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QUASI-CONTRACTS—WAGE RIGHTS OF EMPLOYEES DURING PERIOD OF CONTRACT NEGOTIATION

The recently decided case of Martin v. Campanaro,[1] determined by the Circuit Court of Appeals, Second Circuit, is of interest in that it touches on an interesting aspect of the present-day labor problem and also because it again reviews the classification of contracts, a controversy almost as old as the law itself.

The case arose when thirty-six employes of the Suburban Bus Company, Inc., among whom was Campanaro, filed their claims for additional wages with the referee in bankruptcy, which claims were opposed by Martin, the trustee in bankruptcy of the Suburban Company. These claims were based on services rendered from May 24, 1944, to May 3, 1945. The employes had been represented by a labor union, known as Local Division 1134 of the Amalgamated Association of Street Railway and Motor Coach Employees of America, A. F. of L., which organization acted at all times as their sole bargaining representative. From 1937 until May 24, 1944, at which time the last one expired, yearly contracts fixing wages and working conditions had been made. Prior to the expiration date of the last of these contracts, the union notified the company that it desired to confer with it in regard to the conditions of a new contract. Negotiations were held until December of that year, when, no agreement having been reached, the matter was referred to the National War Labor Board. There followed hearings and recommendations by the board, culminating finally in the issuance of a "directive order," in which it recommended a pay increase of ten cents an hour to all workers to be retroactive to the date of the expiration of the last contract between the union and the company. Before its issuance, however, the bus company had become bankrupt. Between May 24, 1944, the expiration date of the last union contract, and May 3, 1945, at which time all the employes were discharged, the workers had received the same weekly salaries which had been paid them under the old contract. These wages had been paid in cash, the money being delivered in a pay envelope on which was a statement of the amount received and withheld. This was signed by each employe. On the basis of the National War Labor Board's ruling the employes put in a claim against the bankrupt for additional compensation, which was disallowed both by the referee, and on appeal, by the District Court. The District Court held that the order of the board was not legally enforceable against the bus company, but that a contract implied-in-fact had arisen from the conduct of the parties; that the terms of this contract were

[1] Martin v. Campanaro et al, In re Suburban Bus Co., Inc., (C.C.A. 2, 1946), 156 F. (2d) 127.

the same as those of the former contract, and that consequently the claimants had no right to any additional compensation. The present appeal was then brought, and the ruling of the court below was affirmed so far as the effect of the National War Labor Board's order was concerned. However, the court was of the opinion that, although the contract was implied in fact and had arisen from the conduct of the parties in the last year of the company's existence, it was a contract to pay the reasonable value of the services rendered, and therefore ordered a new hearing to determine the value of those services.

Contracts, as ordinarily classified, consist of express agreements, those implied-in-fact, and those implied-in-law, also known as quasi-contracts or constructive contracts.[2] An express contract is one the terms of which are fixed by the written or spoken words of the parties, which terms, when considered in conjunction with the law governing such agreements, define both the rights and obligations of the respective parties. An implied-in-fact contract, too, is determined by the parties' agreement, but such agreement must be shown by their actions, since the phrase assumes no formal express contract made by them.[3] If an express contract exists, an implied contract can not be set up to take its place.[4] However, there may be an express contract which contains one or more implied-in-fact terms.[5] Such an implication arises from the facts and the conduct of the parties, and fills in the gap left in the original agreement. The implied term is not necessarily what the parties actually intended to agree to, but is the reasonable conclusion to be drawn from their overt conduct and the circumstances of the case. As in the case of express contracts, the test of the contract is an objective rather than a subjective one.[6]

[2] Wickham v. Weil, 43 N.Y. 155, 17 N.Y. S. 518 (1892).

[3] Smith v. Vara, 136 Misc. 500, 241 N.Y.S. 202 at 206 (1930): "An implied contract is an actual contract, circumstantially proved—a true contract resting upon an implied promise, for which the assent of both parties is necessary; and unless they have so conducted themselves that their assent may be fairly inferred, they have not contracted."

[4] See 13 C.J. 243, and cases cited in footnote 54.

[5] An example of this situation is found in Austin v. Wohler, 5 Ill. App. 300 (1879), where a contract in writing was entered into, but nothing was said with regard to the time in which the labor and materials contracted for were to be furnished. This was held to be a contract "partly express and partly implied," the implied stipulation as to time being that time which it is supposed the parties intended or would have written into the contract if they had thought about it.

