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## CONTRACTS OF AGENCY WITHOUT STIPULATIONS AS TO DURATION\*

THOMAS PORTER HARDMAN\*\*

The Restatement of Agency by the American Law Institute provides that "A contract of agency, or a contract of service, is the contract, when one exists, which *determines* the existence, *duration*, terms or conditions of the [agency] relation."<sup>1</sup> But what is the duration of the relation when this so-called "contract of agency" contains no stipulation as to how long the employment is to continue? And how does the so-called contract of agency determine the duration in such cases? It is the purpose of this comment to discuss the West Virginia cases on this point.

Since agency is a consensual,<sup>2</sup> not a contractual,<sup>3</sup> relation, and therefore since a contract of agency is not essential to the relation,<sup>4</sup> the general validity and effect of the contract of agency constitute more properly a part of the law of contract than a part of the law of agency.<sup>5</sup> But there is one very common and important type of agreements of agency, namely, agreements without stipulations as to duration, which several courts, including the West Virginia court, sometimes treat in such a stereotyped manner as to justify

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\*This comment is a part of a study of the West Virginia law as affected by the RESTATEMENT OF AGENCY by the American Law Institute and is largely an elaboration of an annotation of §7 of the AGENCY RESTATEMENT.

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<sup>1</sup> THE AMERICAN LAW INSTITUTE, AGENCY, RESTATEMENT No. 1, §7 (1925). Italics ours.

<sup>2</sup> That agency is a consensual rather than a contractual relation is shown (sufficiently for present purposes) by the fact that one can be an agent though he has no capacity to contract (*i. e.*, where there can be no contract), provided that the requisite consent exists; *Fenner v. Lewis*, 10 Johns. (N. Y.) 38 (1813), 1 WILLISTON, CONTRACTS, §274 (1920); and by the fact that one may be an agent though he is acting gratuitously and not under a sealed authority (*i. e.*, where there is no contract), provided that there is the requisite consent. *Bank of White Sulphur Springs v. Lynch*, 93 W. Va. 382, 386, 116 S. E. 685 (1923). See the AMERICAN LAW INSTITUTE, AGENCY, RESTATEMENT No. 1, §2 (1925).

<sup>3</sup> See n. 2, *supra*. But see 1 MECHEM, AGENCY, 2d ed. §42 (1914), and contrast *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845 (1910).

<sup>4</sup> This is sufficiently shown by the fact that one who has no capacity to contract can nevertheless be an agent. See n. 2, *supra*.

<sup>5</sup> *Of.* 1 WILLISTON, CONTRACTS, §39 (1920). See also THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONTRACTS, §32, particularly *Illustrations*, 1 and 2 (1928).

special consideration. Accordingly, it is herein proposed to compare the important West Virginia cases on this point, particularly since the two principal cases,<sup>6</sup> both recent, are (apparently without the court's realizing it) clearly *contra* to each other, at least in their reasoning, and since these two contrary West Virginia cases are highly representative of the almost chaotic conflict of extra-state authority.

In the first West Virginia case, *Resener v. Watts, etc., Company*,<sup>7</sup> decided in 1913, the agreement of agency was "an agreement for a *monthly* salary and expenses, and the further compensation of five per cent commissions, in excess of salary and expenses, on goods sold by \* \* \* [the agent], the excess to be ascertained and paid on settlements made at the end of each year."<sup>8</sup> The agent acted "until May", when he quit and sued for his commission on goods sold before he quit. The defense was that the hiring was for a year. The court held that he could recover for the reason that an agreement to act at so much per month is terminable (or "presumed" to be terminable) at any time by either party, the court quoting with approval a statement from Wood on Master and Servant<sup>9</sup> that "a hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve; \* \* \* and in such cases, the contract may be put an end to by either party at any time, unless the time is fixed".

In the second case, *Alkire v. The Orchard Company*,<sup>10</sup> decided in 1917, the contract of agency simply provided for "a salary of \$100 per month". The agent acted "until December" when he was dismissed. He then sued for salary for the following January, claiming that the contract was for a year. The court refused recovery on the ground that a contract at a monthly salary which does not specify any duration is "simply a monthly employment" and "may be

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<sup>6</sup> *Resener v. Watts, etc., Co.*, 73 W. Va. 342, 80 S. E. 839 (1913); *Alkire v. Orchard Co.*, 79 W. Va. 526, 91 S. E. 384 (1917).

