculiar language: "When on January 10, 1919, the government terminated its control over food, the [seller] was no longer obligated to the maximum price, even if he were theretofore. . . . Thereafter the market price prevailed. . . . The buyer had six weeks longer in which to buy when the government terminated its control. The original contract contemplated delivery of not more than two cars a month during the season, Goods Act[216] and the Uniform Sales Act[217] have adopted these rules.

But, conceding that in every contract where there is a sale at a valuation the parties repose such trust and confidence in the judgment of the valuers selected that the court is not free to substitute any other reasonable man as a referee—an assumption which perhaps may not be altogether justified—there are still many contracts to sell goods at a price to be fixed by a third party in which no valuation is intended. A valuation means an appraisal, an exercise of the valuer's judgment. The third party may be selected. not because his judgment is relied upon, but because it is expected that the price which he sets will represent the market price. The parties may intend to buy and sell at the market, and to select a particular source of information as to what the market may be. Thus the contract may provide that the price is to be fixed by some official market quotation,[218] or by the figures published in a trade journal,[219] or that it is to be set by an association of dealers who control the market.[220]

but since there was an extension to the 1st of March to take the remaining cars, which extension omitted the amount of deliveries per month, the buyer still had this time in which to call for deliveries." In the light of the directed verdict for the buyer, this language is incomprehensible.

[216]Section 9 of the Sale of Goods Act provides: "(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor. (2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault."

Benjamin, Sales, 7th ed., p. 160, interprets "appropriation" as having no technical meaning, but as meaning merely "taken as owner;" "fault" as meaning "wrongful act or default."

[217]Section 10 of the Uniform Sales Act, Mason's 1927 Minn. Stat., sec. 8385, provides: "(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor. (2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act."

[218]Union Naval Stores Co. v. Patterson, (1912) 179 Ala. 525, 60 So. 807 (official quotation of Savannah Board of Trade on rosin and turpentine); Maxwell Planting Co. v. A. P. Loveman & Co., (1924) 212 Ala. 228, 102 So. 45 (official spot quotations of New Orleans cotton exchange); Le Blanc v. Godchaux Co., (1923) 152 La. 405, 93 So. 201 (average price of sugar to be established for week by secretary of sugar exchange.) In all these cases the price was actually fixed, and the contract enforced.

In *Louisville Soap Co. v. Taylor,*[221] the contract was for the sale of the buyer's "requirements" of rosin for one year, at a price "50 cents per 280 lbs. over the official closing Savannah, Georgia, market on date order is received." From January 27 until April 11 there was no trading in rosin on the Savannah market, and the Board of Trade posted the closing price of January 22, with the comments, "nothing doing," or "nominal, no sales." The Board of Trade was required by its by-laws to post quotations which should at all times reflect the true condition of the market. The court held that the contract failed, since the price was to have been fixed by a third party, who had not acted; the board was without power to post a price in the absence of some reasonable basis.[222] Such a decision seems entirely to misinterpret the contract. It can scarcely be supposed that reasonable business men regarded the Savannah Board of Trade as a valuer, or reposed any particular confidence in its judgment, except in so far

[219]Boret v. L. Vogelstein & Co., (1919) 188 App. Div. 605, 177 N. Y. S. 402 (Engineering & Mining Journal); American Car & Foundry Co. v. East Jordan Furnace Co., (C.C.A. 7th Cir. 1921) 275 Fed. 797 (price quoted in current issue of the Iron Age).

[220]Parker v. Adams, (1874) 47 Vt. 139 (schedule of association of marble dealers controlling market).

[221](C.C.A. 6th Cir. 1922) 279 Fed. 470, 27 A. L. R. 119.

[222]"Where there is a contract to sell goods at a price, or on terms, to be fixed by a third person, this express condition qualified the obligations of both buyer and seller; and where such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the seller is released from his obligation to sell and deliver, and the buyer is released from his promise to accept and pay. This doctrine has been universally applied by the courts not only to contracts of sale, but to many other forms of contract, and it has also been written into the Uniform Sales Act adopted by many states of the Union." Donahue, C. J., in Louisville Soap Co. v. Taylor, (C.C.A. 6th Cir. 1922) 279 Fed. 470, 27 A. L. R. 119.

To the same effect is the decision in Ross Lumber Co. v. Hughes Lumber Co., (C.C.A. 5th Cir. 1920) 264 Fed. 757, where it was provided that the price should vary from time to time as fixed by "Shuster's semi-monthly concession sheets." It was recognized in the business that Shuster's sheets constituted an accepted report of the market price. The government fixed a maximum price, lower than that quoted in the last Shuster's publication, and Shuster's then ceased to publish. The court held that the contract failed: "The criterion upon which the price of the commodity to be delivered by the defendant to the plaintiff, a necessary term of a binding contract [was to be determined?] thus, without a fault of either of the parties, ceased to exist, and either party could refuse to be further bound by the terms." Continuing, the court said that if a market price was meant, a price set by the government was not enough, since the idea of a market price was based on untrammeled dealing in the commodity, by sellers and buyers unhampered by price fixing by governments or monopolies. Cf. Boret v. L. Vogelstein & Co., (1919) 188 App. Div. 605, 177 N. Y. S. 402, footnote 223.