[6] The problem of the subjective and the objective tests of contract is discussed by Williston in an article, "Mutual Assent in the Formation of Contracts," in 14 Ill. L. R. 525 (May, 1919). He points out that, although we repeat over and over that mutual assent is necessary to the formation of the contract, yet the true meaning of the statement is often misconstrued. Until nearly the end of the Eighteenth Century assent was determined by almost purely external means. Thereafter for almost a hundred years, external actions became merely necessary evidence with which to prove the actual mutual assent, which actual assent was felt necessary to the existence of a true contract. However, on the basis of necessity, the courts of both England and America, and particularly

Quasi-contracts, those implied-in-law, are sometimes said not to be true contracts at all. There the obligation rises, not from the intention or consent of the parties, but from a duty imposed by the law itself. The contractural remedy of general assumpsit is available to the party injured in order that he may have the relief to which he is in justice entitled, despite the fact that no actual contract has been entered into.[7] In the case of Hertzog v. Hertzog,[8] in which the types of contracts are carefully distinguished, the court remarks:

> "But it appears in another place, 3 Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose on any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in assumpsit.
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> "It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not all necessary; for we have another well-authorized technical term exactly adapted to the office of making a true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In the one case the contract is a mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty."

Let us presume a case in which a contractor and a lot owner are involved. If the parties, either by written or by oral stipulations, reach an agreement, they are bound by an express contract. If they

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the latter, finally veered away from this theory and back to the former one. They now hold that the words and actions of the parties, objectively judged, form the standard of rights and liabilities. "The expression of mutual assent, and not the assent itself is the external element of contractual liabbility." Thus it can be seen that many cases can arise where the spoken or written word will not actually express the intent of the parties, but will, none-the-less, bind them. Similarly with an implied contract, the implication rests on the inferences which can reasonably be drawn from the conduct shown, and here again the parties may find themselves bound to a contract which they did not actually intend to make. Actions, as well as words, may have a significance of which the parties were not conscious at the time.

[7] Situations of this type are discussed by George P. Costigan, Jr., in his article, "Implied-in-Fact Contracts and Mutual Assent," in 33 Harvard L.R. 376 (January, 1920).

[8] Herzog v. Herzog, 29 Pa. 465 at 467 (1857).

agree on all particulars, except that no time is set in which the work is to be done, they may be said to have an express agreement containing an implied-in-fact term that the work should be finished in a reasonable time or at a specific time indicated by their actions and what a reasonable man would deduce from them. If the lot owner were by his actions to encourage the contractor to build the house, no expressed agreement having been reached, there could be an implied contract drawn from the actions of the parties. If there had been an express contract, but the contractor did not complete the work, he could not recover on the actual contract which he had breached. In such a case, however, the property owner would be under an obligation to pay for the value of the work done, provided that the breach was not one made in bad faith. This obligation would be a quasi-contractual one. It would arise, not because he contracted to have this type of house built for him or the house in its unfinished state, but because he has received some benefit from the work of the contractor and should be compelled in justice to pay for the benefits received.[9] This he might reduce by a counterclaim for damages due to the breach of the express agreement.

The measure of quasi-contract recovery is stated to be enrichment or benefit to the defendant. This may differ in amount from the recovery on an implied contract, where the reasonable value of the services of the plaintiff would be recovered unless there was something in the implied agreement to the contrary. However, the benefit to, or unjust enrichment of, the defendant is oftentimes considered an unfair measure of recovery. Particularly when this benefit is hard to measure, courts are inclined to fall back on the quantum meruit theory, recovery being measured by resort to any contract which the parties attempted to make or which one of them repudiated. This is criticized by Costigan, who asserts that when the court allows a contract measure of damages it is really enforcing an implied contract, regardless of what it thinks it is doing. In his opinion this borderline type of contract which contains certain quasi-contractual characteristics, but requires a contract measure of recovery in order

[9] See Pinches v. Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 At 264 (1887). Here the plaintiff contractor sued to recover for work and materials furnished in the erection of a church. Most of the deviations complained about by the defendant were due to unintentional errors on the part of the contractor, which did not, however, render the building unusable. In rendering its decision for the plaintiff, the court remarked, ". . . the weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not wilful, and the other party has availed himself of, and been benefited by, such labor and materials; and as a general rule the amount of such compensation is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work.."

