THE PARTIAL PERFORMANCE INTEREST OF THE DEFAULTING EMPLOYEE—PART ONE

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I. INTRODUCTION

The problem of the defaulter's part performance interest is fundamental in that it brings into conflict basic doctrines underlying the Anglo-American legal system. It pits contracts against restitution, condition precedent against unjust enrichment, sanctity of the legally binding promise against legal abhorrence of the unnecessary forfeiture. The problem is basically one of evaluating conflicting interests. Few questions that have occurred so frequently and have such practical importance have at the same time created such diversity of views and have become so difficult of adequate solution.¹

Text writers, beginning with Woodward,² divide the subject as to the type of contract performance involved. Four classifications have been established: the service contract, construction contract, contract for the sale of goods, and contract for the payment of money. The first of these classifications, the service contract, is to be considered in this article. Keener³ classifies the problem on the basis of default causation, i.e., where the default is wilful or inexcusable, or performance is impossible or illegal.

Consideration will be given primarily to the “wilful” default and to contracts both valid and voidable. Distinction is drawn between the employment contract calling for the creation of an end unit product and the service-employment contract providing for continued employment

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¹ H. B. WALLACE, 2 SMITH'S LEADING CASES 8 (annotation to Cutler v. Powell, 6 T.R. 320); 43 HARV. L. REV. 647 (1930); Mulder, The Defaulting Plaintiff in North Carolina, 15 N. CAR. L. REV. 255 (1937); "The question of the right to recover compensation for services rendered in part performance of an undertaking to act for a given period or accomplish a given object, but which has been abandoned by the agent before full performance, is one of the most vexatious and difficult ones of the law."


³ KEENER, QUASI CONTRACTS Ch. IV, pp. 214-267 (1893).
for a given period, sometimes called the term-employment contract. Personal service of the employee is of prime importance in the latter classification. The relationship between employer and employee is best classified under the old common law terminology of master and servant, although the term today does not carry the same connotation as in earlier days. The servant can properly be defined as one who is employed to render personal service to his employer, other than in the pursuit of an independent calling, and who in such services remains entirely under the control and direction of the employer, denoted his master.  

Distinction must also be drawn between contracts for services and those for work and labor. Where one party employs another to do work, the contract may be one or the other. If the employer during the progress of the work not only directs the employees as to the work to be done, but also controls the manner of performance, the contract is for services. If the employee exercises his employment independently of his employer, the contract is for work and labor. The present article is limited to a consideration of the service contract.

Within this framework is included a large number of judicial decisions wherein the employee abandons performance after having conferred sufficient benefit in the form of partial performance of the service contract so as to exceed the probable monetary damage caused the employer by the employee’s breach. When the employee defaults, part of the conferred performance equal to the monetary damages suffered must be sacrificed by the employee. The employee should never be permitted intentionally to breach his valid service contract and still receive full compensation for his completed performance regardless of the damage caused the employer by the default. The controversy has never involved this portion of the employee’s performance. Damages resulting from the breach are granted whether the employer initiate the suit or set up damages as a defense to the defaulting employee’s suit. The issue that has caused such controversy is whether the employee should have any interest in the value of the executed part performance that exceeds the amount of monetary damages caused by his voluntarily abandoning performance. This distinction between damage-part-performance, and excess-benefit part-performance has repeatedly been made in text commentaries and law review articles. Many of the earlier decisions, however, failed to comprehend this distinction fully and refused to allow recovery to the defaulter. The part performance interest was not separated into its two distinct components, and, as a result, unjust enrichment of the employer was not considered.

Fault causation of the employee’s breach has influenced the court in

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4 Definition of master and servant used in section 3000 of California Code (1953).
its attitude toward the partial performance interest in direct relation to the extent that the reason for breach can be placed upon the employee. Judicial opinion began to relax when fault causation could not be placed upon either employer or employee, e.g., because of impossibility or frustration of purpose, or had to be equally placed upon both, e.g., because of illegality or mutual mistake. It became inevitable that the conflict would have to be evaluated and determined at the level of the intentional default. Although there has been considerable appellate litigation at the intentional default level, the problem has had a turbulent history, gradually changing with the change in the employer-employee relationship. An understanding of the judicial attitude toward the employee’s performance interest necessitates an understanding of the social attitude and general legal position of the employee prior to the time that the present problem was first considered in reported judicial decision.

II. HISTORICAL BACKGROUND

The judicial history of the defaulting employee in the contract for a definite term is a relatively short one, beginning in England and the United States early in the nineteenth century. A proper evaluation of these early decisions requires an understanding of the socio-economic relationship between master and servant during the preceding century.

The dearth of appellate judicial opinion during the eighteenth century does not stem from the fact that there was greater probability of the employee completing his promised performance than his fellowemployee of the subsequent century. The probable influence was the social attitude toward the master-servant relationship during this period and a corresponding reluctance on the part of the employee to test his claim for benefit conferred.

Adam Smith expressed the view that the common law of England during the eighteenth century discriminated against the employee.5 Holdsworth disputes this point, yet agrees that there was legislative discrimination.6

A series of statutes were passed during the eighteenth century to suppress combinations or alliances of men in specified trades. In 1720, combinations of journeymen tailors in London who sought unity in order to advance their wages or lessen their usual hours of work were declared illegal by statute and were punishable by imprisonment. Hours of work and rates of wages were set and fixed; power was allotted to quarter sessions to alter the rate of wages and the hours of work; and, finally, penalties were prescribed for master or servant who gave or received higher wages than specified.7 Imprisonment for combinations

7 7 George I St. 1.c. 13, §1.
was extended to trades of wool combers, weavers, framework knitters and stocking-makers; penalties were imposed for spoiling work, threatening a master\textsuperscript{8} and for terminating work in breach of contract.\textsuperscript{9} There was little inducement which would encourage an employee attempting to litigate a claim for the value of his part performance in excess of damages caused by the breach. In 1749, legislative enactment extended the scope of the above statutes to include a large variety of additional industries, with added provisions dealing with assorted abuses and frauds committed by workmen in these industries.\textsuperscript{10} Statutes were enacted in 1777 against associated journeymen hatters, including penalties for stopping work in breach of contract.\textsuperscript{11}

Aimed at specific trades, the purpose of these numerous enactments was less to regulate employees and more to suppress combinations of various tradesmen. The climate of legislative regulation in England, nevertheless, was altering. With the spread of the capitalistic organization of industry and the growing prevalence of the factory system, the economic thesis that the state should interfere minimally with industrial relations gathered force. Adam Smith's \textit{Wealth of Nations}, published in 1776, advocated liberty of the individual and the belief that the end result would be economic improvement. The wealth of a nation could best be attained by allowing freedom to each individual to pursue his trade rather than restrictive legislation designed to secure prosperity. \textit{Laissez-faire}, and the working of natural economic laws, would do the rest. Smith criticized all commercial and industrial laws of his day. The manufacturers of England at this time controlled the legislature and strove to abolish all regulations governing the relations between master and servant. The manufacturer sought freedom to conduct his business as he pleased. He saw any attempt to regulate wages as ill advised, impossible of success and as an attempt to alter one of nature's physical laws.\textsuperscript{12} In such a climate, it became apparent to the working classes that appeals to Parliament were useless. Petitions to secure a living wage and fair industrial conditions were rejected. Recourse to the courts provided no encouragement. In 1802, the weavers of the West of England combined with the Yorkshire weavers and appointed an attorney to prosecute employers who infringed the trade laws. The courts were asked to enforce their rights based upon then existing statutes. Upon the initiation of this suit, Parliament hastily passed an Act suspending the statute upon which the weavers relied. The Act was passed to put an end to the prosecution of the weavers' employers.\textsuperscript{13}

