

### **Contract--Construction--Indefinite as to Time (United Chemical and Exterminating Co., Inc. v. Security Exterminating Corp., 246 Add. Div. 258 (1st Dept. 1936))**

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

power.<sup>10</sup> It is of no importance how strong the public desire is, fulfillment of this doctrine can only be achieved by a constitutional amendment.<sup>11</sup> Opposed to the doctrine espoused by these cases<sup>12</sup> the constitutionality of assessing banks a percentage of their deposits so as to create a common fund guaranteeing these deposits has found affirmance in the highest tribunal in the land.<sup>13</sup> In a similar vein to force employers to make payments to a pool-fund and to disburse these funds in compensation for injuries for which the employers are not at fault has been deemed a valid exercise of the police power.<sup>14</sup> Instances of pool-fund contributions are many.<sup>15</sup> The exigency for such legislation must exist in a great public need.<sup>16</sup> The right to do so lies in the power of the state to regulate their own domains in legislating for the public safety, morals and welfare.<sup>17</sup> That the object of unemployment insurance is within the reserved power of the state is unquestionable.<sup>18</sup> The difficult barrier is whether the statute is a reasonable approach toward that end and it is with great interest that the final outcome is awaited in the Supreme Court of the United States.

M. McC.

CONTRACT—CONSTRUCTION—INDEFINITE AS TO TIME.—The plaintiff corporation was granted exclusive right to service all accounts acquired by defendant, a corporation engaged in the business of soliciting customers who required the extermination of vermin.

<sup>10</sup> *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124 (1921); *Pennsylvania Coal Co. v. Mahon*, 210 U. S. 393, 416, 43 Sup. Ct. 158 (1922).

<sup>11</sup> *Pennsylvania Coal Co. v. Mahon*, 210 U. S. 393, 416, 43 Sup. Ct. 158 (1922).

<sup>12</sup> *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 393 (1923); *Railroad Retirement Board et al. v. The Alton Railroad Co. et al.*, 295 U. S. 330, 55 Sup. Ct. 765 (1935).

<sup>13</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186 (1911).

<sup>14</sup> *Hawkins v. Bleakly et al.*, 243 U. S. 210, 37 Sup. Ct. 255 (1916); *New York Central Railroad Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 (1916); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1916).

<sup>15</sup> *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247 (1884); *Cooley v. Board of Wardens*, 12 How. 299 (U. S. 1851); *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 225 (1916); *Hawkins v. Bleakly et al.*, 243 U. S. 210, 37 Sup. Ct. 255 (1916); *New York Central Railroad Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 (1916); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1916); *Dayton-Goose Creek Co. v. U. S.*, 263 U. S. 456, 44 Sup. Ct. 169 (1924); *R. R. Retirement Board et al. v. Alton R. Co. et al.*, 295 U. S. 495, 55 Sup. Ct. 837 (1935); *U. S. v. Butler*, 3 U. S. Law Week 373, 56 Sup. Ct. 312 (1936); *State v. Cassidy*, 32 Minn. 312 (1875).

<sup>16</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186 (1911).

<sup>17</sup> *House v. Mayes*, 219 U. S. 270, 282, 31 Sup. Ct. 234 (1911).

<sup>18</sup> *Brown, Due Process of Law, Police Power and the Supreme Court* (1927) 40 HARV. L. REV. 943; *Legis.* (1935) 10 ST. JOHN'S L. REV. 147, 155; 3 LAW AND CONTEMPORARY PROBLEMS (1936) 138.

Defendant was to pay a stated compensation for the services rendered during the term of the agreement; said term was to continue in effect from the day of entry into the contract "until and unless abrogated, cancelled and annulled by the consent of both parties thereto." Defendant terminated the contract without plaintiff's consent, claiming that since all contracts were subject to cancellation by mutual consent the clause providing for such cancellation was surplusage, and that the agreement was therefore indefinite as to duration and the contract was one terminable at the will of either party. On appeal from an order of the Supreme Court in favor of defendant, *held*, reversed. The duration of the contract was measured, in the absence of mutual cancellation, by the existence of either corporation; the contract is, therefore, definite and enforceable. *United Chemical and Exterminating Co., Inc. v. Security Exterminating Corp.*, 246 App. Div. 258, 285 N. Y. Supp. 291 (1st Dept. 1936).

