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Judicial Termination of a Contract - Recovery for Partial Performance of An Entire Contract After Breach - Bright V. Ganas

JUDICIAL TERMINATION OF A CONTRACT—RECOVERY FOR PARTIAL PERFORMANCE OF AN ENTIRE CONTRACT AFTER BREACH—*BRIGHT V. GANAS*[1]

Plaintiff-appellee served deceased for four or five years under an oral contract whereby deceased agreed to leave him $20,000. On the death of the employer plaintiff-appellee filed suit against the executor, the defendant-appellant, declaring on the oral contract in a special count and also on the common counts. The evidence showed that deceased had repeatedly stated that he was going to leave plaintiff-appellee $20,000, that he had paid him no regular wages during his lifetime, and that while the master was dying plaintiff made improper advances to the master's wife. The lower court directed a verdict for defendant on the special count, and the jury found for the plaintiff on the common counts in the sum of $8,990. Defendant-appellant appealed. *Held,* Reversed without new trial.

[1] 189 Atl. 427 (Md. 1937).

Plaintiff-appellee has proved an express contract and cannot therefore recover on an implied contract. One term of a contract between master and servant is that the servant will be faithful and loyal. Plaintiff-appellee has breached this by his conduct toward deceased's wife and can therefore recover nothing.

The case presents two points of interest: 1. The propriety of the Court's action in effecting the servant's discharge when his master had never discharged him; 2. Whether or not a servant can recover on *quantum meruit* on an entire contract, partially performed on his part, and breached by him. These problems will be considered in inverse order. For the purpose of the entire discussion it must be conceded that making improper advances to the employer's wife is sufficient reason to justify discharge[2], and that the evidence probably justified such a ruling as a matter of law.[3]

The earlier rule undoubtedly was ". . . that one who fails to carry out his part of a contract, thus giving the other party thereto the right to prevent his further action under it, loses his right to claim anything by virtue of its provisions in his favor, and . . . cannot recover wages *pro rata* for time served by him."[4] The reason behind the rule was that the service to be performed being entire, and compensation for its completion being entire, complete performance of the service was a condition precedent to recovery of the compensation. Further the servant had no right to recover on a *quantum meruit,* for to allow him so to recover would be to allow him to reap the benefits of his own misconduct.

So, where an employee was engaged to work for one year at $120, and before the end of the term voluntarily

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[2] Atkin v. Acton, 4 C. & P. 208, 172 Eng. Rep. 673 (1830), holding that assault of employer's maid-servant with intent to ravish was cause for discharge without notice; Wood v. Barker, 2 Sask. L. 400, same, seduction of employer's daughter; Dwyer v. Cane, Adm'r., 6 La. Ann. 707 (1851), same, immoral conduct toward female slaves. On the general proposition of discharge see 18 R. C. L. 518; Dorrance v. Hoopes, 122 Md. 344, 90 Atl. 92, Ann. Cas. 1916A, 1012 (1914).

[3] Dorrance v. Hoopes, supra note 1. Whether the evidence in fact justified such a conclusion is debatable. Examination of the record discloses that the letter to his employer's wife merely stated plaintiff's great love for her and intimated that there might be a possibility of his love being reciprocated. There was no proposal of any specific future acts. The letter takes on an even more harmless aspect when we remember that the record also discloses that plaintiff had addressed an earlier and admittedly innocuous letter to the wife, which had been brought to Col. Darden's attention.

[4] 5 L. R. A. (N. S.) 524n, and cases there cited.

and without cause left his employer's service, it was held in a Massachusetts case that he could recover nothing either on the contract or on *quantum meruit,* the Court saying,[5] "The law . . . denies only to a party an advantage from his own wrong. It requires him to act justly by a faithful performance of his own engagements, before he exacts the fulfillment of dependent obligations on the part of others. It will not admit of the monstrous absurdity, that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action which he could not maintain under it."

While it is said[6] that the majority of courts now repudiate this rule, substantial support can be found for it among the earlier cases, and to some extent among the more modern ones.[7] The present majority rule, called the "modern or American rule"[8] has occurred because of the slow realization by the courts that the old rule worked too great a hardship in many cases, even though the employee was the cause of the breach. Thus Professor Mechem states:[9] "It is not every case of misconduct in this regard, however, even though sufficient to warrant the agent's discharge, which will deprive him of all claim to compensation. . . . If . . . though the agent has been negligent or has not performed according to his undertaking, his services are still of some appreciable value to the principal, over and above all damages sustained by him by reason of the default, the agent should be entitled to recover that value."