as it might accurately report the market price.[223] Nor is it reasonable to say that they intended that the contract should be defeated if the Savannah Board posted no price; the obvious intent was to close a deal at the market, and if there should be no market, then at a reasonable price.[224] The decision seems a refinement of technicality, especially in view of the fact, disclosed by the opinion, that there was an actual market price in Savannah, even though there was no trading on the exchange.[225]

It is unfortunate that the language of the Uniform Sales Act[226] which provides that

> "Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or buyer, cannot or does not fix the price or terms, the contract or sale is thereby avoided . . ."

is sufficiently broad to justify such a result.[227] But notwithstanding the number of cases bearing on the question, for some unaccountable reason this statute appears never to have been cited and relied upon by any court.[228]

In some industries, where the entire market is dominated by one large seller, small manufacturers may make contracts which

[223]In Boret v. L. Vogelstein & Co., (1919) 188 App. Div. 605, 177 N. Y. S. 402, the contract was for the sale of copper at the average price (seven days before and seven days after delivery) published in the Engineering and Mining Journal. The government subsequently fixed prices, and the Journal continued to publish them. The court sustained the contract, holding that no valuation was intended. The Journal was not to fix the price, but merely to report the prevailing market price, at which the parties intended to contract. The fact that this price was fixed by the government, and was compulsory, did not prevent it from being the accepted market price, so long as there was actual dealing on the market at that price.

[224]Llewellyn, Cases and Materials on the Law of Sales 19, comments on this decision as follows: "If the parties say nothing, the court will fix a reasonable price. If they pick a particular official quotation, they get that or nothing. Is their intent to deal not clearer, if anything, here than there?"

[225]". . . not the closing price of January 22d, which in this case happens to be largely in excess of the actual market price in Savannah, outside the transactions in that commodity on the board of trade." Louisville Soap Co. v. Taylor, (C.C.A. 6th Cir. 1922) 279 Fed. 470, 477.

[226]Section 10, set out in full in footnote 217.

[227]Note that the English Sale of Goods Act, section 9, set out in footnote 216, applies only to sales at a price to be fixed by the *valuation* of a third party.

[228]1 Uniform Laws Annotated 52, Supplement, sec. 10. The statute was mentioned in Louisville Soap Co. v. Taylor, (C.C.A. 6th Cir. 1922) 279 Fed. 470, 27 A. L. R. 119 (see footnote 222) but apparently was not in force in that jurisdiction. The contract appears to have been governed by the laws of Kentucky, which did not adopt the Sales Act until 1928. Ky. Laws 1928, ch. 148.

provide that their prices shall be the same as those of the large concern on a given date. This enables them to enter the market in advance of the large companies and book orders with the certainty that their prices will be in line. Thus small manufacturers of binder twine may agree that their prices will be those of the International Harvester Company, or the Plymouth Cordage Company.[229] If the particular seller named does in fact set a price, the contract of course is binding at that price.[230] If for any reason it fails to do so, there is considerable uncertainty as to just what the parties to the contract intend. It is probable that they mean to sell at the market price, but with the expectation that the dominant competitor will control the market and fix the price. To this extent, at least, there is a reference to the individual judgment of the third party, and it may be that there is no intent to contract for a market price to be fixed in any other way. In the only case[231] in which the question has arisen, the contract was held to fail, apparently upon some such theory.

11. Differentials.

In the sale of some commodities, notably sugar and flour, it is the practice to specify in the contract only a basic price for a par-

[229]White and Hayward, Marketing Practice 459, 460.

[230]Luetkemeyer Co. v. Murdock, (C.C.A. 6th Cir. 1920) 267 Fed. 158 (one cent less per lb. than carload price on binder twine to be made by the International Harvester Co. for 1917); Lund v. McCutchen, (1891) 83 Iowa 755, 49 N. W. 998 (price at which the Deering Machine Co. and the McCormick Machine Co. shall sell twine of the same quality to dealers for the year 1889, price to be fixed on or about February 1); American Refining Co. v. Staley, (Tex. Civ. App. 1925) 274 S. W. 272 (posted market price of the Texas Pipeline Company for the same kind and quality of oil); American Refining Co. v. Sims Oil Co., (Tex. Civ. App. 1926) 282 S. W. 894 (same; parol evidence held admissible to show whether price paid or received by the Texas Co. was intended).

[231]In Turman Oil Co. v. Sapulpa Refining Co., (1926) 124 Okla. 150, 254 Pac. 84, the contract was for the sale of oil at the posted market price on the day the oil should be run, paid by the Prairie Oil & Gas Co. for "Mid-Continent Crude," plus a premium of 35 cts. per bbl. on account of quality. For eleven years the Prairie Co. had been posting a single price without regard to the gravity of the oil. The Prairie Co. changed its methods and divided Mid-Continent Crude into seven grades, according to gravity, with a separate price for each grade. Buyer and seller agreed that payment should be made at the price posted by the Prairie Co. for oil of the same gravity as that supplied, without prejudice to the rights of either party as to the premium. The court held that the contract terminated when the Prairie Co. ceased to post a single price; if the parties had had in contemplation any change to a gravity basis, it would have been written into the contract. The case was said to be analogous to that of an executory contract for the sale of goods, providing that the price to be paid should be fixed by valuers.