<sup>7</sup> 73 W. Va. 342, 80 S. E. 839 (1913).

<sup>8</sup> This is the court's statement of the terms of the agreement. Italics ours.

<sup>9</sup> §136.

<sup>10</sup> 79 W. Va. 526, 91 S. E. 384 (1917).

terminated at the end of any month by either of the parties thereto."

Which case, then, represents the better view? The first, that such an agreement is terminable (or "presumed" to be terminable) at will by either party, or the second, that such a contract is terminable only at the end of the specified period for which the salary or wages are stipulated? Or is there a preferable third view? A peculiar thing about the two West Virginia decisions is that in each case the court should have reached the same conclusion which it actually reached even if the court had followed the contrary doctrine which it purported to lay down in the other case. Moreover, the second West Virginia case does not even cite the first, although less than four years had elapsed between the two decisions. Nor does either counsel cite the first case in his brief in the second case. Furthermore, in a recent West Virginia case materially in point, *Stewart v. Blackwood, etc., Corporation*,<sup>11</sup> the court, in awarding a new trial, completely avoids the question and does not cite either of these two cases. Let us, therefore, compare and consider the two decisions. In the first case, the Resener Case, the court relies largely on Wood on Master and Servant, whereas the cases cited by Wood do not fully support him.<sup>12</sup> Moreover, the court cites no West Virginia decisions and admits that there is a conflict of extra-state authority.<sup>13</sup> And, as already indicated, if the court in the Resener Case had adopted the contrary doctrine followed in the Alkire Case, that an employment at so much per month or other fixed period, is terminable at the end of the month or such other period, the result in the Resener Case would (so far as this point is concerned) have been precisely the same, for the employé had acted "until May", that is to say, to the end of a month, and, therefore, had terminated his monthly employment (if it was a monthly employment) at the end of the month.

Furthermore, in the Resener Case, it was contended that the employer understood that the employment at a monthly

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<sup>11</sup> 100 W. Va. 331, 130 S. E. 447 (1925).

<sup>12</sup> See a discussion of the cases cited by Wood in Annotation, 11 A. L. R. 469, 475-477 (1921).

<sup>13</sup> See *Resener v. Watts, etc., Co.*, *supra*, n. 6, at p. 344.

salary was an employment *for a year* at so much per month; and on this point the court holds that unless the understanding of the employer and employé "was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring, and is terminable at the will of either party \* \* \*. Here there is no such proof. To constitute an agreement, the minds of the parties must concur, or meet upon its terms; otherwise, there is no agreement."<sup>14</sup>

On this latter point, it would seem that the doctrine of the court is unsound, for the court employs the subjective theory of contract, that to create a contract there must actually be a meeting of the minds of the contracting parties.<sup>15</sup> This theory of contract is a concept of the civil law, and, though sponsored in the nineteenth century by Anson<sup>16</sup> and others, is today generally considered untenable and is supplanted by the objective theory that there is a contract if the words or acts of the parties, *judged objectively*, constitute an agreement.<sup>17</sup> Therefore, in the Resener Case, if the reasonable impression of the parties was that the employment was to be for at least a year, there is a contract of agency whose duration is at least a year, though there may have been no actual inward meeting of the minds on this point. As Mr. Justice Holmes has said (in effect), to lead a person reasonably to suppose that you assent to an arrangement (*e. g.*, an agreement for a yearly employment) is, in the sense of the law, to assent to the arrangement.<sup>18</sup> Therefore, the Resener Case is wrong in this respect at least. The agreement of employment stipulated that in addition to a monthly salary, the employé was to receive a commission on goods sold and the commission was "*to be ascertained and paid on settlements made at the end of each year.*" It is submitted that the question whether such an agreement is terminable at will, or only at the end of each month, or only at the end of each year, is simply a question of the interpretation of the agreement of the parties. But

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<sup>14</sup> *Id.* at p. 346.