\textsuperscript{8} 12 George I c. 34, §§1,6,8.
\textsuperscript{9} Ibid. §2.
\textsuperscript{10} 22 George II c. 27, §§1,2,7,12.
\textsuperscript{11} 17 George III c. 55, §3.
\textsuperscript{12} 11 HOLDSWORTH, HISTORY OF ENGLISH LAW 499 (1938).
\textsuperscript{13} Ibid. 499, Note 2; WEBB, HISTORY OF TRADE UNIONISM 57-60; 3 CUNNINGHAM, INDUSTRY AND COMMERCE 635-6.
Denied assistance from either Parliament or the English courts, the characteristic law abiding instinct of the English during the seventeenth and eighteenth centuries began to diminish in the laboring class, and alliance of workers seeming to protect their own interests became more common. There was almost a complete abandonment of any attempt to bring the relations of master and servant under any effective legal control. Disputes arising between master and servant were withdrawn from the arbitrations of the law and instead settled by the effective forces at the disposal of the contending parties. The *laissez-faire* attitude of Parliament resulted in violation by the working man of statutes against combinations, and these violations in turn prompted Parliament to enact even sterner combination statutes. Finally in 1799 and 1800, the first "general combination" acts were passed. These were fundamentally the same as the earlier 18th century combination acts, making all contracts between workmen entered into for the purpose of obtaining advanced wages, or decreased hours of work, or regulation of the quantity of work, illegal. The formation of such a contract was a criminal offense punishable with imprisonment. The basic difference, however, is that these statutes governed the entire working class in England, while the earlier combination acts related only to specific trades. These combination acts on paper were applicable to both master and working-man alike, but were never interpreted by the magistrates as applicable to the master. The masters combined freely, and in no single instance were they punished. The disdainful attitude of the employer toward his workers was surpassed only by that of the magistrate who refused to enforce legislation that was obnoxious to the masters. This flaunting of the law is evidenced by the frank admissions of the magistrates, who, for the most part, preferred to presume that if the master would not obey the law, nothing could be done to enforce obedience. Hammond even cites examples wherein, the law having been violated by the master, the *employee* was sent to prison by the magistrate because of over-insistence that the magistrate enforce the law against his employer.

In addition to the "combination acts" which were predominantly eighteenth century enactments, there also existed a second set of enactments that were enforced during the eighteenth century, but which had been in effect since a much earlier date, and were directed specifically at the regulation of the working class.

The earliest of these is the Statute of Labourers, passed in 1349, the direct consequence of the Black Death of the same year. The Black Death had wiped out over half of the population of England, hence the

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14 39 George III c.81.
15 39, 40 George III c. 106.
Landlords could secure neither tenants nor labor, and masters could not obtain artificers. Laborers of all classifications found themselves in a position to exact the wages they demanded. To alleviate this situation, the Statute of Labourers was passed containing the following basic principles: (1) all persons covered by the statute (and this included many types of laborers and workmen) and able to work, must do so; (2) these must work at a reasonable rate; (3) failure to accept a reasonable rate of pay was a criminal offense and a writ of trespass partaking both of civil and criminal character could be taken against a servant who left his master's service, as well as against the person who enticed him away. The old order, before the Black Death, based upon customs and by-laws of manors, borroughs and guilds, viewed the relationship of master and servant as a status and regulated in accordingly. This old order was rapidly melting away and the fourteenth century legislature, in enacting the Statute of Labourers, acknowledged that the relationship between master and servant had changed to one of contractual agreement. It was desired, however, that the relationship should preserve some of the characteristics of former status. This was indicated by the statutes themselves and by the manner in which they were interpreted by the courts. An agreement by a workman to serve his employer was an executory contract and was unenforceable before the growth of the action of assumpsit at common law. However, when such contract was coupled with a parol retainer by the employer which complied with statutory requirements, the employment contract was enforceable against even an infant. The retainer under the statutes differed from ordinary contracts in that it gave to the master remedies for breach of contract that were absolutely different from those available in the case of any other contract. By use of the retainer he could use force to capture the servant who departed or who, having been retained, never entered the service. In addition, the retainer gave him rights against other masters who persuaded the servant to depart, or did not give him up when required to do so. The employment contract of the fourteenth and fifteenth centuries can be compared to the marriage contract in that both were contractual in origin, but the agreement created a status of a particular kind. The rights and duties in both cases were fixed to a large extent by law rather than by the agreement of the parties. Both Putman and Holdsworth feel that both the legis-

17 Register ff. 189, 190 and 23 Edward III, c.2.
18 Putman, The Enforcement of the Statutes of Labourers, Part II, Chapter 2. In the proceedings before the central courts, cases turning on breach of contract by the servant, or on procuring breach of contract by another were most frequent.
19 Ibid.; 2 Holdsworth, History of English Law 462 note 1; p. 463; "It was felt and felt wisely that the progress from status to contract could not be made at one bound." At p. 471, "... it will be clear that the view taken by the medieval state as to the proper relationship of the law to trade was so
lative view in enacting and the judicial attitude in interpreting these statutes in such manner as to carry forward into the employment contract many of the incidents of villeinage status were reasonable both for the fourteenth century and long thereafter.

A span of two hundred years following passage of the Statute of Labourers in 1349 saw little change in the legal position of the laborer. During the Tudor period there were some changes, but they were primarily modifications of details in the medieval statutes. In 1562-3 the whole legislation was reconsidered, and the Statute of Apprentices of Artificers was passed. It held that all persons within certain categories defined by the Statute and able to work must do so. But if the workman were not free to decline to serve, then the employer was not wholly free to dismiss him as he pleased. The worker's wages were also established, and he was not permitted more than a reasonable rate of wages. At this early date the reasonableness of wages was determined by the price of necessaries. Wage rates varied based upon a sliding scale related to the price of necessaries.

The above Act, passed during the period of Elizabeth's reign, also prescribed that in a large number of specified employments the hiring must be for one year, and that a quarter's notice must be given to terminate the contract. It has been suggested that it was this provision which gave rise to the presumption existing at one time that an indefinite hiring was a yearly hiring. Just as it had been under the earlier acts, it was an offense for the laborer to depart wrongfully from his employment, refuse to work at the statutory rates, or to receive wages in excess of those prescribed by the statute.

To Webb the intolerable oppression which these laws enabled unscrupulous employers to commit were, by the beginning of the nineteenth century, scarcely inferior to that brought about by the combination laws:

"If an employer broke a contract of service even wilfully and without excuse he was liable only to be sued for damages, or in the case of wages under £ 10 to be summoned before a court of summary jurisdiction, which could order payment of the amount due. The workman, on the other hand, who wilfully broke his

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20 II Henry VII, c. 22 repealed by 12 Henry VII c. 3, 4. Henry VIII c. 5; 6 Henry VIII c. 3; 7 Henry VII c. 5.
21 5 Eliz. c. 4 (1563).
22 Boke of Justyces of 1510; New Boke of 1538; 13 Ric.II st. 1. 1. 8; 1 James I, c. 6; 4 Holdsworth, History of English Law 382.
23 5 Eliz. c. 4, §§2 and 4.
24 Coke on Litt. §42b; Fawcett v. Cash, 5 B. & A. 904 (1834); 4 Holdsworth, History of English Law 383, note 1.
25 5 Eliz. c. 4, §§4, 6, 13. (1563).
contract of service either by absenting himself from his employment, or by leaving his work, was liable to be proceeded against for a criminal offence and punished by three months imprisonment. This inequality of treatment was moreover aggravated by various other anomalies. It followed by the general law of evidence that while a master sued by a servant could be witness in his own favor, the servant prosecuted by his employer could not give evidence on his own behalf, and it frequently happened that no other evidence than the employer's could be produced. It was in the power of a single justice of the peace on an information on oath, to issue a warrant for the summary arrest of the workman, who thus found himself when a dispute occurred suddenly seized, even in his bed, and hailed to prison at the discretion of the magistrate, who was himself in many cases an employer of labor in addition to being magistrate. The case was heard before a single justice of the peace and might take place at his private house. The only punishment that could be inflicted was imprisonment, the law not allowing alternatives of a fine or the payment of damages. From the decision of the justice, however arbitrary, there was no appeal. The sentence of imprisonment was not a discharge of the debt, so the workman was liable to be imprisoned over and over again for the same breach of contract."

Holdsworth maintains that such criticism of the Elizabethan legislation and judiciary is unfair in that the critic assesses the manner in which the laws of the seventeenth and eighteenth century affected the workman, without evaluating the effect of these laws upon the employer. He concedes the difference in remedy applied when the employee rather than the employer breached the contract, but justifies the difference on the ground that it was to the interest of the State that the contracts be kept, and further that a pecuniary penalty and civil action for damages were useless remedies against a man with no estate. Other more effective remedies for performance of the contract, including forced imprisonment, had to be provided. "The poor man because he is poor cannot be allowed to break his contract as he pleases"... "I consider, therefore, that the legislation of this period on the subject of employer and workman was a well thought out scheme, logically connected with the legislation on the cognate subjects of the food supply and prices." Although the employee was legally free to contract, his bargaining power was ineffective. Market forces, custom, public opinion, collective bargaining and legislation played far more important roles than personal negotiation in dictating contract terms. By the time of the establishment of the free labor contract in England, the legally liberated worker, who was forbidden to combine with his fellows, often had to face an employer with whose economic power he could not cope.

