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Contracts—Interpretation of Escalator Clause

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obligated to pay him his commission, as long as the procured customer did business with the defendant. Clearly then this was not a contract which could be performed within a year and the Court properly held it to be within the statute.

Interpretation Of Escalator Clause

Bethlehem Steel Company v. Turner Construction Company[20] involved the interpretation of the meaning of words used in the price-adjusting (escalator) clause of a construction sub-contract. The Court proceeded on the theory that construction of contract terms is a matter of law where the language is plain and unambiguous.[21] Plaintiff, Bethlehem Company, agreed to furnish, erect and paint all structural steel work in a building which general contractor Turner Company was building for Mutual Company, the owner. While the contract in which the disputed clause appears was made by plaintiff with Turner Company that company was acting for Mutual and it is Mutual that is hereinafter referred to as defendant. The escalator clause provided:

> The price or prices herein stated are based on prices for component materials, labor rates applicable to the fabrication and erection thereof and freight rates, in effect as of the date of this proposal. If, at any time prior to completion of performance of the work to be performed hereunder, any of said material prices, labor rates and/or freight rates shall be increased or decreased, then in respect of any of said work performed thereafter there shall be a corresponding increase or decrease in prices stated.[22]

The dispute arose over the meaning of "component materials."

Part of the formula for computing changes in the contract price was based on the labor rates for fabricating and erecting the component materials, but made no mention of labor rates along the steel production line. Use of the word "thereof" in the above quoted clause indicated that the clause in its entirety related to the erection job and not to the manufacture of steel. Taking the language of the clause as a whole, the Court held, as a matter of law, that the intent of the parties was that "component materials" should mean steel products like bars and sheets that are used in the structural steel framework of a building.

Generally, the purpose of a price-adjusting clause is to protect against unanticipated or unpredictable changes in price which might render the bargain unduly harsh. However, in the instant case, the $10 per ton increase in the price of steel products seems to have been already in effect and known to both parties

20. 2 N.Y.2d 456, 161 N.Y.S.2d 90 (1957).
21. *Accord,* Brainard v. New York Central Ry., 242 N.Y. 125, 133, 151 N.E. 152 (1926).
22. See note 20 *supra* at 460, 161 N.Y.S.2d at 94.

at the time the contract was executed.[23] The majority opinion did not concern itself with this problem.

A question of mutuality was raised by defendant. It claimed that plaintiff had an arbitrary unilateral power to change the price terms of the Bethlehem-Turner contract by raising its quotations for steel. The Court rejected this claim stating, ". . . this escalation clause provided for increases or decreases in accordance with changes in Bethlehem's *regular prices to all purchasers* . . . ."[24] (Emphasis added). However, the clause (see above) seems to permit a price change anytime ". . . said material prices, labor rates and/or freight rates shall be increased. . . ." It cannot be concluded, on the basis of the wording of the clause, that the parties intended "prices to all purchasers" to be the extrinsic standard by which escalation would be determined.[25] Nevertheless, since the referee found that Bethlehem in fact charged uniform and regular prices to all purchasers of its steel products, including its own fabrication and erection division, such prices provided a method whereby escalation could be determined and thereby satisfied the requirement of mutuality.[26] Moreover, while it was probably assumed by the parties that plaintiff would supply steel of its own making, that did not appear to be a requirement of the contract.[27]

Waiver Of Nonassignment Clause Of Contract

A motion picture made by National Pictures Inc., had been accepted by Twentieth Century-Fox for distribution. There were certain assignments connected with the profits of the picture that Twentieth Century refused to recognize on the grounds of a non-assignment clause in its agreement with National. The assignees requested a declaration of right and Twentieth Century moved for a summary judgment. The problem presented in *Sillman v. Twentieth Century-Fox Film Corp.*,[28] was whether there was sufficient evidence of waiver of the non-assignment clause to present a triable issue.

The Court recognized that funds can be made unassignable by written agreement between the parties[29] but also that this prohibition can be waived.[30] The

23. *Ibid.* at 459.
24. See note 22 *supra.*
25. Raleigh Assoc. v. Henry, 302 N.Y. 467, 473, 99 N.E.2d 287, 291 (1951); Simpson Bros., Inc. v. District of Columbia, 73 F. Supp. 858 (1947).
26. Buggs v. Ford Motor Co., 113 F.2d 618, 620 (7th Cir. 1940); Ken-Rad. Corp. v. R. C. Bohannan, Inc., 80 F.2d 251 (6th Cir. 1935); *Cf.* WILLISTON, LAW CONTRACTS §41 (rev. ed. 1938).
27. Bethlehem Steel Co. v. Turner Construction Co., 283 App. Div. 69, 126 N.Y.S.2d 147 (1st Dep't 1953).
28. 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).
29. Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 103 N.E.2d 891 (1952).
30. Devlin v. Mayor of City of New York, 63 N.Y. 8 (1875).