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Contracts-Discharge by Inconsistent Provisions of Subsquent Contract

CONTRACTS—DISCHARGE BY INCONSISTENT PROVISIONS OF SUBSEQUENT CONTRACT. —Plaintiff, a public utility, operating under and in accordance with a franchise granted by defendant city in 1899 and accepted by plaintiff, seeks recovery for water furnished the city for the period between April 1, 1930, and June 30, 1931, at a rate provided in a contract entered into between said city and plaintiff in 1919, the rates therein fixed being approved by the Public Service Commission of Indiana. The original franchise was to run for a period of

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mission (1921), 187 Ind. 53, 118 N. E. 531; City of Logansport v. Public Service Commission (1931), 202 Ind. 523, 177 N. E. 249.

22 See Frankfurter, Task of Administrative Law (1927), 75 U. of Pa. L. Rev. 614; Freund, Standards of American Legislation, p. 302.

23 Cooley, Taxation (1924, 4th ed.), sec. 78; Whitfield, Legislative Powers (1910), 20 Yale L. J. 87.

24 Southern Ry. Co. v. Hunt (1908), 42 Ind. App. 90, 83 N. E. 721; State v. Board of Commissioners (1908), 170 Ind. 595, 85 N. E. 513; Egyptian Transportation System v. Louisville & N. R. Co. (1926), 321 Ill. 580, 152 N. E. 510.

25 People ex rel. Pexley v. Lodi H. S. Dist. (1899), 124 Cal. 694, 57 p. 660; City of Little Rock v. Board of Improvements (1883), 42 Ark 152; Cooley, Taxation (1924, 4th ed.), sec. 81.

thirty years and was to be renewed for another such period if the city did not elect to purchase the utility prior to the expiration of the thirty year period. The second contract, made while the franchise was still in effect, was to last for ten years, during which time the utility was to furnish the defendant with water "under the franchise thereofore granted." The plaintiff has never elected to purchase said utility. Held, the rates as provided in the original franchise will control.[1]

As an ordinance granting a franchise and its subsequent acceptance by the utility constitutes a binding contract,[2] the parties thereto may at their pleasure mutually modify it or substitute in its place a new contract.[3] An interesting question arises in the principal case in considering the effect of the second contract upon the original franchise. Did it amount to a discharge of the original contract in whole or in part, or did that contract still remain in force in whole or in part? In this jurisdiction there seems to be a dearth of authority on the question of formal requisites necessary to discharge a contract by the provisions of a subsequent contract. In the determination of this question it will, therefore, be well to look at the attitude taken by the courts of other states.

Some courts have held that in order to discharge a contract by a subsequent contract on the same subject it is necessary that the fact of discharge be clearly expressed in the substituted contract.[4] However, this does not seem to be the weight of authority. Most courts have held that a contract may be treated as discharged or rescinded in the absence of an express agreement of the parties.[5] They have taken into consideration various factors upon which to base their decisions. It has been held that where the intention of the parties to discharge may be implied from the circumstances, then the contract will be treated as abrogated.[6] But other courts have been more exacting and will declare a contract to be discharged only where the provisions of a subsequent contract are so inconsistent with it that they cannot subsist together.[7] Still other courts have based their decisions on whether or not the second contract depends upon a new consideration.[8] It is evident, however,

[1] Seymour Water Co. v. City of Seymour, Ind. (1935), 197 N. E. 701 (Ind.).

[2] Muncie Natural Gas Co. v. City of Muncie (1903), 160 Ind. 97, 66 N. E. 436.

[3] Commercial Acceptance Co. v. Walton (1931), 93 Ind. App. 136, 176 N. E. 244; Greensburg Water Co. v. Lewis (1920), 189 Ind. 439, 128 N. E. 103; 26 C. J. 1042, sec. 107.

[4] Metallograph Corporation v. Arma Engineering Co., Inc. (1923), 199 N. Y. S. 347.

[5] Evans v. Jacobitz (1903), 72 P. 848, 67 Kans. 249; Holmes v. Robarts (1929), 102 Cal. App. 53, 282 P. 519; LeMieux v. Cosgrove (1923), 155 Minn. 353, 193 N. W. 586; 6 R. C. L. 923, sec. 307.

[6] Evans v. Jacobitz (1903), 67 Kans. 249, 72 P. 848; LeMieux v. Cosgrove (1923), 155 Minn. 353, 193 N. W. 586.

[7] House Keeper Publishing Co. v. Swift (1899), 97 Fed. 290; Bridges v. Sheldon (1880), 7 Fed. 17; Cornish et al. v. Suydam (1893), 99 Ala. 620, 13 So. 118; Bourn v. Dowdell (1897), 50 P. 695; Menefee v. Rankins (1914), 158 Ky. 78, 164 S. W. 365; Homire v. Stratton and Terstegg Co. (1914), 157 Ky. 822, 164 S. W. 67; Thompson v. Craft (1913), 85 Atl. 1107 (Pa.); Sherman v. Sweeney (1902), 29 Wash. 321, 69 P. 1117; Boder v. Moore (1917), 94 Wash. 221; 162 P. 8; 6 R. C. L. 923; 13 C. J. 603.