The leading case on this rule is the New Hampshire case of *Britton v. Turner.*[10] In that case the plaintiff agreed to work for defendant for the term of one year, defendant agreeing to pay for the year's labor the sum of $120. Plaintiff worked for nine months, and then left defendant's service without his consent. Plaintiff brought assumpsit for

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[5] Stark v. Parker, 2 Pick. 267, 275, 13 Am. Dec. 425, 430 (1824).

[6] 18 R. C. L. 539.

[7] Olmstead v. Beale, 19 Pick. 528 (1837); Posey v. Garth, 7 Mo. 94, 37 Am. Dec. 183 (1841); Libhart v. Wood, 1 Watts & Serg. (Pa.) 265, 37 Am. Dec. 461 (1841); Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638 (1852); Smith v. Brady, 17 N. Y. 173 (1858); Larkin v. Buck, 11 Ohio St. 561 (1860); Von Heyne v. Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524 (1903), and others.

[8] 5 L. R. A. (N. S.) 527n; 18 R. C. L. 539. There is some disagreement among the authorities, *Corpus Juris* states that the earlier rule is still the majority rule, 39 C. J. 146.

[9] I Mechem, Agency (2d Ed.) 1152, Sec. 1548.

[10] 6 N. H. 481, 26 Am. Dec. 713 (1834).

the value of his services while in defendant's employ. In an elaborate and closely argued opinion Chief Justice Parker reached the conclusion that plaintiff could recover the value of beneficial services rendered less the amount of damage caused defendant by the breach. This conclusion was based upon the argument that the earlier rule was founded upon a technicality, and that under it the employer received more by the breach of contract than he was entitled to because of the breach by the employee. Analogy was drawn to the case of a contract to build a house, where the work is done, but not in the prescribed manner, and the contractor is allowed to recover on *quantum meruit* because the other party has received the benefit of the labor and materials.[11] Admitting that it was true that there was in such a case an acceptance of the work and materials, it was argued that the contract in question was one to labor from day to day, and that the other party in reality stipulates to receive it from day to day. In other words, there is necessarily an acceptance of labor done in pursuance of the contract, though the entire amount of labor may never be completed. On this basis the court said, "If . . . a party actually receives labor and materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of the excess."[12]

The merit and equity of this decision soon made itself apparent to courts of other states. Many were unwilling to change the rule because of past decisions, but others, more willing to throw over the traces of the often unjust common law rule, adopted the conclusion of the New Hampshire court.

We come now to a consideration of the Maryland cases on the point. In the case of *Mallonee v. Duff*[13] our Court of Appeals adopted the proposition that one who enters into a contract to perform certain labor and agrees that

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[11] Maryland cases to this effect are: Meyer v. Frenkil, 113 Md. 36, 77 Atl. 369 (1910); Presbyterian Church, Etc. v. Hoopes Artificial Stone Co., 66 Md. 598, 8 Atl. 752 (1887); Watchman & Bratt v. Cook, et al., 5 G. & J. 239 (1883).

[12] Supra note 10, 6 N. H. 481, 26 Am. Dec. at 719.

[13] 72 Md. 283, 19 Atl. 708 (1890). The proposition seems to be assumed by the Court, for no authority is given in the report for the statement.

his employer may discharge him in case of drunkenness, and who is discharged for such offense, does not thereby forfeit what he has earned according to the contract price up to the time of discharge. The case could probably be distinguished on the theory that the provision for discharge was a provision for an earlier termination of the contract on the happening of a certain event, and that, the event having occurred, the contract was terminated and fully performed.

The next case of interest is *Thomas v. Cheney.*[14] In that case plaintiff had contracted for the services of a jockey and assigned his contract to defendant subject to the assent of the jockey's father. The father having refused his assent, the Court held that plaintiff could not recover on the special contract because the condition precedent had not been performed, and that he could not recover on *quantum meruit* for the services rendered by the jockey pending assent because "there can, in the nature of things, be no *implied* contract where there is an *express* contract."[15] The Court has unmistakeably adopted this doctrine, holding that where there is an express contract, recovery can be had on *quantum meruit* only if the work is fully performed and accepted by the parties, or the contract is abandoned by the parties, or by some act of the party sought to be charged, the fulfillment of the contract was prevented.[16]

Again in *Schneider v. Brewing Co.*[17] the Court in dicta affirmed the rule announced in the principal case, saying, "If the contract had been entire and indivisible both as to period of service and as to payment of compensation, the plaintiff's breach would have deprived him of any right of action for the partial performance."[18] Thus it can be seen that the Court is not, in the decision in the principal case, announcing a new rule, though it must be said that it is a harsh one.