27 Ibid., at 249.
28 4 Holdsworth, History of English Law 386.
29 Ibid., at 387.
The worker simply offered his labor, which must be sold both because it was highly perishable and because he had no other means of existence. The employer possessed capital that was more lasting and that increased his power of resistance, and he generally had an oversupply of workers from which to choose. In the eighteenth century, empirical individualism became rational with Adam Smith's Wealth of Nations, and the businessman's subconscious ideal of laisse-faire became articulate as a concrete economic philosophy.

Blackstone, lecturing at Oxford in 1753, set forth his four classifications of servants. As to the menial or domestic servant he relied on Coke and natural justice for his view that if the servant's hiring is general, without any particular time limit, the law should construe the contract as a hiring for a year. So construed, the employee must work the entire year or collect nothing. Regarding the laborer hired by the day or week who does not live as part of the employer's family, Blackstone expressed the view that the statute of Elizabeth (5 Eliz. c. 4 and Geo. III c.26) "have many very good regulations" including the provisions punishing those who leave or desert their prescribed work.

He granted that the apprentice system, whereby the trade laborer must serve seven years as an apprentice before he had an exclusive right to exercise his trade in England, had been looked upon as both a hard and as a beneficial law. At the time Blackstone wrote, several attempts had already been made to repeal the apprenticeship law, but success did not come until 1814, after Blackstone's death.

Schoulder, referring to Blackstone as authority, points out that while fines and imprisonment were the punishment of the employed, the employer suffered rarely for his own misconduct beyond rescission of the contract.

III. EIGHTEENTH CENTURY JUDICIAL DECISIONS

The early English cases are related to the growth of assumpsit. The branches of special and indebitatus assumpsit became distinct in the course of the seventeenth century, and practical consequences were
drawn from these differences. In 1696, it had been held that *indebitatus assumpsit* would not lie on an executory contract where a promise was consideration for a promise. The action would lie only where a debt had been created. Thus, alleging and proving performance was essential where performance by one party was a condition precedent to payment by the other. Neither debt nor *indebitatus assumpsit* were available because the debt had not been incurred. This led to the famous case of *Countess of Plymouth v. Throgmorton*, in 1688, an employment for the collection of rents in exchange for a promise to pay £100 a year. The employer died after there had been performance for three quarters of a year, and it was held that there could be no recovery from the deceased's executor by action of debt. He could only have recovered the value of his services if the testator had wrongfully broken the contract. An implied promise was necessary for recovery, and this could not be created by judicial decision as long as the special contract remained in existence.

The principal eighteenth century case involving partial performance of a service contract is *Cutler v. Powell*. Defendant promised payment of thirty guineas to a seaman if he "proceeded, continued and did his duty" as second mate on a voyage from Jamaica to Liverpool. The sailor died on the voyage, and it was held that his representative could not recover on a *quantum meruit*. By this time, at the close of the eighteenth century, Lord Kenyon, in discussing the rule that where the parties have come to an express contractual agreement none can be implied, commented that "it has prevailed so long as to be reduced to an axiom in the law." Although *Cutler v. Powell* influenced the early American service contract default decisions, it should be distinguished in that it, as well as the earlier *Countess of Plymouth* decision, dealt with impossibility of performance resulting from death, rather than intentional breach of performance. *Cutler v. Powell* is also, basically, an aleatory contract with assumed risk of failure to perform. This distinction, however, was often overlooked by the early American decisions dealing with intentional default of the employee. Emphasis was placed on similarities rather than fundamental distinctions.

**IV. Early Nineteenth Century Decisions in the United States**

The precise issue of the term employee's partial performance interest, when the contract default resulted from abandonment of per-
formance, first arose shortly after the beginning of the nineteenth century. The initial group of cases originated within the state of New York. The initial case of M'Millian v. Vanderlip\(^{42}\) in 1815 involved employment in a spinning mill. Justice Spencer found the contract entire by refusing to recognize divisibility based on pay by the completed run and based his decision on the English case of Waddington v. Oliver,\(^{43}\) involving the sale of goods rather than a service employment contract. To Justice Spencer, "the rule contended for held out temptations to men to violate their contracts." The year 1816 was significant in that a series of New York decisions helped crystalize the rule against the defaulting service contract employee. A \textit{per curiam} decision of the New York court\(^{44}\) allowed recovery on a note given by the employer in settlement of the employee's partially performed services, but hastened to point out that the contract being entire, in the absence of the note there would have been no recovery. Spencer's \textit{M'Millian} decision was cited as authority for the court's \textit{obiter dictum}. Justice Spencer then denied recovery for part performance of a contract involving the clearing and fencing of land;\(^{45}\) and later in the same year Justice Van Nees used Spencer's two earlier decisions as his reason for refusing recovery to a seaman who had refused to help unload certain cargo at its place of destination.\(^{46}\)

Several decisions were handed down at the appellate level in New York during the 1820's,\(^{47}\) two by Justice Savage.\(^{48}\) Savage, using the \textit{M' Millan} case as authority, clearly brought out the unbending severity of the forfeiture rule in 1827, when he refused any relief to an employee who had completed ten and one half months' employment out of a twelve month contract. In Savage's second decision, the employer had ordered his employee to water cattle on Sunday, which the employee refused to do. The employer swore at him, and as a result the employee quit the employment. Recovery was again denied; but the case is of interest in that as \textit{obiter dicta} Savage, while pointing out that it was unnecessary for the decision, nevertheless questioned whether or

\(^{42}\) 12 Johns. 165 (N.Y. 1815).
\(^{43}\) 2 B. & P. (N.R.) 61; 127 Eng. Rep. 533 (1805). Seller agreed to deliver 100 bags of hops at a stated price by a certain time. Having delivered part of hops, he commenced an action for the price thereof before the expiration of the time for delivery of the balance. \textit{Held}, the action could not be maintained as the contract was entire.
\(^{44}\) Thorpe v. White, 13 Johns. 53 (N.Y. 1816).
\(^{45}\) Jennings v. Camp, 13 Johns. 94 (N.Y. 1816). "It seems to be that the mere statement of the case shows the illegality and injustice of the claim." (Justice Spencer). Note that this is not a term employment contract.
\(^{46}\) Webb v. Duckingfield, 13 Johns. 390 (N.Y. 1816). The contract in this case also contained a forfeiture clause.
\(^{47}\) Reab v. Moor, 19 Johns. 337 (N.Y. 1812) (Emphasis primarily on the issue of divisibility); Lantry v. Parks, 8 Cowen 63 (1827); Marsh v. Rulesson, 1 Wend. 514 (N.Y. 1828).
\(^{48}\) Lantry v. Parks, \textit{supra} note 47; Marsh v. Rulesson, \textit{supra} note 47.
not the employer would have been justified in turning away the employee without compensation if he had refused to obey his commands. Savage felt that the employer would be so justified. This is the first employment case in the United States to indicate a refusal of any recovery for part performance to the employee discharged for cause. It should be noted that prior to Savage's expression in the Marsh case, the few decisions in the United States involving employee's discharge for cause had allowed recovery for the value of the part performance in excess of damages resulting from the breach. These cases, however, all originated in the South and arose from an entirely different employer-employee relationship. The few English decisions prior to 1827 involving employees discharged for cause had refused any recovery.

The early nineteenth century also saw decisions in Louisiana, Alabama and Massachusetts. The decisions in all three states denied recovery to the defaulting employee. The Louisiana decision, in 1819, involved the manager of a newspaper who terminated his work when the owner published an article advocating monarchical power. The court held that the manager possessed the right to refuse to print the article, but could not publish it and then resign his employment. Although not emphasized by the court, the employment contract provided that the manager's compensation would be an equal division of the newspaper's profits. A distinction has at times been drawn when payment for the employee's services is to be computed based upon the employee's efforts for the entire employment term. The same distinction has been suggested when payment for services is to be in land or chattels rather than money. In the Alabama decision, the court realized that the rigid approach to the problem demanded a forfeiture of the contract performance, but felt that this was justified when the deficiency was comparatively small "in order to preserve the inviolability

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49 Grafton v. Collins, 3 Mart. (N.S.) 156 (La. 1824); McClure v. Pyatt, 4 McCord 26 (S.C. 1826); Byrd v. Boyd, 4 McCord 246 (S.C. 1827); Eaken v. Harrison, 4 McCord 249 (S.C. 1827). Note that the employee in each of the above cases was a plantation overseer. (A detailed discussion of the partial performance interest of the employee discharged for cause is beyond the scope of the present article, but is of sufficient importance to deserve special consideration).