The law does not favor, but rather avoids, the destruction of contracts because of uncertainty.<sup>1</sup> While it is an implied condition to every contract that it is terminable by mutual consent,<sup>2</sup> the parties in the instant case took pains to clearly express in writing their intention that the contract be terminable upon the happening of a particular event—abrogation by mutual consent and had they meant one terminable at will they would have said so. The provision as to cancellation takes on added significance from the fact that no other limit was imposed by the terms of the contract other than that springing from its inherent nature. The court will try to give effect to the intent of the parties as shown by the fair import of the language employed;<sup>3</sup> to give full effect to the intention expressed in the instant case the court must declare the contract to be permanent and revocable only by that meeting of the minds which is essential to the rescission of a contract by mutual consent.<sup>4</sup>

Although the contract failed to state the term in days, weeks, or years for which it should continue in force, it expressed an intention to enter into an agreement which should continue until the occurrence of a particular event, namely, abrogation by mutual consent. Contracts so expressed as to be discharged by the occurrence of a particular event have been upheld and enforced in New York<sup>5</sup>

---

<sup>1</sup> WHITNEY, CONTRACTS (2d 1934) § 24; *Saunders v. Barnaby*, 166 App. Div. 274, 151 N. Y. Supp. 580 (1st Dept. 1915) (a contract should be construed so as to support rather than defeat it).

<sup>2</sup> *Ashley v. Cathcart*, 159 Ala. 474, 49 So. 75 (1909).

<sup>3</sup> *White v. Hoyt*, 73 N. Y. 505 (1878); *Durland v. Pitcairn*, 51 Ind. 426.

<sup>4</sup> *Conservative Ins. Co. v. Hutchinson*, 52 S. W. (2d) 709 (1932).

<sup>5</sup> *Potter v. City of N. Y.*, 59 App. Div. 70, 68 N. Y. Supp. 1039 (2d Dept. 1901); *Crotty v. Erie R. Co.*, 149 App. Div. 262, 133 N. Y. Supp. 696 (2d Dept. 1912); *Schwarz v. Regensburgh*, 227 N. Y. 568, 124 N. E. 901 (1919); *Rague v. Eve Journal*, 146 App. Div. 126, 149 N. Y. Supp. 668 (2d Dept. 1914) (plaintiff held entitled to receive payments from defendant as long as he refrained from the sale of a certain paper); 2 CLARK, NEW YORK LAW OF CONTRACTS § 875.

and other jurisdictions.<sup>6</sup>

Defendant entered into the agreement because of the need for the services of an exterminator which his business required. This need for plaintiff's services would remain as long as defendant remained in business and solicited accounts. The contract must endure so long as the object contemplated by it remained unfilled or until it had been terminated by mutual consent<sup>7</sup>

Since the defendant only agreed that plaintiff shall perform all the work of a particular character which defendant might solicit, the defendant would not be liable to plaintiff if it discontinued business,<sup>8</sup> received an extension of charter,<sup>9</sup> or was dissolved as a corporation;<sup>10</sup> thus the contract is definite, for by its inherent nature it could not continue beyond the corporate existence of the defendant; contracts whose duration is measured by the parties' existence in business have been upheld as definite.<sup>11</sup> Corporate parties, for their joint protection, may make and enforce contracts with one another which are intended to continue throughout the corporate life of either unless rescinded by mutual consent.<sup>12</sup>

It is the settled law that in New York a contract providing for a continuing performance of indefinite duration may be terminated at will by either party to such contract upon giving reasonable notice;<sup>13</sup> in the same manner, a contract for personal services unlimited as to time may be terminated.<sup>14</sup> While the validity of the latter

<sup>6</sup> *Cohen v. Cohen*, 141 Cal. 534, 75 Pac. 100 (1904) (a provision for monthly payments to two sisters "as long as they remain unmarried" found definite, and enforceable until they married); *James Macalium Printing Co. v. Graphite Co.*, 150 Mo. App. 383, 130 S. W. 836 (1910) (contract provided that plaintiff was to get defendant's printing work on "succeeding issues" if his price were no more than another printer's. Defendant refused to give plaintiff the work although his price was as low as other reputable printers. *Held*, plaintiff must be given the work as long as his bids were no higher than other printers. The contract expressed an intention of the parties to confer a perpetuity of right or obligation and is valid).

<sup>7</sup> *Western Union Tel. Co. v. Penn. Co.*, 129 Fed. 849 (C. C. A. 3d 1904).

<sup>8</sup> *Fox v. Comm. Press Co.*, 28 Ky. 44, 88 S. W. 1063 (1905).

<sup>9</sup> *Pullman Car Co. v. Cent. Trans. Co.*, 171 U. S. 139, 18 Sup. Ct. 808 (1898).

<sup>10</sup> *Petro. Corp. v. Better Gas. Co.*, 157 Misc. 1, 282 N. Y. Supp. 671 (1936).