<sup>15</sup> See the able criticism of the subjective theory of contract in 1 WILLISTON, CONTRACTS, §§20-22, 94 (1920).

<sup>16</sup> ANSON, LAW OF CONTRACT (Huffcut, Second American Ed.) p. 2 (1906).

<sup>17</sup> *Plate v. Durst*, 42 W. Va. 63, 24 S. E. 580 (1896). See 1 WILLISTON, *op. cit.*, *supra*, n. 15, §§20-22, 94; WIGMORE, EVIDENCE, 2d ed. §2413 (1923).

<sup>18</sup> In *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747 (1887).

this interpretation is to be determined objectively. As Wigmore on Evidence puts it: "The person using words is to be treated from the point of view of the reasonable man, not only in determining the actual tenor of his act, but also in interpreting it."<sup>19</sup> On the question of construction, as the United States Supreme Court, per Mr. Justice Holmes, has recently said, "Words are flexible."<sup>20</sup> In the Resener Case, the words used are reasonably susceptible of meaning employment for at least a year. Therefore, if, judged objectively, the understanding of the parties was that the employment was to be at a monthly salary for at least a year (as the commission was "to be ascertained and paid on settlements made at the end of each year") it is a contract of agency terminable at the end of the year, rather than a mere agency at will. In accord with this view a recent New Jersey decision held that a similar agreement constituted a yearly employment, whose duration is at least a year.<sup>21</sup>

Where an agreement of employment contains no stipulation at all as to duration, not even a provision that the employé shall receive a fixed sum for each day, week, month, year, or other definite period, the American authorities generally treat the relation as an agency at will,<sup>22</sup> sometimes as if such an agreement necessarily creates an agency at will.<sup>23</sup> The better view, however, is believed to be that whether such an agreement constitutes an agency at will, or a contract for a definite period, is a question of fact depending upon the objectively judged understanding of the parties.<sup>24</sup> But where there is no trustworthy evidence of

<sup>19</sup> WIGMORE, EVIDENCE, 2d ed., §2466 (1923).

<sup>20</sup> In *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 52 (1926).

<sup>21</sup> *Lyons v. Pease Piano Co.*, 92 N. J. L. 592, 107 Atl. 66 (1910).

<sup>22</sup> *Moore v. Security, etc., Ins. Co.*, 168 Fed. 496 (1900); *Christensen v. Pacific Coast, etc., Co.*, 26 Ore. 302, 38 Pac. 127 (1894); *Coffin v. Landis*, 46 Pa. 426 (1864). No effort has been made to collect all authorities touching on this point or on this general problem as they are too numerous to justify citation. See 1 WILLISTON, CONTRACTS, §39 (1920), citing authorities. See also a collection of cases in Annotation, 11 A. L. R. 469 (1921). The West Virginia case of *Resener v. Watts, etc., Co.*, *supra*, n. 6, also supports this view, though in the Resener Case the agreement of agency contained a stipulation (among others) "for a monthly salary". The court, however, put the agreement in the same category as agreements without any stipulations as to duration.

<sup>23</sup> See, *e. g.*, *Fulkerson v. Western Union Tel. Co.*, 110 Ark. 144, 161 S. W. 168 (1913).

<sup>24</sup> See 1 WILLISTON, *op. cit.*, *supra*, n. 15, §39.

such understanding, how is the question to be decided? In England it is generally held that such an agreement creates an employment for a year.<sup>25</sup> But in the United States the authorities generally say that such an indefinite hiring is terminable at any time by either party,<sup>26</sup> some authorities, though expressing it inaccurately, laying down what is believed to be the correct doctrine, namely, that there is a "presumption", or, to express it more accurately, that there is an *inference of fact*,<sup>27</sup> that such an agreement constitutes an agency at will.<sup>28</sup> It is believed that this inference of fact is based on the common experience (in the United States at least) that, where reasonable persons enter into an agreement of employment and do not stipulate as to duration, they do not normally understand that there is any definite duration. Hence, in such cases, it is only fair to start with a rebuttable inference of fact that the duration was understood to be indefinite and terminable at any time by either party. Therefore, in the absence of evidence outweighing this inference, the cases in the United States generally hold, in effect, that such an indefinite agreement creates no executory obligations.<sup>29</sup>

But the Resener Case erroneously applies this sound doc-

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<sup>25</sup> See 1 LABATT, MASTER AND SERVANT, 2d ed., §156 (1913), collecting cases. See also 1 WILLISTON, *op. cit.*, *supra*, n. 15, §39.