51 Mortmain v. Lafaux, 6 Mart. 654 (La. 1819); Wright v. Turner, 1 Stewart 29 (Ala. 1827); Shaw v. Wallace, 2 Stew. & P. 193 (Ala. 1832).

52 WILLISTON ON CONTRACTS §1477, pp. 4129-30: "There are several situations in which it seems desirable to retain the stricter view, for instance, where by the terms of the contract the employee's right to compensation upon completion is not absolute but dependent upon the achievement of a specified result or upon the success of the particular enterprise or that a promise of a bonus at the end of a definite period. Another situation is where the return promised is not for money but for land or chattels."
of contracts, and because of the impossibility of limiting innovations upon them.”

The six New York decisions between 1815 and 1828 set the pattern of many judicial decisions to follow; however, it was the Massachusetts decision, *Stark v. Parker,* written by Justice Lincoln in 1824, that first adequately analyzed the issues involved. Plaintiff's counsel foresaw the reasoning that would have to be specifically evaluated and induced the Massachusetts Supreme Court to come to task with the problems involved in the defaulting employee cases. Plaintiff's arguments are basically those adopted ten years later by the New Hampshire court in the famous case of *Britton v. Turner.* It was suggested that the part performance interest of the defaulting employee included both a damage element and an enrichment factor. The remedy proposed by plaintiff was a return of the enrichment resulting from part performance over and above damages suffered by default. This is the remedy adopted by *Britton v. Turner.* Although the laborer expected to perform, it was argued, such performance was not a condition precedent to receiving payment for the partial performance over damages. The court however clung to condition precedent. It was also suggested that plaintiff would not generally be disposed to breach his contract because he would still be subject to payment of compensatory damages, while the opposite view gave the employer the opportunity to subtly force the employee to leave near the end of his performance, thus forfeiting all benefit conferred. This was also rejected with the suggestion that “to say that this is not sufficient protection ... is to require no less than the law should presume what can never legally be established.” It is submitted, however, that plaintiff was not proposing evidentiary proof changes in order to protect the employee against the forfeiture rule, but a modification of the forfeiture rule so that these difficult problems of proof of pressure would not have to be encountered. Finally, the apparent discrepancy between default decisions involving sale of goods and service-employment contracts was pointed out to the Court, but this problem the Court passed by without comment and instead lashed out with the comment that “nothing can be more unreasonable than that a man who deliberately and wantonly violates an agreement should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act. . .” (emphasis added). The question might be raised as to whether subjugation to compensatory damages for

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53 Shaw v. Wallace, supra note 51.
54 2 Pick. 267 (Mass. 1824).
55 6 N.H. 481 (1834).
contract breach is permitting an indemnity from the consequences of the act. The arguments that prevailed in Britton v. Turner led Justice Lincoln to comment that such relief would be a "monstrous absurdity." Thus within the short period of nine years the rule denying any relief to the partially performing employee became well established in the two key states of New York and Massachusetts.

V. THE BRITTON V. TURNER DECISION

In 1834, Justice Parker of the New Hampshire Supreme Court handed down the now famous decision that has aroused such controversy. Arriving only nineteen years after the first American appellate case on the issue, reasoned in detail, and fortified by the strong judicial reluctance of many courts toward creating unnecessary forfeiture, the decision seemed to have strong possibilities of influencing decisions in the many states that had not yet come to grips at the appellate level with the problem.

Parker recognized and sought to rectify the divergence within decisions involving breach in different types of employment contracts. There seemed to be no justifiable reason for permitting the defaulting seller of goods to recover for his part performance and denying equal relief to the service contract employee. The longer the employee served, the more inequitable the forfeiture rule became at the time of breach. Woodward, writing in the early twentieth century, thought that a "wilful" defaulter should not be permitted to point out such inequity. When the employee's hands were soiled by wilful wrongdoing, he was alleged to be hardly in a position seriously to complain of the inequity. "Wilfulness" to Woodward thereby became the justification for recognition of an acknowledged inequitable rule.

Woodward placed his distinction on the basis of the "wilfulness" of the default. The term "wilful" is both illusive and variable depending upon the fact situation involved. It is a term rarely used when relief is allowed to the defaulter; while, in contrast, almost invariably the court's inclusion of the term within its decision forecasts a denial of

58 Supra note 54. "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."

59 Phelps v. Sheldon, 13 Pick. 50 (Mass. 1832) reaffirming the Massachusetts view (Stark v. Parker) but only as obiter dicta—(the defaulter having received full compensation for his part performance prior to default).

60 Supra note 55, pp. 489-90; Supra note 57, p. 36.

61 "Clearly, the wilful contract breaker is not to be given the right to recover, merely because a denial of such right may cause him greater loss if he performs part of his engagement than if he disregards it from the beginning, or because such denial may result in a greater enrichment of the defendant in case of abandonment after part performance than in case of complete performance of the engagement." Woodward, The Law of Quasi Contract §168, p. 272 (1913).
INTEREST OF DEFAULTING EMPLOYEE

recovery to the defaulting employee. Such use of the term indicates to Corbin "a childlike faith in the existence of a plain and obvious line between the good and the bad, between unfortunate virtue and unfor-giveable sin." The Restatement of Contracts also suggests the use of the term "wilful" as the test of recovery. The suggestion is that a distinction be drawn between knowingly and wilfully done acts. It is not wilful "if it is the result of mere negligence, or error of judgment, or mistake of fact or law, or is due to hardship, insolvency, or circumstances that tend appreciably towards moral justification." Terms such as hardship and error of judgment are almost as illusive as the terms they attempt to define, and few courts have accepted the dividing line between wilful and non-wilful breach as being established by "moral justification" for the breach. The extreme cases on either side give little trouble. As usual, it is the fact situations that shade towards the center that need more positive judicial assistance for evaluation of the rights of the contracting parties.

The alleged injustice caused by enrichment in excess of damages resulting from the majority rule and the difference in judicial attitude towards the defaulting employee as compared with the defaulting vendee are both also justified by Woodward when the employee's breach is "wilful".

Justice Parker justified his decision in Britton v. Turner as the basis of "general community understanding" and the theory of implied acceptance. The first of these has found little acceptance in the United States in employment breach cases. There was no general usage in the community calling for the employer to pay his defaulting employee for the period of performed work. Implied acceptance was based upon Parker's suggestion that the employer "in truth stipulates to receive it (labor) from day to day as it is performed... and the party must have understood when he made the contract that there was to be such acceptance." The fact that intangible service is incapable of return made no difference "for it has still been received by his assent." This reasoning may also be doubted, for the nineteenth century employer never subjectively thought in terms of day to day acceptance of part performance, and certainly not when the benefit was intangible. Indebitatus assumpsit necessitates the finding of an implied promise to pay, and this underlies Justice Parker's theory of implied acceptance. It is implied by the Court for judicial reasons, and not by the employer on the basis of contractual consent. It may, however, be argued that the acceptance

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62 Corbin on Contracts §1123, pp. 545-6 (1951).
63 Restatement, Contracts §357 (1); Comment on sub. 1, paragraph (e), p. 626.
64 "As to this argument it need only to be said that the analogy relied upon by the court [Britton v. Turner] fails utterly, in that none of the cases of building and sales contracts cited in the opinion appears to be a case of wilful breach. And the distinction while very frequently overlooked is a vital one." Supra note 61, p. 273, §170.
indicates a satisfaction of a desired want and thereby falls under the broader definition of the term "benefit" creating a quasi-contractual obligation for unjust enrichment. Professor Patterson feels that this is apparently the assumption used in allowing recovery to the defaulting seller of goods under section 44 of the Uniform Sales Act.\textsuperscript{65}

