4-1-1935

Contracts -- Adoption of Present and Future Laws therein

J. L. Carlton

Follow this and additional works at: http://scholarship.law.unc.edu/nclr
Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol13/iss3/6

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
the act that this additional duty was laid for the purpose of enabling Congress to regulate by taxes the intrastate liquor traffic, a power which was withdrawn by the Twenty-first Amendment.

THOMAS H. LEATH.

Contracts—Adoption of Present and Future Laws therein.

In a mortgage the mortgagor declared "his assent to the passing of a decree by the Circuit Court of Baltimore City ... for a sale of the property herein mortgaged in accordance with sections 720 to 723 inclusive of chapter 123 of the laws of Maryland passed at the January session of 1898, or any amendments or additions thereto". The mortgagee assigned to the plaintiff part of the mortgage debt, but less than a one-fourth interest therein. Thereafter the legislature passed section 720A, amending section 720 to the effect that during the emergency period holders of less than a one-fourth interest in mortgage debts should not have recourse to the summary remedies given under section 720. Upon subsequent default by the mortgagor, the plaintiff petitioned for relief under section 720, alleging that section 720A was unconstitutional, as impairing his contract rights and violating the equal protection clause. The judgment of the trial court, upholding both contentions of the plaintiff, was affirmed by the Maryland Court of Appeals on the basis of impairment of contract only. On appeal to the Supreme Court of the United States, judgment was reversed on the theory that the amendment did not impair the plaintiff's contract rights.

The Maryland Court of Appeals took the position that assent of the mortgagor to a decree as provided by section 720 "or any amendments or additions thereto", did not amount to an agreement that the proceedings should be governed by "future amendments effective before application for the decree", but that the intention of the parties "embraced only such amendments as had been made prior to the execution of the mortgage". After quoting that argument, Justice McReynolds, for the United States Supreme court, said, "Prior to the mortgage there had been no such amendments, and it cannot be correctly said that the 'intention of the parties embraced only such amendments as had been made prior to the execution of the mortgage'. On the contrary the words

844 (S. D. Ga. 1935) hold directly that the statute is a regulatory measure and unconstitutional.

1 Md. Laws 1898, c. 123, §720 (providing that where the mortgagor declared his assent to such decree, upon the petition of the mortgagee or his assigns to the named court, that court could issue such decree of sale and prescribe terms for same).

2 Md. Laws 1933, c. 56, §1.

employed seem to us to embrace the amendments and additions thereafter made”.

Problems connected with relief legislation, which this case suggests, have been adequately discussed elsewhere. The scope of this note will be confined to the examination of questions raised by the express adoption into the mortgage contract of an existing statute and “any amendments or additions thereto”.

As to law in existence when the contract is made, the familiar rules may be briefly summarized. When the parties do not refer to it: (a) All valid law applicable becomes a part of the contract; (b) but that is not true of unconstitutional law, even if such law specifically recites that it is a part of contracts to which it is made applicable. When the parties do refer to it: (a) Express inclusion of valid law is unnecessary, since it applies anyway; but express adoption of unconstitutional law makes it a part of the contract, unless it was written therein merely in compliance with mandatory provisions of the law, or unless it is unenforceable because contrary to public policy. (b) An express exclusion of valid law is of no effect if the attempt is to exclude substantive rules of contract, such as those relative to consideration; but if the attempt is to exclude only laws of a non-mandatory nature, such as procedural requirements, the intention of the parties will be given effect. (c) Without going into the implications connected with Conflicts of Laws, it is pertinent to mention here the doctrine that parties may successfully stipulate that their rights are to be governed by the substantive law of another state or nation, unless their purpose is evasion of their own state’s laws.