In view of the decisions in this state holding that in actions for work and materials furnished under a contract plaintiff is not precluded from recovery by noncompletion

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[14] 114 Md. 362, 79 Atl. 590 (1911).
[15] Ibid, 114 Md. 367, 79 Atl. 592.
[16] Ibid. On the general proposition see Jenkins v. Long, 8 Md. 132 (1855); Denmead v. Coburn, 15 Md. 29 (1859); Gill v. Vogler, 52 Md. 663 (1879); Fairfax Forrest Mining and Mfg. Co. v. Chambers, 75 Md. 604, 23 Atl. 1024 (1892); Breitinger v. Heisler, 155 Md. 157, 141 Atl. 538 (1928).
[17] 136 Md. 151, 110 Atl. 218 (1910).
[18] Ibid, 136 Md. 154, 110 Atl. 219.

if there was an acceptance by the defendant,[19] it is submitted that plaintiff could have been allowed to recover in the principal case. To do so would be in effect to overrule the decisions in the three cases above cited, but would not be a disaffirmance of the rule that there can be no implied contract where there is an express one. Admittedly where the party to be charged has accepted the work and materials, he is chargeable for their reasonable worth, though plaintiff has committed a breach of contract; for to hold otherwise is to cause a forfeiture, which the law abhors. By the very nature of the contract between master and servant there must be an acceptance of the work as it is done. In other words, though the contract and compensation are both entire, the acceptance must be piece-meal. It may be urged that in the work and materials cases the party to be charged has an opportunity to reject and thus be relieved on all liability on the contract, while in service contracts the servant's partial performance does not admit of rejection. The answer to such an objection is that, while it is true that there can be rejection in the work and materials cases, when rejection occurs the contractor is left with the results of his work, which he can either sell to another or dismantle and use. By the rejection the contractor is not left with nothing as a result of his work. On the other hand to allow the employer upon breach of the contract of service to reject all services, both performed and unperformed, is to leave the servant with nothing at all, though the employer may have received great benefit from the work done.

The object of the earlier rule was to prevent the willful and voluntary breach of a contract without cause. However valid the reason may be, it must be admitted that the damages occasioned the employer by a voluntary breach without cause are in the ordinary case not proportionate to the injustice done the employee by depriving him of all compensation for his faithful performance for the major portion of the time. Conceding that the employee by his breach has discharged the employer from all obligation under the contract, the law raises an implied contract because of acceptance of the services. "Where the contract is to labor from day to day, for a certain period, the party for whom the labor is done, in truth stipulates to receive it

[19] Supra note 11. "If after work was done, though not pursuant to the contract, the party for whom it was done, accepted it, it would seem right and proper, that he should pay for it, what it is worth. This we think, justice would require, and it is believed, the principles of law do not forbid it." 5 G. & J. at 263.

from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has necessarily been an acceptance of what has been done in pursuance of the contract, and the party must have understood, when he made the contract, that there was to be such an acceptance."[20]

The conclusion is that by drawing the same analogy as was drawn in the case of *Britton v. Turner*,[21] a more just decision could have been reached, though it would have entailed overruling the *Cheney* case and the dicta in the *Schneider* case. The amount of compensation to which the plaintiff-appellee would have been entitled would have been $8,990, as found by the jury to be the reasonable worth of his services, less the amount of damages caused by the breach, in the principal case, little more than nominal.

But, even though the principle of *stare decisis* may have entailed the affirmance of the minority rule, it is submitted that the action of the court in holding the contract terminated when there had been no such action by the employer was at least questionable. While it is true that the employee's act was sufficient cause for discharge, it is also a fact that neither the employer nor his wife ever discharged him. The only mention in the principal case of the possibility of waiver is for the purpose of circumventing the point, the court saying, ". . . it cannot be assumed that the employer would not have done the thing that common decency and loyalty to his wife would have required him to do."[22] The general proposition as to waiver is stated as follows: "Whether an employer by his conduct has waived his right to object to his employee's work is a mixed question of law and fact to be submitted to the jury with proper instructions"[23] except in clear cases. While it is true that a waiver cannot ordinarily be inferred from an employer's acts where he has no knowledge of the employee's breach, it is arguable at least, that the employer's wife should have either made known the breach to her husband, or herself have discharged the employee. Conceding that the husband's physical condition made it impossible to communicate the facts to him, can it not be argued that, by the same token, the wife therefore had authority to act as his agent[24] and herself effect the dismissal.

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[20] Supra note 10, 6 N. H. 481, 26 Am. Dec. at 718.
[21] Supra note 10.
[22] 189 Atl. 427, 431.
[23] 39 C. J. 209. See also 8 L. R. A. (N. S.) 1007.
[24] Meyer v. Frenkil, 116 Md. 411, 82 Atl. 208, Ann. Cas. 1913C 875 (1911); 4 Amer. & Eng. Ency. (2d) 856.