VI. THE INFLUENCE OF BRITTON \textit{v. TURNER} IN BREACH OF EMPLOYMENT CONTRACT DECISIONS

At the time that \textit{Britton v. Turner} was handed down in 1834, only New York and Massachusetts had established a clear pattern of cases refusing all relief to the employee terminating his employment without "justifiable" cause. In most jurisdictions, the matter was still to be presented to the courts for initial consideration. How much influence did the \textit{Britton} case have upon these decisions? Consideration must first be given to its influence during the first twenty-five years after 1834. In this period before 1860 it has been suggested that the decision had considerable effect and that recovery was allowed to the defaulting employee in a number of jurisdictions. Only the term service employment contract (the type of fact situation involved in the \textit{Britton v. Turner} decision) is presently under consideration. A study of these cases reveals that the influence of \textit{Britton v. Turner} may have been overrated. The following cases granted relief to the defaulter during this period, and many of them referred to the \textit{Britton} decision. Included within this category are cases from Vermont, in which the default was in defective work rather than abandonment after part performance,\textsuperscript{66} a New Hampshire ruling in which the damages from the breach equaled the value of services performed,\textsuperscript{67} from Louisiana, where the employer rather than the employed school teacher may have actually been the breaching party,\textsuperscript{68} an Iowa decision similar to the earlier Vermont case in that breach after part performance was not involved,\textsuperscript{69} and two Indiana decisions that were actually only \textit{obiter dicta} approval by the court of the \textit{Britton v. Turner} decision.\textsuperscript{70} It was actually not until 1859, twenty five years after \textit{Britton v. Turner}, that the first case closely resembling the facts of the \textit{Britton} case applied the same remedy for a defaulting employee and used similar reasoning in so doing.\textsuperscript{71}

\textsuperscript{65} See \textit{Acts, Recommendation and Study Relating to Recovery for Benefits Conferred by Party in Default Under Contract}, Law Revision Commission of New York (1942), at p. 35, for Professor Patterson's expression of this same view.

\textsuperscript{66} Dyer v. Jones, 8 Vt. 205 (1836).

\textsuperscript{67} Elliott v. Health, 14 N.H. 131 (1843).

\textsuperscript{68} Lefrançois v. Charbonnet, 5 Rob. 185 (La. 1843). "The defendant's failure to pay her either quarterly or by the year released her from the contract." There was also an indication that employer breached contract by demanding that she teach additional children not required by her contract.

\textsuperscript{69} Davis v. Fish, 1 G. Green 466 (Iowa 1848).

\textsuperscript{70} Epperly v. Bailey, 3 Ind. 73 (1851); Ricks v. Yates, 5 Ind. 115 (1854).

\textsuperscript{71} Pixler v. Nichols, 8 Iowa 106 (1859).
During this same quarter century, in addition to decisions in New York and Massachusetts, redress was denied to the defaulting service contract employee in eleven jurisdictions, including four decisions in Alabama, three in Vermont and two each in Massachusetts, Illinois and Missouri. It is clear, therefore, that the great majority of decisions during this period did not accept the proposed remedy of Britton v. Turner. It was adopted by the Iowa Supreme Court in 1859, and again nineteen years later in Kansas. Parsons, in writing his text on contracts, expressed the view that the law on contract breach cases was changing; and Justice Vallentine, in allowing recovery to a defaulting service contract employee, failed to consider Parson’s footnote in which he commented, "We are not aware that there are any cases upon contracts for service fully sustaining the proposition in the text except the celebrated one of Britton v. Turner. . . . The courts of other states have thus far shown little disposition to adopt the views of that learned judge." Parsons failed to include the Iowa decision of Pixler v. Nichols, but this would not justifying the Kansas view that "many cases" had changed the law of contract default "in all of its various aspects". Four earlier Iowa decisions are also cited, but none of them involve service employment contracts.

Two Nebraska decisions in 1880 and 1902, under the misappre-

72 ALABAMA: Pettigrew v. Bishop, 3 Ala. 441 (1842) (overseer case), relies on Cutler v. Powell as authority; Norris v. Moore, 3 Ala. 676 (1842); Givan v. Dailey’s Admr., Ala. 1842; (condition precedent); Nesbitt v. Drew, 17 Ala. 379 (1850) (slaves, entire contract, condition precedent).


74 GEORGIA: Henderson v. Stiles, 14 Ga. 135 (1853), seems to make no distinc- tion between abandonment and discharge for cause.

75 ILLINOIS: Eldridge v. Rowe, 2 Gilm. 91, 7 Ill. 91 (1845) (Similar to Britton v. Turner—recovery here denied); Badgely v. Heald, 4 Gilm. 64 (Ill. 1847).


77 MASSACHUSETTS: Brown v. Vinal, 3 Metc. 533 (Mass. 1842) (obiter dicta); Davis v. Maxwell, 12 Metc. 286 (Mass. 1847).

78 MAINE: Miller v. Goddard, 34 Me. 102 (1852).

79 MISSOURI: Caldwell v. Dickson, 17 Mo. 575 (1853); Schweer v. Lemp, 19 Mo. 40 (1853) (based upon Posey v. Garth, 7 Mo. 96, which was not abandon- ment but discharge for cause, and cf. Halpin Mfg. Co. v. School Dist., 54 Mo. App. 371 (1893).

80 NEW JERSEY: Erwin v. Ingram, 4 Zab. 520 (N.J. 1854).

81 NEW YORK: Monell v. Burns, 4 Denio 121 (N.Y. 1847).

82 OHIO: Larkin v. Buck, 11 Ohio St. 361 (1860).

83 TENNESSEE: Hughes v. Cannon, 33 Tenn. (1 Sneed) 622 (1854).

84 VERMONT: Ripley v. Chipman, 13 Vt. 268 (1841); In Winn v. Southgate, 17 Vt. 335 (1845), abandonment resulted from employee’s mistake; Mullen v. Gilkinson, 19 Vt. 503 (1847).

85 See note 71, supra.

86 PARSONS ON CONTRACTS 523, 524, 526 (6th ed.).

87 McClay v. Hedge, 18 Iowa 66 (construction contract to build barn, shed and corncrib); McAffery v. Hale, 24 Iowa 536 (delivery of hogs); Byerlee v. Mendel, 39 Iowa 382 (term contract, but defaulting employee was a minor); Wolf v. Gerk, 43 Iowa 339 (construction contract).

88 Parcell v. McComber, 11 Neb. 209 (1880); Murphy v. Sampson, 2 Neb. 297, 96 N.W. 494 (1902). The latter case compounded the mistake of the earlier
hension that Britton v. Turner was “quite generally, through not uniformly followed” and that the law (following Britton v. Turner) “may be considered to be pretty generally settled throughout the western states,” also allowed the defaulting employee the value of his part performance in excess of the damages caused by his breach after part performance. Sedgwick, writing in 1896, also expressed the view that that law had changed in most jurisdictions, but for the employment service contract cites only the Britton v. Turner decision as authority for his statement. A North Dakota decision also granted recovery to the employee with the expression that “less injustice was liable to be done under [the Britton v. Turner] doctrine than under the more strict and rigid rules formerly prevailing” (emphasis added). The latter part of the nineteenth century thus produced only a few service employment decisions that followed Britton v. Turner, some of these on the erroneous belief that they were following what had become a majority rule within the United States. During this same period there were over a dozen decisions denying any relief in similar fact situations, and it was clear that most jurisdictions felt that the intentionally defaulting employee should not receive any of the value of his part performance. The divergence between decisions involving default by the vendee of goods and the employee was rarely recognized, and only a few courts tried to reconcile their decisions.

by the expression, “Nearly all of the older cases [refused recovery], but we think a majority of the later cases sustain the doctrine [of Britton v. Turner].” (Emphasis added.)

77 Sedgwick, Elements of Damages 215 (1896).
78 Bedlow v. Tompkin, 5 S.D. 432, 59 N.W. 222 (1894). Relief to the defaulting employee was also granted during this period in McMillan v. Malloy, 10 Neb. 228, 4 N.W. 1004 (1880), but this case involved a contract to thresh a crop of wheat and oats and not a general employment contract for a stated term; and in Halpin Mfg. Co. v. School Dist., 54 Mo. App. 311, there is obiter dicta as to the employee’s right of recovery, although the case actually involves a vendee’s default in the sale of a furnace. In Riggs v. Horde, 25 Tex. Supp. 456 (1860), a school teacher quit her employment, but court found “her attendance on her sick mother rendered her absence necessary.”


80 The distinction was recognized by the Kansas and Missouri courts: see Duncan v. Baker, 21 Kan. 99 (1878): “It will perhaps be admitted that the doctrine preventing recovery for partial performance has been overruled with respect to all contracts except those for personal services; and if so, then
The twentieth century has produced little appellate litigation involving default in farm service contracts, and recovery for excess part performance interest has usually been denied. There has been a shift in the type of contract litigation involving the part performance interest of the defaulter. The issue has become one of periodic bonus, sales commission or division of business profit. These and the contract for care and support of the aged property owner have supplanted the typical nineteenth century farm employment contract for a season or year.

