Statute of Frauds--Contracts Not to be Performed Within One Year--Parol Lease

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Under the older view, the general rule seems to be that a railroad cannot abandon its road or a branch, even though it may be operated at a loss, because it owes a duty to the public. *Farmers' Loan & Trust Co. v. Henning*, Fed. Cas. No. 4,666; *Gates v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 333, 5 Atl. 695. The modern, and better view, is that constitutional liberty as applied to public service means, that as the entrance into a public service is voluntary, so total withdrawal is possible upon reasonable notice. *Satterlee v. Groat*, 1 Wend. (N. Y.) 273; *Munn v. Illinois*, 94 U. S. 113. Of course, so long as a public service company retains its charter, mandatory in terms, no part of the service may be abandoned. *Chicago & Alton R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824; *Savannah & Ogeechee Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937. But where the receipts of an entire railroad are insufficient to meet its operating expenses, operation at a loss will not be compelled, and it may be abandoned unless forbidden by the express terms of its charter, in the absence of special circumstances. *Moore v. R. Co.*, 80 W. Va. 653; 93 S. E. 762; *Jack v. Williams*, 113 Fed. 281, affirmed in 76 C. C. A. 165, 145 Fed. 281, distinguishing *State v. Sioux City & Pacific R. Co.*, 7 Neb. 357. The reason for the modern view is, that to compel operations at a loss would violate the due process clause of the constitution. *Pa. R. R. Co. v. Public Service Commission of Pa.*, 40 Sup Ct. Rep. 36. Under both the older and newer views, however, a company operating its railroad primarily for the purpose of transporting its own wares, and only incidentally for the benefit of third persons, may abandon the road or any part of it, whenever the business of the company does not justify that it longer be operated. *Montell v. Consolidation Coal Co.*, 45 Md. 16. The same argument based on the due process clause applies here. A complete discussion of the right to withdraw from public service may be found elsewhere. See 1 *Wyman, Public Service Corporations*, 253-279. See also 26 *Harv. L. Rev. 659; 32 Harv. L. Rev. 716; L. R. A. 1915 A. 549; L. R. A. 1917 D. 1105; L. R. A. 1918 A 1028n.; L. R. A. 1917 E. 1193.

—A. W. L.

**Statute of Frauds—Contracts Not to be Performed With- in One Year—Parol Lease.**—The defendant held under a written lease which was to expire December 31, 1919. A verbal agreement was made on November 12, 1919, again leasing to the defendant for six months from January 1, 1920, with a
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The privilege in the lessee to renew for an additional six months. The lessor brought an action of unlawful entry and detainer and the defendant relied upon the verbal lease under which he was in possession. Held, the verbal lease for one year to commence in futuro was not within the Statute of Frauds. *Clark Development Co. v. Sonnenberg*, 103 S. E. 199 (W. Va. 1920).

The English Statute of Frauds provided that parol leases for three years "from the making thereof" should be valid, but in a subsequent section it provided that "any (parol) agreement that is not to be performed within the space of one year from the making thereof" should be invalid. *Stat. 29 Car. II*, c. 3. Under this statute the English courts held valid a parol lease for three years, on the ground that the provision as to leases was an excepting and special clause to the construed independently of the provision as to parol contracts in general. *Rawlins v. Turner*, 1 Ld. Raym. 736; *Bolton v. Tomlin*, 5 A. & E. 586. The Virginia statute of 1819 reduced the period for a valid parol lease to one year, and omitted the words "from making thereof" in the provision dealing with leases, but retained them in the clause dealing with parol contracts in general. See *VA. Code*, 1819, 372. Later these words were omitted from the latter clause as well. See *VA. Code*, 1849, c. 143. In this form the statute was retained in West Virginia. See *W. VA. Const.*, 1862, *Art. XI*, § 8. The West Virginia court has construed the general clause to have the same meaning as though these words were retained. *Parkersburg Mill Co. v. Ohio River R. Co.*, 50 W. Va. 94, 40 S. E. 328. The West Virginia statute, therefore, must be considered, in effect, as being like the Virginia statute of 1819, which, in form, is the same as the statutes in most of the American states. Under such statutes the weight of authority is in accord with the principal case in adopting the English rule of construction, as stated, and in taking the view that the *infra annum* restriction is satisfied, as to leases, if only the life of the lease be no more than one year. *Young v. Dake*, 5 N. Y. 463; *Higgins v. Gager*, 65 Ark. 604, 47 S. W. 848; *Sears v. Smith*, 3 Colo. 287; *Whiting v. Ohlert*, 52 Mich. 462, 18 N. W. 219; *Sullivan v. Bryant*, 40 Okla. 80, 136 Pac. 412; *Baumgarten v. Cohn*, 141 Wis. 315, 124 N. W. 288. However, there are cases holding *contra* to this view. *Cormmelin v. Theiss*, 31 Ala. 412; *Wickson v. Monarch Cycle Co.*, 128 Cal. 156, 60 Pac. 764. The principal case comes as somewhat of a surprise in view of the previous holding of the court on the other section of
the statute. *Parkersburg Mill Co. v. Ohio River R. Co.*, *supra*. It indicates a return to a desirable strictness in limiting the field of statutes in derogation of common law rights. But *quaere*: Could not the same result have been reached on the facts of the principal case by holding that since the lease in question was terminable by the lessee at the end of six months, the contract was not one which could not possibly be performed within a year, and was, therefore, not within the Statute of Frauds? *Cf. McClanahan v. Otto-Marmet Coal etc. Co.*, 74 W. Va. 543, 82 S. E. 752.

—S. C. M.

**TELEGRAPH AND TELEPHONE COMPANIES—LIABILITY TO ADDRESSEE**

—CONDITION AGREED TO BY SENDER BINDING ON ADDRESSEE.—In an agreement between a telegraph company and the sender of a telegram there were certain stipulations limiting the former's liability. The telegram was not delivered. The addressee brought an action in tort against the telegraph company for the failure to deliver. The question was whether the conditions limiting liability were binding on the addressee. *Held*, The conditions were binding. *Dunham v. Western Union Tel. Co.*, 102 S. E. 113 (W. Va. 1920).

For a discussion of this case, see NOTES, p. 81.

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**WEST VIRGINIA BAR ASSOCIATION NOTES:**

**NEWS OF THE PROFESSION**

**BAR EXAMINATION.**—Eleven candidates took the examination for admission to the West Virginia bar held in Charleston, September 8-9, 1920. Certificates of having passed the examination were issued to the following:

Harry V. Campbell, Charleston,
Rolla Daecres Campbell, Huntington,
William Wallace Goldsmith, Beckley,
T. Seldon Jones, Huntington,
Joe P. Hatfield, Williamson,
Chas. E. Lamberd, Jr., Clarksburg,
E. B. Pennybacker, Parkersburg,
Harper Poling, Hendricks,
John V. Ray, Charleston.

**NECROLOGY.**—Judge Alston G. Dayton, U. S. District Judge, Northern District, W. Va., Philippi, died July 30, 1920; Ed. Noonchester, Williamson, died September 5, 1920; Judge E. Boyd Faulkner, Martinsburg, died September 19, 1920, and S. N. Pace,