[8] McKay v. Fleming (1913), 24 Colo. A. 380, 134 P. 159.

that there must be a new consideration in order that the second instrument may be a binding contract.

If the rule of inconsistency be adopted as the general one, the question arises as to what extent a subsequent contract must be inconsistent with a former one in order to operate as a discharge of it. The courts in substance say that if the contracts are so inconsistent that they cannot subsist together, the latter will be treated as a discharge of the former.[9] It is evident that the application of this rule without correlative limitation would tend to make the ground upon which discharge is granted very broad.

However, the courts do not use this rule as to inconsistency exclusively, and, though stressed, there is usually attendant upon it a consideration of the intention of the parties. Thus where the provisions of a contract have been found inconsistent with those of a former one on the same subject, it has been held that the second contract does not discharge the former, except as to specific inconsistencies, if the parties did not intend the new to supersede the old in the entirety. The Kentucky court held that "a new contract with reference to the subject matter of a former one does not supersede the former and destroy its obligations except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old but intended it as supplementary thereto.[10]

The application of these principles to the instant ease is evident. If the original franchise were discharged, it would be impossible for the plaintiff to recover on the basis of the rate therein provided. This would leave no contractually provided rate for water furnished after the lapse of the second contract.

In the principal case it will be noted that the rates as provided in the original franchise are inconsistent with those set out in the second contract. However, the second contract states that the water is to be furnished "under the franchise theretofore granted." This phrase was used by the court in showing that the intention of the parties was that the original franchise was not discharged, but the second contract was only supplemental to it. Hence if it be true that this phrase does in fact represent the intention of the parties when such interpretation is given it, the court was correct in stating that the original franchise was still in effect.

There are two possible rationalizations for the proposition of applying the rates of the original franchise. One rationale is that the original franchise was completely discharged by the second contract, but that by the terms of that contract the original franchise became a part of it, and the provisions of the franchise, killed by its discharge, gained a new birth in the provisions of the second contract. Hence the rates provided in the original franchise were applicable at the expiration of the ten year period.

With regard to the theory of this latter rationale, which makes the second contract the exclusive basis for determining the status of the parties, a difficulty arises. In the same contract there would be two provisions for rates, i. e., the rate as provided in the original franchise as reenacted by the

[9] See footnote 7, supra.

[10] Menefee v. Rankins (1914), 158 Ky. 78, 164 S. W. 365.

new contract and the rate for the ten year period as also provided in the second contract. Hence there would be an inconsistency in the same contract, and the question would arise as to why the whole contract should not become a nullity because of uncertainty. However, the tendency is for the courts to hesitate before declaring a contract a nullity for uncertainty.[11] In a case of this kind where there is a general provision that the original franchise will remain in effect and a specific provision, for rates in the new contract, which two are inconsistent, the courts will allow the specific to qualify the general, and the contract will be held binding.[12]

Another rationalization, and the one which the court seemed to use, is that the original franchise may be considered as being in effect in its entirety for the entire period involved in these transactions. The second contract may then be considered as simply superimposed upon it, and after the expiration of the second contract the rates of the original franchise would seem to be in effect.

There is a difficulty, however, that arises as to the court's rationalization. Since contracts may be partially changed by the provisions of a substituted contract,[13] the fact that the franchise is still in effect, as held in the court's rationale, would not seem to preclude the possibility that the rates therein provided had been abrogated. We have seen that in the case of inconsistent provisions in two contracts the provisions in a subsequent will supersede and abrogate those of the former, unless the intention of the parties is shown to be otherwise.[14] The mere phrase in the second contract, "under the franchise theretofore granted," does not show an intention of the parties that the rates provided therein should not be discharged. Hence, the logic of a holding that the rates of the original franchise are controlling because that original franchise, as such, is still in effect is questionable.

O. E. G.

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[11] 13 C. J., sec. 497; 6 R. C. L. 847, sec. 236; Strauss v. Yeager (1911), 48 Ind. App. 448, 93 N. E. 877.

[12] Restatement of Contracts, sec 236; Northwestern Mutual Life Insurance Co. v. Hazelett (1885), 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Wood v. Lindly (1894), 12 Ind. App. 258, 40 N. E. 283.

[13] Restatement of Contracts, sec. 408. (See Indiana Annotations.) Smith v. Fulton (1882), 85 Ind. 223.

[14] Menefee v. Rankins (1914), 158 Ky. 78, 164 S. W. 365.