Williston suggests that the strict view of the nineteenth century should be applied in both situations; and the courts have consistently followed this view when the default involves a periodic bonus, sales commission, profit sharing plan, or vacation compensation.

Most "family support cases", many of which were adjudicated in the early twentieth century, denied any relief to the relative who partly performed his support contract. Several Kansas cases during this...
period allowed recovery to the defaulter, but the most striking case is the Indiana decision of *Humphrey v. Johnson.* The court felt that the plaintiff, a distant relative, should be allowed to resign his care and support of the aged defendant at any time "and for any reason satisfactory to himself" (emphasis added). A relation of trust and confidence must be established; and should aversion, hatred, distrust and discontent arise, then the Court visualized a situation that would become intolerable for the aged defendant. Under such undesirable circumstances to cause plaintiff's compensation to depend upon continued performance of the support contract would involve both impropriety and danger. Either party should be allowed at any time arbitrarily to abandon performance and adjust their rights on the basis of quantum meruit. The aged person, however, becomes more dependent upon complete fulfillment of the contract proportionately with the degree of performance. In addition, the damages resulting from plaintiff's breach are not readily compensable in money damages. To allow the other party to quit at will converts a definite term contract into an indefinite one, flexible but unsuited to the needs of the aged defendant.

An early Ohio decision refused relief to the defaulter because "so radical a change in the legal effect of entire contracts, and the breach of them should originate with the legislature and not with the judiciary." The legislature of Arkansas, in 1883, expressed the same view as the majority of the courts; and, based upon this statute, the Arkansas Supreme Court denied recovery to a defaulting farm hand.

During the second half of the nineteenth century the majority of American decisions rejected the remedy proposed by *Britton v. Turner,* and the twentieth century opinions reaffirm this attitude. Only a few

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plaintiff was housekeeper for defendant's decedent, the agreement being that a certain amount was to be paid monthly and an additional amount on death. She left before promisor's death. Schultz v. Andrus, 178 Wis. 358, 190 N.W. 83 (1922): Sister-in-law kept house for deceased for five years and then married and left. "Where a valid express contract is proven no recovery can be had on an implied contract." See also Roszina v. Nemeth, 251 Wis. 62 (1946).

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88 Holland v. Holland, 97 Kan. 169, 155 Pac. 5 (1916); In Masterson v. Master-son, 100 Kan. 108, 163 Pac. 617 (1917) the contract was abandoned for reasons not "chargeable to one party more than to the other."

89 73 Ind. App. 551, 127 N.E. 819 (1920): "The common law doctrine ... has fallen into disfavor and does not prevail. In our country it has been supplanted by the more humane rule laid down in Britton v. Turner." The support contract cases do not bear out the statement. See comment on case in 69 U. of Pa. L. Rev. 187 (1921) and Note, 47 A.L.R. 1164, discussing the case.

90 5 WILLISTON ON CONTRACTS §1477, pp. 4129-30.

91 Larkin v. Buck, 11 Ohio St. 561 (1860).

92 Lanthan v. Varwick, 87 Ark. 328, 113 S.W. 646 (1908).


cases have recently allowed the recovery of excess benefit over damages. The difficulty of proving the extent of damages may have indirectly influenced some of these decisions.94

VII. REASONS OPPOSING ADOPTION OF THE BRITTON v. TURNER RULE

1) Relief Would Encourage Bad Faith: Some courts have asserted that if relief were to be granted to the defaulting employee bad faith breach of contract in future situations would be encouraged.95 This is a judicial method of preventative law with the assumption that future legal transactions are based upon prior judicial opinions. Within commercial fields of our legal system, this attitude may find sufficient vindication. Business transactions are frequently considered in advance, and the existing legal status of the contracting parties affects the nature of their future relationship. However, it is unrealistic to assume that the service contract employee, who may be induced by one of many reasons to terminate his contract, will be either greatly encouraged to violate his contract because of existing judicial decisions within his state, or dis-

NORTH CAROLINA: Goldston Bros., Inc. v. Newkirk, 233 N.C. 428, 64 S.E.2d 424 (1951) (Broker's services; no benefit conferred).

CONTRA:
MISSOURI: Sullivan v. Sullivan, 122 Ky. 707, 92 S.W. 966 (1906); Buckwalter v. Bradley, 31 Ky. 1177, 104 S.W. 970 (1907) (Plaintiff cut trees on defendant's land). Davidson v. Gaskell, 32 Okla. 40, 121 Pac. 649 (1912) (By obiter dicta the court said that the plaintiff had a right to recover in quantum meruit but had already received more than this amount); San Augustine Independent School Dist. v. Freelon, 195 S.W.2d 175 (Tex. 1946): “Texas is one of the states that have adopted the doctrine of Britton v. Turner.”
TEXAS: 33 Ten. 622 (1854). “It would certainly operate most unjustly to so extend the relaxation of the common law rule requiring the plaintiff to show the performance of the contract on his part as a condition to recovery as to embrace a case like the present. It would encourage bad faith . . . . (Emphasis added). Hutchinson v. Wetmore, 2 Cal. 310 (1852): “. . . to sustain an action as it now stands would be a violation of law, and serve to encourage an infraction of contracts for frivolous causes, or without any reason whatever.”

94Asher v. Tomlinson, 22 Ky. 1494, 60 S.W. 714 (1901). Riech v. Bolch, 68 Iowa 526, 27 N.W. 507 (1886) (Plaintiff quit with large quantity of uncut hay still in field, employer could not get other help. Court held that “the damages sustained by defendant in the loss of the hay are too remote to be recovered in an action for a violation of the contract.” See also Lynn v. Seby, 29 N.D. 420, 151 N.W. 31 (1915) (Fluctuation in price of wheat between time of promised performance and completion of work by third party after plaintiff's breach. Held, damages too indefinite).
95See Hughes v. Cannon, 33 Tenn. (1 Sneed) 622 (1854). “It would certainly operate most unjustly to so extend the relaxation of the common law rule requiring the plaintiff to show the performance of the contract on his part as a condition to recovery as to embrace a case like the present. It would encourage bad faith . . . .” (Emphasis added). Hutchinson v. Wetmore, 2 Cal. 310 (1852): “. . . to sustain an action as it now stands would be a violation of law, and serve to encourage an infraction of contracts for frivolous causes, or without any reason whatever.”
couraged to the extent that this will cause him to perform the balance of the agreement. It would be necessary that the employee have knowledge of the existing law on the issue, and then evaluate his legal position when he considers abandoning performance. It is doubted that the employee who leaves his employment evaluates the advantages of paying only provable damages resulting from the breach as opposed to losing all of the value of his partly performed contract. Both knowledge of law and deliberate evaluation of consequences would be required. The minority of states that adopt the relief of Britton v. Turner bear this out, in that there has been no marked tendency towards employment contract breach within these jurisdictions.

2) Relief Would Destroy the Sanctity of Contract Promises: This, as well as the above reason, is not a judicial attempt to justify the total forfeiture rule by proof of its merit, but an attack upon the proposed alternative of Britton v. Turner. It is generally coupled with the affirmative view that the courts should discourage contract breach. The issue is not whether the legal system should encourage performance of the legal promise, a matter generally conceded, but whether the generally adopted "forfeiture rule" encourages performance more than the "breach damages" rule of Britton v. Turner. If this be decided in the affirmative, there is still the second question whether the degree of encouraged performance gained outweighs the loss when the employer retains more performance benefit than the damages he suffers.

