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CONTRACTS—DEFINITENESS OF TERMS IN A SPECIAL CONTRACT.—*Doyle* v. *Edmonds,* 91 N. W. 322 (Supreme Court of South Dakota, July, 1902). Assumpsit.

The facts are as follows: The plaintiff, Doyle, sues defendant as administrator of one Crisci on promise made by Crisci that if Doyle as a physician would perform an operation on him, he would pay for Doyle's services "from $200 to $400." In the lower court Doyle obtained a verdict for $250.

The Supreme Court of South Dakota first decided that this promise by decedent and the performance of the act by plaintiff constituted a definite special contract. They then held that the plaintiff is entitled to recover only $200 as he failed to prove that his services were worth more, under a statute of that jurisdiction which states that "where a contract does not determine the amount of the consideration . . . the consideration must be so much money as the object of the contract is reasonably worth."

It is submitted (1) that the court erred in considering this

a definite special contract; (2) that even assuming for the sake of argument that the contract was, as stated by the court, a definite one, then the court erred in deciding the amount of plaintiff's recovery under a statute which clearly is intended to apply, not to special contracts, but to contracts implied in fact. In such cases, where with mutual assent, work is done, or goods taken, but without any definite price stipulated, on an implied promise the promisee may recover what the labor or goods are reasonably worth, and it is to such class of contracts implied in fact that the South Dakota statute clearly refers. But the court after deciding that this contract was a special one—and therefore not an implied one—determined plaintiff's rights to recovery as if no price had been set by the parties, *i e.*, as if the physician had performed his services on an implied promise to pay him what they were reasonably worth. Now if that is all that the court meant, then their rather labored efforts to prove the contract a definite special one were quite unnecessary, for if the contract comes rightfully under the statute, there is no need to prove it perfectly definite. A contract implied in fact is by its very nature often indefinite as to price. But the court did hold, in an elaborate opinion, that the contract was definite. By what right then could they say that plaintiff should be allowed to recover only what his services were reasonably worth, in the teeth of a contract which called for "from $200 to $400," and which the court had just declared was definite and binding.

Admitting that the physician might very well recover for fair value of work done, it is submitted that the contract held definite by the court, was void for uncertainty and indefiniteness of terms. To support its decision the court states that *alternative* contracts have always been held definite and valid. This is unquestionably true. *McNibb* v. *Clark,* 7 Johns, 465, 1811; *Choice* v. *Mosely,* 1 Bailey, 136, 1828; *Plowman* v. *Riddle,* 7 Ala. 775, 1845; *Thorn* v. *City Rice Mills,* L. R. 40 Ch. Div. 357, 1889; *McMillan* v. *Philadelphia Company,* 159 Pa. St. 142, 1893. All the authorities cited by the court, with one exception, are cases of alternative contracts, but this was not an alternative contract. A promise to pay "from $200 *to* $400" is a very different thing from a promise to pay $200 *or* $400. The latter is alternative, the former is vague. According to the rules in alternative contracts, the promisor has his option up to the time set, after which the option passes to the promisee. Now if the court had any idea that this was an alternative contract, they should have allowed the plaintiff as promisee having option $400, instead of only giving him $200! But this promise lacks the essential element of an alternative agreement where there is to be done one thing *or* another. Here the promise was to pay, not one sum or another but any sum within certain limits.

The remaining case cited by the court is *United Press* v. *New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, 1900, in which it was held that an executory contract for news service to extend over a period of years at a price "not exceeding three hundred dollars during each and every week that said news report is received" was so indefinite as to the price to be paid as to preclude a recovery of damages for refusal to accept the service. In that case Gray, J., says "It (*i. e.*, the alleged special contract)* lacked support in one of its essential elements; in the absence of a statement of the price to be paid. That was a defect which was radical in its nature and which was beyond the reach of oral evidence to supply; for if the intention of the parties in so essential a particular cannot be ascertained from the instruments (or from the terms of their special contract),* neither the court, nor the jury, will be allowed to make an agreement for them upon the subject." The Dakota court hold this case rightly decided, but say it would be different if a minimum price had been named.

This New York case is supported, on similar facts, by two Pennsylvania decisions, *Coffin* v. *Landis*, 46 Pa. St. 426, 1864; *Peacock* v. *Cummings*, *id.* 434. But it is submitted that the mere addition of a minimum price is not sufficient to relieve this contract of its uncertainty. The New York case is void not because its leaves one limit undefined, but because the promise there was neither certain nor explicit. The same is true here. The promise has a range of anywhere from $200 to $400. Suppose the defendant had offered plaintiff $300, could the plaintiff have refused it, on the ground that defendant's offer was up to $400? Or if plaintiff demanded $400 of defendant, could the latter refuse to pay, stating that his promise started at $200, and that payment of $200 would satisfy the terms? Clearly a contract susceptible of such wrangling is not definite and clear.

It is elementary in the law that the full intention of the parties must be ascertained with a reasonable degree of certainty. This may be ascertained though the contract's terms are not minutely specific. For example a contract to supply ice "for the season" is sufficiently definite. *East* v. *Lake Ice Line*, 21 N. Y. Sup. 887, 1893. Likewise a promise to pay interest on certain outstanding indebtedness, amount of which may be known by reference to books, *N. C. Ry.* v. *Walmouth*, 193 Pa. St. 207, 1899. But in all such cases the terms are easily determinable. If, however, the agreement is uncertain and vague in its terms it is unenforceable. As a promise to give one hundred acres of land, without designating what land, *Sherman* v. *Kitsmiller*, 17 S. & R. 45, 1827; see also *Soles* v.

* Words in parentheses are the editor's.

Hickman, 20 Pa. St. 180, 1853; *Graham* v. *Graham,* 34 Pa. St. 475, 1859.

The mere fact that here a minimum price was stated does not affect the principle that a contract indefinite in terms cannot be enforced. Suppose no minimum had been named, it would then be a promise to pay up to $400. From what up to $400? Naturally from one dollar, or even from one cent. If this is bad for uncertainty, the mere fact that $200 instead of one cent is placed as the lowest figure, does not obviate the vagueness and uncertainty still allowed by the range between the amounts stated.

Where a benefit is conferred by one party and accepted by the other, as a matter of business, and so understood by both parties, though no price is stated, or if stated is so vague as to be of no avail, a recovery is allowed in assumpsit for the fair value of the services performed, *Kidder* v. *Boom Co.,* 24 Pa. St. 193, 1855. But this is upon the obligation implied in fact and not upon a special contract. It is upon such grounds here, and such only, that the plaintiff should recover.

B. L. S.