<sup>26</sup> See n. 22, *supra*.

<sup>27</sup> As to the distinction between a true "presumption", and the so-called "presumption of fact", a mere inference of fact, see WIGMORE, EVIDENCE, 2d ed., §§2487, 2491 (1923).

<sup>28</sup> *Moore v. Security, etc., Ins. Co.*, 168 Fed. 496 (1909). See also, 1 MECHEM, AGENCY, 2d ed. §592; and 1 LABATT, *op. cit.*, §§159, 160. Many cases laying down this doctrine are cases of employment at so much per fixed period which in this respect the courts treat as employments indefinite as to duration. See, *e. g.*, *Resener v. Watts, etc., Co.*, 73 W. Va. 342, 80 S. E. 839 (1913); *Associated Newspapers v. Phillips*, 294 Fed. 845 (1923), (opinion by Judge Henry Wade Rogers); and *Miller v. Rodd*, 285 Pa. 16, 131 Atl. 482 (1925).

<sup>29</sup> Compare 1 WILLISTON, *op. cit.*, *supra* n. 15, §39, reaching this conclusion but not wholly by this reasoning. It is believed however that this is the general effect of the decisions. See particularly *Moore v. Security, etc., Ins. Co.*, 168 Fed. 496, 499 (1909) which MECHEM, AGENCY, 2d ed., §592 cites as his principal authority for the proposition that there is a "presumption" that such indefinite agreement constitutes an agency at will. The court, per Sanborn, J., actually says that there is a "strong presumption" to that effect. This language indicates a so-called "presumption of fact" (a mere inference of fact) rather than a true presumption. As to the distinction between the two, see WIGMORE, EVIDENCE, 2d ed., §§2487, 2491 (1923).

trine to cases where there is a provision for so much per given period of time. Of the cases supporting such an application of the doctrine, Williston on Contracts<sup>30</sup> says that in reaching this result courts have "failed to observe that such a construction should, if possible, be put upon the language of parties who enter into an agreement as will give rise to a legal obligation. It is true that a hiring at so much a day does not specify the length of time that the service may endure, but it may fairly be *presumed* that the parties intended the employment to last for at least one day. So if the payment is fixed by the week, month, or year. It is, of course, possible that this mode of expression was merely to fix the rate of compensation, but in the absence of evidence to the contrary, it seems a fair *presumption* [*inference of fact*]<sup>31</sup> that the parties intended the employment to last at least for one such period. The fact that they regarded it as possible that the employment should continue beyond one period would not prevent a definite contract being formed for the first period; and should the parties continue their relation after the expiration of the first period, another contract by implication of fact would arise for another similar period. This view is adopted by many courts of high standing.<sup>32</sup> It is believed these decisions are sound."

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<sup>30</sup> §39.

<sup>31</sup> See n. 27, *supra*.