Judicial decisions often state that if the defaulting employee receives recognition for the value of any of his part performance the sanctity of his contract promise will be violated. What creates the sanctity of this promise? It is not the fact per se that a promise has been given, for not all promises exchanged between men have ever been enforceable by society. It would neither be desirable nor practically feasible to give judicial recognition to all promises that are made daily. This was true at the times of Plato and Cicero, and even in Canon law. The views of Kantians like Reinack that all covenants create a duty without which rational society would be impossible are refuted by actual day to day experience in which many promises go un-enforced. Pound expressed the view that all business promises should

96 See supra note 95. "It would encourage bad faith and destroy the sanctity of contracts."
97 "The principle that promise or consent creates obligations is foreign to the idea of justice... It is plain that if anyone promises a friend to give him something and does not do it, he does not commit an injustice—at least, understood, if he does not wrong this friend indirectly." Tourtoulon, PHILOSOPHY IN THE DEVELOPMENT OF LAW 499-500 (Read's translation, 1922); Fuller and Perdue, Reliance Interest in Contract Damages, 46 YALE L. J. 52, 56 n. (1936).
98 I PLATO, REPUBLIC 311.
99 I CICERO, DE OFFICIS, c. 10; III, cc. 24-25.
100 Decretales of Gregory IX, Lib. II, tit. 24, cc. 1, 2, 3, 15, 23, 27, 33; Sexti Decretalium, Lib. V, reg. 58.
be enforced since such promises create wealth, and their enforcement is necessary in order to maintain wealth as a basis of our civilization. With even this limitation placed on the legal enforcement of promises, Cohen still disagrees with Pound's view. To Bentham the origin of obligations is based upon the reason of "utility"; and to place the foundation upon natural rights, Divine law, so social or quasi contract "is an oblique and roundabout process involving uncertainty and embarrassment and leading to interminable disputes." Page rebelled at granting legal enforcement to "pure" moral obligations which he felt called for

"replacement of our law of consideration with the ethical principle that an honest man keeps his promise although to his own hurt, and with the constitutional principle that it is the primary duty of our courts to make people be honest, or at least, to act as though they were honest; and as the result, to take the position that all promises must be enforced without regard to the presence or absence of valuable consideration."

To both Cook and Page, certain agreements between men are not legally enforceable because the duty is not one that should properly be placed upon our judicial system. Cicero and Kent both expressed the view that the reason certain promises of men were not given legal sanction was because certain principles of higher ethics are "too austere in their nature, and too sublime in speculation for actual use amidst human laws." Just as Chancellor Kent agreed with Cicero, so Dean

101 COHEN, LAW AND SOCIAL ORDER 90 (1933).
102 "Consult those masters of the science, Grotius, Pufendorf, Burlamaque, Vatel, Montesquieu, Locke, Rousseau and the crown of commentators. When they wish to lay open the origin of obligations they tell you of a natural right, of a law anterior to man, of the Divine law, of conscience, of a social contract, of a tacit contract, of a quasi contract etc. I know that these terms are not incompatible with the true principle, because all of them by explanations more or less forced may be made to signify good and evil. But this oblique and roundabout process involves uncertainty and embarrassment, and leads to interminable disputes. . . . It is the reason of utility which gives the contract all its force; thereby it is that the cases are distinguished in which a contract ought to be confirmed, as well as those in which it ought to be annulled." BENTHAM, HISTORY OF LEGISLATION, (2nd ed.), Principles of the Civil Code, Part Second, Chapter V, p. 193.
103 "It seems therefore to be expected about one whose thinking took shape under such a 'climate of opinion' would adopt as one of his fundamental premises the notion that the purpose of the law of contracts is to put pressure on people to do what they have promised to do; simply that and nothing more. That the adoption of this particular premise was tacitly made and without discussion of its validity was perhaps also to be expected." (Cook commenting on Williston's attitude as to the purpose of the law of contracts). See Cook, Williston on Contracts, 33 ILL. L. REV. 497, 503.
104 "Let us keep what we have won in the form of common law consideration and let us be thankful for it: unless indeed we are willing to go all out for morality, following Mansfield the less in his ethics, though not in his profanity; willing to throw overboard all ideas of realism and practical operation of our law. . . ." Page, Consideration: Genuine and Synthetic, 1947 WIS. L. REV. 483, 513.
105 2 KENT, COMMENTARIES ON AMERICAN LAW 490, 491 (4th ed. 1840).
Pound agreed with Kent that "the sphere of morality is more enlarged than the limits of civil jurisdiction." Although there has been divergence of view as to the reason that all of man's promises are not legally recognized, it is generally agreed that only a small proportion of man's promises fall within the judicial sphere. It has been suggested that a measurement of development within the field of contract law is the extent of legally enforceable promises.

During the nineteenth century emphasis was placed upon freedom of the individual will with the accompanying attitude of *caveat emptor*. The risk of performance was placed upon the individual. He was free not to assume the task of performance necessitated by contract promise, and therefore once having promised to undertake performance, he must either completely perform the entire contract as promised or receive no compensation for his labor. With such a judicial attitude of assumed risk prevalent, the courts placed more importance on the intentional breach than on the enrichment of the defendant. In this atmosphere it was understandable to find judicial decisions creating forfeiture of the employee's part performance on the grounds of "enforcing the sanctity of contracts."

3) *Relief Would Weaken the Right of Reliance*: If it were permitted to the laborer to determine the contract at his pleasure, no well founded reliance could be placed at any time upon its due observance. Future calculations have to be built upon the support of others. Not only does the contracting party rely upon the given promise to the extent of preparatory expenses, but he often forgoes the opportunity of securing equivalent promises of performance from other sources. Pufendorf expressed the view that from breach of faith "are apt to arise entirely just causes for quarrels and wars"; and, regardless of the amount of actual damage suffered because of the promisor's breach, "it is a shame to be mocked because [you] believe the other to be a prudent and honest man." Llewellyn writing at a more recent date expressed the same view as to the importance to the businessman of right of reliance upon performance of the contract promise. "Business men offer, together with the promising and as its consequence, a continuing expectation and sense of security—an assurance in result as well as in expression—which is immediate and continuing value in itself. This as-

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106 Pound feels that moral man should keep all of his promises, but the fact that legal systems only enforce those made for a consideration established his belief that "the provinces of law and morality are not co-existent." *Pound, Law and Morals* 37 (1926).

107 Miller v. Goddard, 34 Me. 102 (1852). See also 34 *Marq. L. Rev* 218 (1951): "When the seller commits himself, he wants assurance that the buyer will perform, and to permit recovery of the part payment defeats the purpose of the contract."


insurance is offered to be relied on; and after the deal is 'on', is not to be withdrawn. . . ."¹¹ There this right of reliance, however, is of greater importance to the commercial contract than to the non-commercial one. The industrial employer relies for production purposes on availability of ready labor. The private employment contract for specific task often does not necessitate the same degree of reliance on completed performance. The performance of the specific promised task is not integrated into future transactions involving additional contractual relations.

The importance of the reliance factor should not be underestimated, however; it must be evaluated with specific reference to the amount it is affected by the application of the conflicting rules as to the employee's right to compensation for partial performance. Unless the refusal of the courts to require the non-defaulting employer to pay for enrichment in excess of damages increases the probabilities of the employer in future contracts being able to rely upon the employee's complete performance, then it should not be sufficient ground for forfeiting all of the defaulting employee's completed performance. The stricter rule must stimulate complete performance in order to increase the right of employer's reliance. Since it has previously been suggested that the employee's quitting his employment is infrequently related to the extent of loss that such action will produce, the employer's reliance may in turn be only slightly affected by the court's attitude towards the employee's partial performance interest.

4) The Condition Precedent: The terms "wilful" and "condition precedent" are frequently found in judicial opinions denying any compensation to the employee who abandons his employment contract. Both terms have been classified as merely labels indicating the attitude of the court. Complete performance of the employment contract has been stated as a condition precedent to the employee's right to enforce the contract terms, and also stated as a condition to any recovery for partial performance. As first stated, the defaulting employee merely loses his right to enforce the contract; however, the latter statement also eliminates his right to quasi-contract recovery based upon prevention of unjust enrichment of the employer. Condition precedent is used by the court to deny relief only in those situations where there is also a finding of "wilful" breach. The first definition is used when the breach is non-wilful. It is, therefore, the causation factor within the breach that shapes the court's use of condition precedent in the employment default cases. As Harnett and Thornton have pointed out, "The label 'precedent' and 'subsequent' is often attached after the court has decided what the pleading burden shall be; and rather than serving as a guide to the court's determination of the procedural question, the words

simply explain a result which the court has reached.” The validity of a conclusion cannot be determined by a rule of law if the rule is based upon an erroneous presupposition. The quarrel cannot be with the application of the given rule, but with the use of the rule itself. The principle of condition precedent has had an artificial influence on the breached employment contract, so that the use of this rule of contract law has been used to defeat quasi-contract recovery.

5) **Impossibility of Rejecting Benefit Conferred:** Numerous decisions have denied relief to the defaulting employee because it was deemed unjust to “force” the duty of payment upon the non-defaulting employer, when the benefit received was an intangible service. A distinction on this ground is sometimes made between the service contract and the construction or sales contract in which the benefit conferred is tangible. The election to accept or return, however, often is not available in these contracts. The power of rejection extended to the owner of land who has received a partly completed building is of little value to him. The manufacturer or processor of goods who must use the goods in raw form as partially delivered has no option of return of the delivered goods when the supplier defaults after partial performance of the contract. Section 44 of the Uniform Sales Act imposes liability on the non-defaulting buyer of goods to the extent of their reasonable value, when he has disposed of them without knowledge of the impending default of his seller. It has been suggested that the test should be merely one of enrichment of the defendant, and that he should compensate the employee for the benefit in excess of damages regardless of whether he retains it from choice or from necessity.