to give justice to the injured party, is what he terms a no-meeting-of-the-minds, implied-in-fact contract; that is, one in which the intentions of the parties never merged in fact, but where their overt actions could lead the reasonable person to the conclusions which the court has incorporated into the contract as its terms. Naturally, if such is the case, the contract measure of damages, recovery to the plaintiff on the basis of what his services were worth, becomes the proper one.[10]

Even with these matters in mind the problem of classifying the obligation in the instant case still remains difficult. The court in rendering its decision spoke of the contract as one implied-in-fact, but in a footnote appended to the case it showed its doubt by remarking, "In the instant case it makes no difference as to the amount of recovery whether the claims be granted on a contract implied-in-fact or on a quasi-contract, but we think it was a contract of the kind described in the text."[11]

As pointed out above, if the court had determined that the contract was one implied-in-fact, the reasonable value of the plaintiffs' services would have been the proper measure of damages; whereas if it were one implied-in-law, the plaintiffs would be limited to the amount by which the defendant had been unjustly enriched. The fact that the only possible measure of the unjust enrichment would be the reasonable value of the plaintiffs' services means, at least according to Professor Costigan's theory, that this is a no-meeting-of-the-minds, implied-in-fact contract on which a contract remedy should be allowed. In his article on implied-in-fact contracts, he discusses the situation which arises when one member of a household sues another for the value of services performed, and points out, as did the court in this case, that if recovery were allowed in such a case, it would be on the contract theory of the reasonable value of the plaintiff's services, rather than the quasi-contractual measure of enrichment of the defendant, although in fact there would probably be no difference in amount between the two.[12]

It seems that the court was correct in its holding that an implied-in-fact contract had arisen from the conduct of the employer bus company and the employes who continued to work for it after the expiration of the 1943-44 contract. Therefore, the next question to be considered is a determination of the exact terms of the contract. Did the conduct of the parties lead to the conclusion that the new contract contained the same terms as the old one, or were the bus drivers working for the reasonable value of their services after May

[10] Supra, footnote 7.
[11] Campanero, In re Suburban Bus Co., Inc., 156 F (2d) 127 at 131 (1946).
[12] Supra, footnote 7.

24, 1944, when the old contract expired? Here the employer is aided by a presumption that when an employe continues to work after the original period of his employment has ended, nothing being said about changes in working hours, conditions, or wages, a new contract has been formed, the terms of which are the same as those of the preceding one. This presumption is rebuttable by evidence showing a different intention.[13]

In commenting on the effect of this presumption, the Court stated:

> "A contract implied in fact derives from the 'presumed' intention of the parties as indicated by their conduct. When an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old. Ordinarily, the existence of such a new contract is determined by the 'objective' test, i.e., whether a reasonable man would think the parties intended to make such a new binding agreement — whether they acted as if they so intended.
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> "Applying that test, as it is now applied by the New York (as well as most other) courts, no new contract to continue on the old terms came into being here. In the light of the notice of unsuccessful negotiations, the activities of the Mediation Board, the hearings before the National War Labor Board, and the wartime no-strike pledge given by organized labor — we think that a 'reasonable man' would not believe that, when these employees continued to work, while their representative, Amalgamated, was making efforts to procure revised terms, they were agreeing to work, in the interval, at old rates."[14]

Under the new Federal rules findings of fact may not be set aside unless clearly erroneous.[15] This gives an opportunity to the appellate court, which it would not have had prior to the adoption of the Code, to review and reweigh the evidence in a case where a jury has been waived.

Judge Frank, in this case, exercised his right to review, and found that the findings were not only clearly erroneous, but that "a reasonable man would not believe" the conclusions adopted by the trial court. This is even a stronger statement than is needed in order to justify the court's reversing the decision on the basis of the evidence presented.

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[13] See note in L.R.A. 1918 C, p. 706.
[14] Martin v. Campanaro, supra, at 129.
[15] Rules of Civil Procedure for the District Courts of the United States, Rule 52 (a).

Whether all would agree with the conclusion reached as to the weight and effect of the evidence is questionable. The laboring man's point of view seems to have been taken throughout, and the terms of the contract have been arrived at by a consideration of what he alone intended, or did not intend, or could be presumed to have intended. The old concept that it takes two contracting parties to form an agreement seems to have received little consideration.

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