<sup>32</sup> Citing the following cases: "National L. Ins. Co. v. Ferguson, 194 Ala. 658, 69 So. 823 (weekly payment); Magarahan v. Wright, 83 Ga. 773, 10 S. E. 584 (monthly payment); Odom v. Bush, 125 Ga. 184, 53 S. E. 1013 (monthly payment); Webb v. McCranie, 12 Ga. App. 269, 77 S. E. 175 (weekly payment); Nichols v. Coolahan, 10 Metc. 449 (monthly payment); (*cf.* Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 4, 85 N. E. 877); Chamberlain v. Detroit Stove Works, 103 Mich. 124, 61 N. W. 532 (annual salary); Horn v. Western Land Assoc., 22 Minn. 233 (annual salary); Capron v. Strout, 11 Nev. 304 (price 'per day payable monthly' held monthly hiring); Beach v. Mullin, 34 N. J. L. 343 (monthly payment); Jones v. Manhattan Manure Co., 91 N. J. L. 406, 103 Atl. 984 (price 'per year payable monthly', also providing for contingent payments at Christmas and Easter. Held yearly hiring); Lyons v. Pease Piano Co., (N. J. L., 1919) 107 Atl. 66 (weekly salary, but also commission on annual sales. Held to indicate yearly hiring); Gressing v. Musical Instrument Sales Co., 222 N. Y. 215, 118 N. E. 627 (guaranteed income of a certain amount *per annum*); Pinckney v. Talmage, 32 S. C. 364, 10 S. E. 1083 (wages payable monthly 'at the rate of \$500 a year' held monthly hiring); Young v. Lewis, 9 Tex. 73 (monthly payment); San Antonio, etc., Ry. Co. v. Sale (Tex. Civ. App.), 31 S. W. 325 (monthly payment); Cronemillar v. Milling Co., 134



It would seem, however, that the view adopted by Mr. Williston should be modified as follows. Mr. Williston says that "should the parties continue their relation after the expiration of the first period, another contract by implication of fact would arise for another similar period." It would seem, however, that such "another contract by implication of fact" would not *necessarily* arise, but only that it should be (in the ordinary language of the courts) "presumed", or more accurately that there should be a not-necessarily-conclusive *inference of fact*,<sup>33</sup> that another contract arises for another such period, because the same reasons for such a "presumption", or rather *inference of fact*, would exist then as existed before.<sup>34</sup>

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Wis. 248, 114 N. W. 432 (monthly payment). So in California Civil Code, Sec. 2010, it is provided that if payments are made at a fixed rate, a hiring is intended for the same period in the absence of express agreement. And in Sec. 2011 it is provided that in the absence of agreement, custom, or fixed rate of hiring, a month's employment is presumed. This California legislation has been copied in Mont. Rev. Codes (1907), Secs. 5280, 5281; N. Dak. Rev. Codes (1905), Secs. 5572, 5573; Okla. Gen. St. (1908), Sec. 4044; S. Dak. Rev. Code (1903). Secs. 1477, 1478. The statutes of these States also provide that on the termination of one period of service for a term thus implied, if the service continues without new agreement, another term of the same length is presumed. See also *Emmens v. Elderton*, 4 H. L. C. 624; *Buckingham v. Surrey & Hants Canal Co.*, 46 L. T. (N. S.) 885; *Foxall v. International Land Credit Co.*, 16 L. T. (N. S.) 637; *Smith v. Theobald*, 86 Ky. 141, 146, 5 S. W. 394; *Great Northern Hotel Co. v. Leopold*, 72 Ill. App. 108. In considering the English decisions cited above, it must be borne in mind that in England an indefinite hiring is presumptively for a year, and consequently a yearly salary merely adds force to the general presumption." Italics ours. See also *Southwell v. Parker Plow Co.*, 234 Mich. 292, 207 N. W. 872 (1926).

<sup>33</sup> As to the distinction between a genuine presumption and the so-called "presumption of fact", which is not a true presumption but a mere inference of fact, see WIGMORE, EVIDENCE, 2d ed. §§2487, 2491 (1923). That there is a mere inference of fact (a so-called "presumption of fact") rather than a true legal presumption where the parties continue their relation after the expiration of the first period, see *Williams v. John T. Hesser Coal Co.*, 207 Mo. App. 197, 231 S. W. 680 (1921) where the court said: "It being conceded that at the end of the second year and also at the end of the third year plaintiff continued in the defendant's service without a new agreement, the presumption arose that the employment was to continue through another year. Such a presumption is one of fact, and does not alter, but continues, the terms of the original contract, and does not convert an express into an implied contract, but simply raises an inference of fact that the parties agreed to extend the operation of the old contract for another year." But see the language of Judge Henry Wade Rogers quoted in the following footnote.

