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CONTRACTS — DEFINITENESS — EFFECT OF PROVISION IN EMPLOYMENT CONTRACT FOR TERMINATION ONLY BY MUTUAL CONSENT — Plaintiff entered into a written contract with defendant whereby defendant was to employ plaintiff as a salesman and plaintiff was to receive a salary of seven per cent of the annual profits of defendant's business with a guaranteed drawing account of forty-five dollars per week. The agreement provided that it should be terminable only by the mutual consent of both parties and contained no other stipulation for duration. Plaintiff was employed under the agreement from August 1912 until April 1933, when he was discharged because of a decrease in defendant's business. *Held*, that the contract was too indefinite to afford any reasonably certain basis for the assessment of damages and was therefore void. *Mallory v. Jack*, 281 Mich. 156, 274 N. W. 746 (1937).

Contracts of employment, containing provisions for permanency, are divided by the courts into two general classes. When a consideration, such as releasing the employer from damages resulting from personal injuries, flows from the employee in addition to his performance of services, the contract is usually construed as being one of continuing force and not terminable at the will of the employer.[1] In such cases the contracts are generally held to bind the parties as long as the employee is ready, willing, and able to perform, and the employer's business and the employee's job continue to exist.[2] However, when the only consideration furnished by the employee is his promise to serve, the contract is held to be terminable at the will of either party.[3] The distinction seems to be based mainly on the interpretation of the intent of the parties in the light of the extra consideration. The additional consideration is apparently considered by the courts to indicate that the parties must have intended to create a binding contract not terminable at will.[4] The general reluctance of

[1] Carnig v. Carr, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512 (1897); Kelly v. Peter & Burghard Stone Co., 130 Ky. 530, 113 S. W. 486 (1908); Fisher v. John L. Roper Lumber Co., 183 N. C. 485, 111 S. E. 857 (1922); Pierson v. Klingman Milling Co., 91 Kan. 775, 139 P. 394 (1914); Roxana Petroleum Co. v. Rice, 109 Okla. 161, 235 P. 502 (1924).

[2] Yellow Poplar Lumber Co. v. Rule, 106 Ky. 455, 50 S. W. 685 (1899); Rhoades v. Chesapeake & O. R. R., 49 W. Va. 494, 39 S. E. 209 (1901); Louisville & N. R. R. v. Cox, 145 Ky. 667, 141 S. W. 389 (1911).

[3] Lord v. Goldberg, 81 Cal. 596, 22 P. 1126 (1899); Speeder Cycle Co. v. Teeter, 18 Ind. App. 474, 48 N. E. 595 (1897); Minter v. Tootle, Campbell Dry Goods Co., 187 Mo. App. 16, 173 S. W. 4 (1915); McKelvy v. Choctaw Cotton Oil Co., 52 Okla. 81, 152 P. 414 (1915); Rape v. Mobile & O. R. R., 136 Miss. 38, 100 So. 585, 35 A. L. R. 1422 at 1432 (1924).

[4] Referring to Lord v. Goldberg, 81 Cal. 596, 22 P. 1126 (1899), the court in Louisville & N. R. R. v. Cox, 145 Ky. 667 at 674, 141 S. W. 389 (1911), said,

the courts to hold a contract perpetual unless clearly so intended [5] may also be a determining factor. The court in the principal case seems disinclined to treat the present contract as being within this classification. It distinguishes the present contract because of the stipulation contained in it to the effect that it may be terminated by mutual consent. But such a provision is implied in every contract.[6] From a practical standpoint the provision in the principal case would seem to be merely another, though somewhat unusual, mode of expressing an intent to create a permanent employment, which, under the general view, would be terminable at will, there being no consideration furnished by the employee other than the promise to serve.[7] The court in the principal case, however, prefers to rest its decision on the ground that the provision for termination renders the contract too uncertain for the assessment of damages. That position seems unfounded both on principle and authority,[8] as is evident from the fact that such contracts have frequently been enforced.[9] Even were it

"But the principle applied in these cases should not govern in a case like that before us, where the servant relinquishes his right of action in consideration of the promise of permanent employment."

"The construction contended for by the defendant, namely, that it was for him to say whether he needed plaintiff's services or not, would put the plaintiff entirely at the defendant's mercy, and, in view of the fact that the plaintiff was to give up his business to enter the defendant's employment, would be such an agreement as he could not reasonably have been expected to make." Carnig v. Carr, 167 Mass. 544 at 547, 46 N. E. 117 (1897).