If this be taken to be the true rule on that point, it must be admitted that either husband or wife could have and should have exercised a right of dismissal. The question which next presents itself, then, is whether there were sufficient facts to go to the jury on the question of waiver. The record shows that the breach occurred on or about the last day of August, 1933, and that the plaintiff was not told that he must leave until about November 20th, the day of the employer's funeral, at which time the contract had already terminated. The report does not show what services plaintiff performed during these two and one-half months, but whatever they were, the fact remains that his employment was continued and his services accepted from the time of breach until the termination of the contract.

Professor Mechem states the rule to be: "Where the principal undertakes to discharge because of specific acts of misconduct, he must, it is held, act with reasonable promptness after the discovery; otherwise he will be deemed to have waived or condoned them."[25] Speaking of condonation, the L. R. A. annotator says, "More especially is such an inference (of condonation) proper where the servant is retained to the end of the term."[26] In the New York case of *McGrath v. Bell*[27] the servant was retained for 12 days after knowledge of the breach and the court held the question of condonation to be one for the jury. In *Wood on Master and Servant,* it is stated[28] that prima facie there is a waiver where a delinquent servant is retained, and condonation is presumed.

On the other hand it must be conceded that the employer is not bound to discharge the employee immediately, but only within a reasonable time.[29] Under the circumstances of the principal case, then, it was at least a question for the jury as to whether there had been a waiver of the breach, i. e., whether the reasonable time for discharge had passed; and, it is submitted, the Court was in error in itself terminating the contract, especially since a jury had already shown itself to be constrained to take a more lenient view of the plaintiff's conduct.

There is, however, possible justification for the court's action if the view is taken that the wife did not have author-

[25] I Mechem, Agency (2d Ed.) 440, Sec. 611.
[26] 8 L. R. A. (N. S.) 1009.
[27] I Jones & S., (N. Y. Super. Ct.) 195.
[28] Sec. 123. See also Jones v. Vestry of Trinity Parish, 19 Fed. 59 (1883).
[29] Atlantic Compress Co. v. Young, 118 Ga. 868, 45 S. E. 677 (1903); Huntington v. Claflin, 23 N. Y. Super. Ct. (10 Bosw.) 262.

ity to discharge. In that case plaintiff is guilty of misconduct which never came to his employer's attention. If the employer had no knowledge of plaintiff's misconduct, then there can be no question of waiver; for the doctrine of waiver finds its basis in equitable estoppel.[30] In this view, if knowledge of the misconduct came to the employer for the first time after the contract had been terminated but before the employee had been paid, it might be said that the employer would be justified in refusing to pay for any of the services rendered, the contract being entire. Thus, in the principal case, the defendant-executor, who stands in the place of the employer, would be upheld in his refusal to pay the plaintiff the $20,000 which according to the contract was to be his compensation. Such a view would be reasonable in a jurisdiction allowing recovery for services rendered on a *quantum meruit*, but it is submitted that, where the proposition of the principal case is followed on this point, the Court should at least be reluctant to uphold such a view and thus deprive the employee of all compensation though he has completely performed.

Again, by drawing a distinction between a breach and misconduct justifying discharge, the action of the Court in declaring the contract terminated can be upheld. If plaintiff's conduct is regarded as misconduct justifying discharge, then the employer, when he learns of it, would have to affirmatively discharge his employee, or be held to have waived the misconduct. If, however, it be regarded as a breach of contract, and thus an act which of itself terminates the contract, the defendant-executor, standing in the place of the employer, would be justified in resisting payment on the ground of the breach. It may be stated generally, however, that misconduct is not regarded as a breach[31] in the sense used above, though courts often inadvertently disregard the distinction drawn and use the terms interchangeably. Even this weak justification does not stand, however, in the light of the Court's language, above quoted, that "it cannot be assumed that the employer would not have done the thing that common decency and loyalty to his wife would have required him to do"[32]; for the Court can mean nothing else by this language than discharge, and if the misconduct be regarded as a breach there

[30] 39 C. J. 88, note 57b.

[31] The authorities all refer to grounds of discharge, rather than to breach of contract of employment. See 18 R. C. L. 517; 39 C. J. 80.

[32] Supra note 22.

would not have been any necessity for such rationale of the Court's action in thus judicially terminating the contract.

The conclusion is that there was sufficient evidence in the case to go to the jury on the question of waiver, but that, even if justification can be found for holding the contract to be terminated, the Court should have been very reluctant to adopt such a view and thus, because of the peculiar Maryland rule refusing recovery on *quantum meruit*, deprive plaintiff of all compensation after he had rendered valuable services.