However, as to law enacted after the execution of the contract, some
NOTES AND COMMENTS

difficulty is encountered. When the parties do not refer to such law in their agreement, ordinarily the rule is that only remedial measures become a part of their contract,12 but that substantive enactments will not operate retroactively to impair vested rights,13 apart from a valid exercise of the police power.14 But when there is an expression of mutual assent by the parties to the adoption into the contract of an existing statute and all amendments and additions thereto, there arises a problem of construction relative to three specific fact situations:

First, there is the situation wherein amendments exist at the time of the making of the contract, but no further ones are enacted before the suit. Here, obviously the amendments form part of the contract, regardless of the express adoption, because they were valid law when the contract was made.15

Second, there is the situation wherein there are amendments existing at the time of making the contract, and also new amendments passed before the suit. Here, if it appeared that the parties knew or thought amendments existed at the time of entering the agreement, it would logically appear that their intention was to include only such additions, since to include the new ones also would make their contractual rights uncertain.16 It is submitted that in this situation the intention of the parties should be given effect, and the application of the new amendments excluded, in spite of the fact that their expression of incorporation is literally broad enough to cover the new statutes. This contention is based on the rule that though ordinarily contractual rights are determined strictly by expressions of agreement,17 still, when the expressions of agreement differ from the agreements intended by the parties, courts will often accept the interpretation of the parties, or rescind the contract.18

Third, there is the case in which there are no amendments in exis-

Walker v. Whitehead, 83 U. S. 314, 21 L. ed. 357 (1872); Strand v. Griffith, 63 Wash. 334, 115 Pac. 512 (1911); See: 3 Jones, Mortgages (8th ed. 1928) §1693.

Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. ed. 93 (1895); Hard v. State ex rel Baker, — Ala. —, 154 So. 77 (1934); See: 2 Lewis and Sutherland, Statutory Construction (2nd ed. 1904) §660; 3 Jones, Mortgages (8th ed. 1928) §1694.

See note (4) supra on Relief Legislation.

Cases cited supra note (5).

In reaching the result of the instant case, the court, by stressing the point that "prior to the mortgage there had been no such amendments", indicates by inference agreement with the contention made in the text.


Morgan v. United States, 8 F. Supp. 746 (Ct. Cl. 1934); Cage v. Black, 97 Ark. 613, 134 S. W. 942 (1911); Metropolitan Life Ins. Co. v. Humphrey, 167 Tenn. 421, 70 S. W. (2d) 361 (1934); See: 3 Williston, Contracts (1922) §1541.
tence when the contract is executed but amendments are enacted before the bringing of the action. Here there are three possibilities: (1) If from the circumstances, as unusual particularity of language in the contract, it appeared that the parties knew there were no amendments existing when they entered the agreement, it would seem that they did intend to embrace the amendments enacted thereafter, since that would be the only meaning of the language including amendments. 9 (2) But if there were not convincing indications of such knowledge, it would seem that their intention was not to include future additions to the statute, but only additions they thought might exist when the contract was made, for the same reason as given in the second situation. 20 (3) But even if the parties knew there were no amendments to the statute when the agreement was made, still if the future additions were so sweeping as completely to change their agreement or work forfeitures, it could not logically be said that they intended such amendment to be a part of their contract, because it is not normal for parties to include in their agreements such chances of losing rights for which they bargained. 21 Here again it is believed that the intention of the parties should be given effect, so as to exclude the operation upon their contract of the future statutes, both for the reason given in the second situation, and also because the courts prefer a construction that makes the contract fair and avoids a forfeiture. 22

In both the second and third situations, it is conceivable that for some reason, such as opposite beliefs as to the existence of amendments at the time of making the contract, one party might intend future additions to apply to the contract, while the other party did not so intend. In this case, aside from possible questions involving misrepresentation resulting in erroneous belief as to the existence of amendments, or negligence of parties in signing express agreements, it is thought that the clause purporting to adopt amendments, in so far as future additions are concerned, should be without effect, because of misunderstanding. 23

J. L. CARLTON.

It seems that the principal case belongs in this category; and hence that it properly represents one of the rare situations in which such expressions are reliable indications of the intent of the parties to make future statutes a part of their contract.

9 See material cited supra, notes 16 and 18.

20 For primary rules of interpretation, see: 2 WILLISTON, CONTRACTS (1922) §618 ("The writing will be read as a whole; and if possible it will be construed so as to give effect to its general purpose").


22 Peerless Co. v. Pacific Crockery Co., 121 Cal. 641, 54 Pac. 101 (1898); Metropolitan Life Ins. Co. v. Humphrey, 167 Tenn. 421, 70 S. W. (2d) 361 (1934); Raffles v. Wichelhaus, 2 H. & C. 906 (Exch. 1864); See: 1 WILLISTON, CONTRACTS (1922) §95.