This decision has the effect of leaving the seller with the price paid ticular grade or package size, from which the prices of other grades or packages may be determined by the addition or subtraction of a known differential. These differentials may be a matter of common knowledge among the trade, or they may be widely advertised or circulated by the seller, or by a group of sellers; or they may be separately agreed between the parties. In so far as certainty is concerned, such a contract is not subject to objection, since the right to make variations within a general description does not invalidate the agreement,[232] and the price is sufficiently certain if it can be determined by computation.[233] The only obstacle to the enforcement of such a contract lies in the requirement of the statute of frauds, to which reference has been made above,[234] that wherever a price is actually agreed upon, it must be stated in the memorandum of the contract.

Where the written agreement provides only that the price is to be "basis 22.50," or some equivalent phrase, the question before the court is whether the differential which the parties had in mind may be established by parol evidence. The Pennsylvania court, in two well considered opinions[235] has made it clear that such evidence cannot be introduced unless the differential is recognized by a general business custom of the particular trade. If it is so recognized, the contract may be construed in the light of the custom, and the differential, proved by parol, will be incorporated.[236] But it is not enough that the seller has advertised

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by the Prairie Co. for oil of like gravity, without any premium. Quaere, whether this fairly represented the market value of the oil delivered?

[232]Namquit Worsted Co. v. Whitman, (C.C.A. 1st Cir. 1915) 221 Fed. 49, affirming (D.C.R.I. 1913) 206 Fed. 549.

[233]J. W. Cherry Co. v. Consolidated Flour Mills Co., (1930) 143 Okla. 99, 287 Pac. 1019; Summit Lumber Co. v. Sheppard, (1912) 102 Ark. 88, 143 S. W. 100. But see Lewis v. Aronow, (Mont. 1926) 251 Pac. 246, where the price was to be $1.16 per bushel, "subject to terminal weights, grades and charges." It was held that the contract failed, because the terminal, grading standard, and "charges" were not specified.

[234]See footnotes 16 and 17 and text.

[235]Franklin Sugar Refining Co. v. Howell, (1922) 274 Pa. St. 190, 118 Atl. 109; Franklin Sugar Refining Co. v. Kane Milling & Groc. Co., (1923) 278 Pa. St. 105, 122 Atl. 231. In the later case of Franklin Sugar Refining Co. v. John, (1924) 279 Pa. St. 104, 123 Atl. 685, the court referred briefly to these decisions as the law.

[236]Franklin Sugar Refining Co. v. Lipowicz, (1928) 247 N. Y. 465, 160 N. E. 916; American Sugar Refining Co. v. Colvin Atwell & Co., (D.C. Pa. 1923) 286 Fed. 685; Franklin Sugar Refining Co. v. Egerton, (C.C.A. 4th Cir. 1923) 288 Fed. 698; Franklin Sugar Refining Co. v. William D. Mullen Co., (C.C.A. 3d Cir. 1926) 12 F. (2d) 885; Namquit Worsted Co. v. Whitman, (C.C.A. 1st Cir. 1915) 221 Fed. 49, affirming (D.C.R.I. 1913) 206 Fed. 549; King Collie Co. v. Richards, (1919) 79 Okla. 6, 184 Pac. 130.

and circulated the differential, or that it is well known to the trade and to the buyer,[237] nor is it sufficient that there is a general usage in the industry to employ differentials, so long as the particular figures are not recognized as a matter of custom.[238] Unless such a custom can be proved, the contract cannot be interpreted in the light of the differential, and must fail. The harshness of this rule is to be attributed to the statute of frauds.[239]

CONCLUSION

In reviewing the various methods by which the price may be left open in a contract for the sale of goods, it is difficult to escape the conclusion that consistency is not the jewel the courts have most highly prized. There is seldom any great uniformity in the decisions dealing with any one type of contract, and the rules as to the different types cannot reasonably be reconciled. It seems fair to say that in most cases the parties clearly intend to make a binding agreement, with the price left open, and the court does violence to their intention, and injustice to one of them, if the agreement is defeated. Unless we are to assume that they are unreasonable men, probably the nearest approximation to their actual intention which the court can offer is a binding agreement at a reasonable price. In all cases where the price is left open, and a contrary intention does not clearly appear, such an interpretation is highly desirable.[240]

[237]Franklin Sugar Refining Co. v. Howell, (1922) 274 Pa. St. 190, 118 Atl. 109.

[238]Franklin Sugar Refining Co. v. Kane Milling & Groc. Co., (1923) 278 Pa. St. 105, 122 Atl. 231.

[239]See footnote 27.

[240]Except as to contracts for sale at a price to be fixed by a third party, the Uniform Sales Act appears to favor such a result. Section 9 of the Act is set out in footnote 32, and section 10 in footnote 217.