<sup>11</sup> *Ehrenworth v. Stuhmer and Co.*, 229 N. Y. 210, 128 N. E. 108 (1920)

(defendant agreed to exclusively furnish plaintiff with all the black bread plaintiff required on his route. The contract was to last as long as the parties continued in business. Defendant breached the contract by selling to others on plaintiff's route. Plaintiff sues for damages for breach. *Held*, the contract could endure only as long as the parties were in business and is therefore definite in duration); *Jugea v. Trouttett*, 120 N. Y. 21, 23 N. E. 1066 (1890).

<sup>12</sup> *Llanelly Ry. etc. Co. v. London etc. Co.* L. R., 7 H. L. 550; *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 884 (1892).

<sup>13</sup> *Baily v. Stafford Inc.*, 178 App. Div. 811, 166 N. Y. Supp. 79 (1st Dept. 1912); *Outerbridge v. Campbell*, 87 App. Div. 597, 84 N. Y. Supp. 537 (2d Dept. 1903); 1 WILLISTON, CONTRACTS (1924) § 38; see 2 CLARK, NEW YORK LAW OF CONTRACTS (1922) 1318.

<sup>14</sup> *Watson v. Guging*, 204 N. Y. 535, 98 N. E. 18 (1912); *Martain v. N. Y. Life Ins. Co.*, 148 N. Y. 117, 42 N. E. 416 (1895).

rule is unchallenged,<sup>15</sup> the former is opposed by the weight of opinion in other states,<sup>16</sup> the English rule,<sup>17</sup> and the Federal rule, upheld by the United States Supreme Court,<sup>18</sup> to the effect that contracts (continuing, and indefinite as to duration) with the exception of those for personal services<sup>19</sup> cannot be regarded as terminable except by mutual consent.

B. B.

CORPORATIONS — EQUAL PROTECTION OF LAWS — STATUTORY SUSPENSION OF FELLOW SERVANT RULE.—Plaintiff, injured by a fellow employee of defendant company, a foreign corporation organized in Delaware and authorized to do business in Arkansas, is suing in Arkansas to recover damages for injuries suffered by him.<sup>1</sup> The Arkansas statutes provide that all corporations shall be liable for injuries sustained by an employee resulting from negligence of any other employee.<sup>2</sup> They also provide that foreign corporations authorized to do business in the state shall be subject to the same regulations and liabilities as domestic corporations.<sup>3</sup> Defendant petroleum company claims that these statutes violate the equal protection clause<sup>4</sup> because it makes corporations, domestic and foreign, liable for personal injuries sustained by an employee through negligence of any other employee while as to non-corporate employers the common-law rule that every servant assumes the risk of injuries through the negligence of his fellow servants still obtains. *Held*, plaintiff was entitled to recover as the defendant corporation became

<sup>15</sup> *McKell v. Chesapeake*, 175 Fed. 321 (C. C. A. 6th 1910); 13 C. J. 630.

<sup>16</sup> *Pitts. etc. Co. v. Reno*, 123 Ill. 273, 14 N. E. 195 (1887); *Globe Ins. Co. v. Wayne*, 75 Ohio St. 451, 80 N. E. 13 (1907); *Rossmassler v. Spielberger*, 270 Pa. St. 30, 112 Atl. 872 (1921) (where no limitation as to time is expressed in the agreement, neither party can terminate it without the consent of the other); 6 R. C. L. 282; *id.* 895.

<sup>17</sup> *Great Northern Ry. Co. v. Manchester etc. Co.*, 5 D. G. & S. 138; *Llanely etc. Ry. v. London etc. Co.*, L. R. 7 H. L. 550.

<sup>18</sup> *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 884 (1892); *Miss. Logging Co. v. Robinson*, 69 Fed. 773 (C. C. A. 8th, 1895); *Western Union Tel. Co. v. Penn. Co.*, 129 Fed. 849, 68 L. R. A. 968 (C. C. A. 3d, 1904).

<sup>19</sup> *Warden v. Hinds*, 163 Fed. 201 (C. C. A. 4th, 1908).

<sup>1</sup> 297 U. S. 629, 56 Sup. Ct. 611 (1936).

<sup>2</sup> ARK. DIG. STAT. (Crawford & Moses, 1907) § 7137.

<sup>3</sup> ARK. CONST. Art. 12, § 11.

<sup>4</sup> U. S. CONST., Amend. 14, cl. 2: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws." Corporations are persons within the meaning of this amendment. *Covington, etc. Rood Co. v. Landford*, 164 U. S. 578, 592, 17 Sup. Ct. 198 (1896).