[5] See Holt v. St. Louis Union Trust Co., (C. C. A. 4th, 1931) 52 F. (2d) 1068; Hess v. Iowa Light, Heat & Power Co., 207 Iowa 820, 221 N. W. 194 (1928).

[6] Ashley v. Cathcart, 159 Ala. 474, 49 So. 75 (1909).

[7] In considering a provision similar to that in the principal case in Faulkner v. Des Moines Drug Co., 117 Iowa 120 at 122, 90 N. W. 585 (1902), the court approaches the question from the usual view. The court says, "It is not conceivable that in entering into the contract in suit plaintiff supposed he was entering a service from which nothing but death or the consent of the defendant could relieve him. It is equally incredible that defendant supposed or understood that it was thereby taking into its employment a person whom it was bound to retain in its service until such time as that person should consent to his own discharge. If we should hold the contract enforceable according to its literal terms, the defendant could never abandon or sell or dispose of its business without plaintiff's consent, even though its prosecution entailed certain loss or bankruptcy. . . ."

[8] In Faulkner v. Des Moines Drug Co., 117 Iowa 120, 90 N. W. 585 (1902), the court bases its decision on the ground that, like all other permanent or continuous contracts, the agreement is of indefinite duration and terminable at will since there is no extra consideration. The court then goes on to say that even if the contract were not terminable at will it would be too uncertain for the assessment of damages. It is on this latter principle that the court in the principal case rests its decision.

Bolles v. Saches, 37 Minn. 315, 33 N. W. 862 (1887), cited by the court, presents a different situation in that the employee could terminate the contract at any time. But that decision has been severely criticized in 35 L. R. A. 512 at 516-517 (1897).

[9] In Carnig v. Carr, 167 Mass. 544 at 547, 46 N. E. 117 (1897), the court says, "If it is difficult, as the defendant insists that it is, to lay down a rule for estimating the damages arising from the breach of such a contract as we have construed this

admitted that the provision for termination in the principal case made the contract too uncertain as to ultimate termination, it might at least be held to be definite for shorter periods.[10] By the better rule, employment contracts with no express provision for termination are held to be binding for periods commensurate with the stipulation for payment.[11] Although the parties could not have intended that the contract should be terminable only by death, still there is no apparent reason to suppose that they did not intend it to be binding according to the provision for payment. That the parties had performed under the contract for twenty-five years is at least proper evidence for the jury in that respect.[12] The contract might properly be held to run from year to year and to be terminable, without cause, only at the end of any year.[13]

to be, the difficulty is no greater than exists in many other cases, and does not present an insuperable objection to recovery."

As indicated by the cases cited in note 2, supra, the courts have implied and the contracts have many times called for termination in a variety of ways. Yet a brief survey of those cases will show that the objection of uncertainty in assessing damages is not insurmountable. See also Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289 at 300 (1892); Brighton v. Lake Shore R. R., 103 Mich. 420, 61 N. W. 1550 (1894). All of these cases, of course, are those wherein there was an extra consideration flowing from the employee.

As regards the recovery of a share in prospective profits, the defendant in the principal case had been in business for at least twenty-five years and that fact should furnish a reasonably certain basis for the assessment of damages. In allowing recovery of damages for prospective profits on facts similar to those in the principal case, the court in Barnett v. Caldwell Furniture Co., 277 Ill. 286 at 289, 115 N. E. 389 (1917), said, "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty."

[10] In the principal case the lower court instructed the jury that, if no cause was shown, the contract could only be terminated at the end of any employment year. Defendant took no appeal from that instruction and the court did not consider the problem.

[11] Cases collected and discussed in 11 A. L. R. 469 (1921). Compare 32 MICH. L. REV. 107 (1933). Considering a contract with a provision for payment similar to that in the principal case, in In re Moran, (C. C. A. 6th, 1924) 299 F. 222 at 224, the court said, "The undisputed facts as to the share that the employes were to have in the annual earnings make it clear that the arrangement here in question was to run from year to year."

[12] Chamberlain v. Detroit Stove Works, 103 Mich. 124, 61 N. W. 532 (1894); Laughlin v. School Dist. No. 17, 98 Mich. 523, 57 N. W. 571 (1894).

[13] Hobbs v. Brush Electric Light Co., 75 Mich. 550, 42 N. W. 965 (1889). Referring to the effect of lack of consideration in permanent contracts, it is said in 35 L. R. A. 512 at 513 (1897): "Whatever merit there may be in this distinction it is scarcely necessary to point out that the courts' theory must be modified *pro tanto* wherever the rule prevails that an indefinite hiring is not a hiring at will, but a hiring for some fixed period depending on usage."