<sup>34</sup> See *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176 (1887): "The presumption is, when the service continues, it is under the same contract \* \* \*. Being only a presumption it is liable to rebuttal by evidence of

Hence, the doctrine of the Alkire Case is preferable, but even it is unsound in that the Alkire Case lays down the doctrine as if it is an inflexible agency doctrine<sup>35</sup> rather than a rebuttable inference of fact. The sound doctrine must not be understood as meaning that all agreements of agency which specify that the agent is to receive so much for each day, month, or other fixed period and contain no other stipulations as to duration, are necessarily terminable at the end of such period.<sup>36</sup> Though some cases, including the Alkire Case, seem to take this view, there is, or at least should be, no such agency doctrine. There should be rather a rebuttable inference of fact that such agreements are so terminable and an objective interpretation with the aid of such inference.

To sum up, it is submitted that the general problem is simply a question of the construction of the so-called "contract of agency", to be judged objectively. Where there is no stipulation as to duration, not even a provision that the payment is to be so much per fixed period, it should be (in the ordinary language of the courts) "presumed", or more accurately there should be an *inference of fact*, that the duration is at will. Where, however, there is no stipulation as to duration except a provision that the payment is

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a change of contract." See also *Associated Newspapers v. Phillips*, 204 Fed. 845, 849 (1923). Opinion by Judge Henry Wade Rogers, who says: "And where one enters into another's service for a definite period, and continues in the employment after the expiration of that period without any new agreement, the legal presumption is that the employment is continued on the terms of the original contract, unless facts are proven which are sufficient to rebut that presumption."

<sup>35</sup> See particularly point 1 of the syllabus which is by the court and reads as follows: "1. MASTER AND SERVANT—*Employment Contract—Termination.*

A contract for work and labor which provides for a monthly salary to be paid by one party to the other and does not specify any term of employment, may be terminated at the end of any month by either of the parties thereto."

<sup>36</sup> This is aptly illustrated by the case of *Pfiester v. Western Union Tel. Co.*, 282 Ill. 69, 118 N. E. 407 (1918). See also *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56, 58-59 (1870) where, with reference to an employment with quarterly payments, the court said: "There was no express stipulation, either written or oral, which fixed the time for the continuance of the employment of the plaintiff by the defendant. That element of their contract depended upon the understanding and intent of the parties; which could be ascertained only by inference from their written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment, and all the circumstances of the case."

to be so much per fixed period,<sup>37</sup> there should be an inference of fact that such an agreement is for at least one such period. Where the parties continue their relation after the expiration of the first period, there should be an inference of fact that another contract arises for another such period. But in all three cases the inferences should be rebuttable; and competent evidence, such as general custom in the business, may show that in a given case the agreement is terminable otherwise than in accordance with such so-called "presumptions".<sup>38</sup>

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<sup>37</sup> A contract of agency containing such a provision is herein treated under the title of this article for the reason that, though a provision of this sort is in a sense a stipulation as to duration, many courts do not so treat it. But where there is admittedly a stipulation as to duration, *e. g.*, a provision that the employment shall be permanent, the question does not fall within the scope of this comment. As to the validity and effect of such stipulations, see, *e. g.*, *Rua v. Bowyer Smokeless Coal Co.*, 84 W. Va. 47, 56, 99 S. E. 213 (1919), and 1 WILLISTON, *op. cit.*, *supra*, n. 1, §39.

<sup>38</sup> See *Pfiester v. Western Union Tel. Co.*, 282 Ill. 69, 75, 118 N. E. 407 (1918). With respect to an offer to pay a baseball player \$300 per month the court, per Mr. Justice Farmer, said: "The message of the Milwaukee Club to plaintiff did not expressly say its offer was \$300 per month for the season, but both that club and the plaintiff knew the custom and practice of contracting for the playing season of some six months, and it will be implied, in the absence of an expressed contrary intention, that it contracted with reference to such known custom and usage. \* \* \* While a contract providing for payment at or for stated intervals may create a presumption that the hiring was for corresponding intervals, the circumstances attending the hiring, including the nature of the services and the customs and usages attending the particular employment, should be looked to in determining the length of the employment. (*Smith v. Theobald*, 86 Ky. 141.) Applying this rule to the facts in this case, we think the contract, if entered into had the telegram been received and its terms accepted, would have been for the base ball season."