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Contracts--Landlord and Tenant (Belasco Theatre Corp. v. Jelin Productions, Inc., 270 App. Div. 202 (1st Dep't 1945))

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RECENT DECISIONS

CONTRACTS—LANDLORD AND TENANT.—The landlord, respondent, was awarded possession of the premises known as the Belasco Theatre in the Borough of Manhattan, City of New York, upon the theory that the tenant held over after forfeiture for breach of a provision in the lease whereby the tenant gave the landlord the option, at any time "to book the demised premises from the tenant upon the usual and customary terms of booking arrangements prevailing in the theatrical industry". The tenant breached this agreement but contends that even if the option providing for the right to book the premises "upon the usual and customary terms of booking arrangements in the theatrical industry" is not too indefinite or vague in itself to be enforceable, it was required to be supported by proof showing the existence in the theatrical industry in New York of fixed and invariable terms applicable to all theatre bookings. *Held,* reversed and petition dismissed. It was improper to award a final order of dispossess when there was no proof showing the existence in the theatrical industry in New York of fixed and invariable terms applicable to all theatre bookings. To establish merely a range with minimum and maximum figures within which the parties could negotiate, does not meet the test of definiteness essential to establish an enforceable contract. *Belasco Theatre Corp. v. Jelin Productions, Inc.,* 270 App. Div. 202, 59 N. Y. S. (2d) 42 (1st Dep't 1945).

The Appellate Division found that the evidence produced in the trial court did not conclusively show that there existed, in the theatrical industry in New York, uniform and unvarying terms of booking arrangements. The evidence established that the financial terms of booking arrangements varied in many appreciable respects, and that they were required to be the subject of negotiation. Therefore, the option amounted to nothing more than an agreement to make a future agreement and an agreement to agree is not enforceable.[1]

As to customs and usages, it has been said that custom is such usage as has acquired the force of law.[2] In order to become part of a contract a custom must be so far established, and so far known to the parties, that it is supposed that their contract was made in reference to it. For this purpose the custom must be established, uniform, general, and known to the parties.[3] The testimony of experts in the trade in which the custom is alleged to exist must amount to a clear

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[1] St. Regis Paper Co. v. Hubbs & Hasting Paper Co., 235 N. Y. 30, 138 N. E. 495 (1923).

[2] Matter of Gerseta Corp. v. Silk Ass'n of America, 220 App. Div. 293, 222 N. Y. Supp. 11 (1st Dep't 1927).

[3] Sipperly v. Stewart, 50 Barb. 62, 68 (N. Y. 1867).

statement of the existence in that trade of a custom so general, uniform, and unvarying as to furnish a fixed and definite standard by which to ascertain the intention of the parties.[4]

It has been held that where an agreement is indefinite or incomplete in respect to one or more of its vital terms, and is still executory, generally no recovery can be had for its breach.[5] Terms of an agreement must be definite and complete. For if they are not, there is only an indefinite obligation to be performed, and in the case of legal dispute arising therefrom, there is no way for the court to determine what the parties' obligations are, or whether they have been properly performed. The court can not and will not make a contract for the parties if they have failed to make their agreement definite and complete.[6]

B. H. A.

FEDERAL—STATE STATUTE OF LIMITATIONS IN FEDERAL EQUITY SUITS.—The petitioners are creditors of a joint-stock land bank which closed its doors in 1932; the respondent was a shareholder of that bank. Eleven years after the bank closed, the petitioners learned that Jules S. Bache had concealed his ownership of one hundred shares of the stock under the name of the respondent. Suit was brought in the District Court of the United States for the Southern District of New York against the respondent and Bache to enforce the liability imposed upon shareholders of the bank by § 16 of the Federal Farm Loan Act which imposed upon shareholders a liability of one hundred per cent of their holdings for all contracts, debts and engagements of the bank. As defenses the respondents set up the statute of limitations of New York and laches. *Held,* for petitioners. Where the action is to enforce a federal right, the federal statute of limitations and not the state statute applies. Where a plaintiff has been injured by fraud and has used reasonable diligence to ascertain the truth, the statute of limitations does not begin to run until the fraud is discovered. *Holmberg v. Ambrecht,* — U. S. —, 90 L. ed. 590 (1946).

The respondent, relying upon *Guaranty Trust Co. v. York,*[1] contended that the New York statute of limitations [2] was controlling and that the mere lapse of ten years had barred the action. The court, however, distinguished and limited the *York* case. The *York* case was a case brought into federal court merely because of diversity of citizenship. It was a case involving a state-created right, and for

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[4] Wise & Co., Inc. v. Wecoline Products, Inc., 286 N. Y. 365, 36 N. E. (2d) 623 (1941).

[5] Fairplay School Township v. O'Neal, 127 Ind. 95, 26 N. E. 686 (1891).

[6] WHITNEY, CONTRACTS (3d ed. 1937) § 19.

[1] 326 U. S. 99, 89 L. ed. 2079 (1945).

[2] N. Y. CIV. PRAC. ACT § 53—"An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."