6) **Inadequacy of the Remedy Proposed:** The employer is primarily interested in complete execution of the contract by the employee. When the employee defaults, the most satisfactory remedy from the employer’s viewpoint would usually be the equitable relief of specific performance of the agreement. It is the expectation interest of the employer that needs protection; however, the difficulty of supervision necessary


113 See Varner v. Hardy, 209 Ala. 575 (1923); Johnson v. Fehsefeldt, 106 Minn. 202, 118 N.W. 797 (1908): “The fact that the plaintiff had rendered services, the value of which defendant retained, did not entitle plaintiffs to recover on quantum meruit because of the contract and the inability of defendants to return the services.”

114 Duncan v. Baker, 21 Kan. 99 (1878): “The reason usually given is that the employer in contracts for personal services has no choice except to accept, receive and retain the services already performed, while in other contracts he may refuse to accept, or may return the proceeds of the partially performed contract, if he choose. But this is not always, nor even generally true, with respect to other contracts.” (Suggests the examples where the miller purchases and processes wheat, or the owner of real estate furnishes some of the material used by the contractor in constructing a partially completed building).
for the proper discharge of the decree, the inability to gauge accurately when the employee is performing to the best of his ability,\textsuperscript{115} and the inexpediency of compelling continued personal association after confidence and loyalty are gone\textsuperscript{116} have led the courts to consistently refuse the relief of specific performance against the defaulting employee. Any attempt to overcome these difficulties might involve too serious an infringement of personal liberty.\textsuperscript{117}

The judicial choice of remedy has therefore become a complete forfeiture, either of all of the benefit conferred by the employee, or that amount which will compensate the employer for his damages. Of the two, the majority of American courts have chosen the former. When the non-defaulting employer initiates the action asking compensation for breach damages, he has uniformly been required to account for the value of part performance benefit received. Several writers, in law review articles, have pointed out this difference in remedy depending upon whether it is the defaulting employee or his non-defaulting employer who brings the action. This difference in remedies is claimed to be a clear discrimination against the defaulting employee. The comparison is not sound, however, because the employer is not the breaching party. To draw a similar analogy the employer would (1) have to be the defaulting party and (2) have conferred some benefit upon the employee before breach. The issue would then be raised whether the defaulting employer could prove the value of the benefit conferred and recover the excess over damages caused to the employee by the breach, on the basis of prevention of unjust enrichment. An appellate decision involving similar facts has not been located. It would only be in the case where the employer is permitted by the courts to recover the excess benefit that a discrimination between employer and employee could properly be claimed.

Does the remedy proposed by \textit{Britton v. Turner} adequately protect the non-defaulting employer? When the employer has obtained the employee's labor valued in excess of provable damages, he clearly is being enriched in that he has received value without paying for it. However, whether the retention of this enrichment is unjust may in part depend upon whom the burden of proof of damages is placed. The fact that the employer cannot prove monetary loss does not mean that he has not been damaged by the employee’s abandonment of his promised performance. If nothing more, the employer has been inconvenienced. When the employer brings a damage action against the em-

\textsuperscript{115} 3 \textit{Williston on Contracts} §§830 and 1423A.
\textsuperscript{116} \textit{Restatement, Contracts}, §379, comment (d). It should be noted that this same reason of "forced continued incompatibility" was used by the Indiana court in \textit{Humphrey v. Johnson}, 73 Ind. App. 551, 127 N.E. 819 (1920). The defaulter was allowed the reasonable value of his care and support prior to leaving.
\textsuperscript{117} \textit{Supra} note 115, §1423A, notes 2, 3.
ployee, his initiation of the suit is completely voluntary. He evaluates his position to determine whether or not his loss exceeds the benefit received and whether or not he can establish this loss to the satisfaction of the court. If he fails to prove his damages, he loses the benefit of the employee's part performance; but it is an assumed risk, taken with the belief that he can prove loss in excess of benefit thereby forcing the employee to pay additional compensation. When the balance between benefit and damages is small, or proof of damage is felt to be difficult, the employer does not take the risk of litigation. The choice, however, is his own. It is a voluntary decision. When, however, the defaulting employee sues to recover the value of his part performance, Britton v. Turner forces the employer to prove the amount of damage that he has suffered by the breach or compensate for all of the service received. The decision is not that of the employer but of the defaulting employee.

Some courts have tried to alleviate this problem by requiring the employee to prove that there was a "net benefit" to the employer. Even this term, however, has varied, with a Texas court holding that "the value of the services would be determined by the usual rule, regardless of whether or not they were of actual value of [the defendant]"; on the other hand, the Kansas court stated that "While the plaintiff proved what his services were reasonably worth as a farm servant or farm manager, there is no evidence to show what if any benefit these services were worth to defendant." There is also an unjustness in this rule requiring the employee to prove both benefit and damages. It is the person injured who has better access to evidence of his damage, and the burden should be upon him to prove that the injury is more, rather than upon the employee to prove that it is less. Unfortunately the problem of ultimate burden of proof in employment default cases is infrequently discussed in the appellate decisions. The Restatement of Contracts requires the plaintiff to prove that there has been a "net profit" to the defendant. A compromise solution was suggested for New York by their Law Revision Commission in 1942, proposing that the "net benefit rule" be used, but that where the services are designated by units or

118 Vancleave v. Clark, 118 Ind. 61, 20 N.E. 527 (1889); United Shoe Stores Co. v. Dryer, 16 La. App. 605, 135 So. 50 (1931).
120 Fritts v. Quinton, 118 Kan. 111, 233 Pac. 1036 (1925).
121 See 5 CORBIN ON CONTRACTS §§1124, p. 553.
122 RESTATEMENT, CONTRACTS §357; See also N.Y. Leg. Doc. No. 65 (f) 1942, p.17 at 36, 7.
123 "... Net benefit shall be determined by deducting from the amount of such payment, or the value of the property transferred or delivered, the amount or value of the benefits, if any, received by the defaulting party or a third party beneficiary by reason of the contract, and the amount of damages to which the other party is entitled by reason of the default..." Of the difficulties which stand in the way of the adoption of the doctrine of Britton v. Turner, the measurement of the employer's benefit from the employee's part performance and the measure of the employer's damages are the principal ones."
portions of services or periods of time of service as measuring the compensation payable, the contract shall be deemed severable for the purpose of giving the party performing one or more units or portions of the service, or during one or more of such periods, a right to recover on the contract the compensation so measured subject to the employer's damage off-set.\(^1\) A "twenty per cent" proposal, although not adopted by the New York Legislature,\(^2\) has merit. The amount forfeited to the employer is relatively small and yet large enough to eliminate frivolous small claims for short term performance before abandonment by the employee. It also establishes a presumption that the employer's damage from the employee's quitting his employment is a minimum of one fifth the value of total performance. There may be occasions when the employee can prove that the employer has not suffered any loss by the employee's quitting, and in this situation the twenty percent requirement creates a penalty imposed upon the employee as pure punishment for quitting. Many times, however, the employer has suffered intangible loss because of the default, and the right to retain twenty percent of the value conferred then serves as a protection to the employer who is ready and willing to complete the contract. A comparative study of recent legislation for the defaulting buyer of personal property reveals a 1952 statute in New York providing for forfeiture of twenty percent or $500, whichever is less. Maryland lets the defaulting buyer regain up to ninety percent of his payments, thus providing a ten percent penalty; and the proposed Uniform Commercial Code proposes a twenty percent maximum to the seller when there is a forfeiture clause within the sales contract. Whether the twenty percent figure adopted in New York or the ten percent of complete performance in the Maryland statute is better is debatable; however, the matter of prime importance is that these states have begun to use a compromise formula preventing complete forfeiture, and yet offering protection to the non-breaching party. The problem of determining the value of intangible service is, of course, greater than the monetary down payment in purchase default contracts, but the evaluation is not any greater than many others that juries must consider every day. It is regretted that the New York legislature did not adopt Professor Patterson's recommendation in 1942.

7) The Social Reasons (a) Greater Responsibility of the Employer; (b) Extension of Credit; (c) Custom: Williston has declared that the

\(^{124}\) Restitution for Benefit Conferred by a Party in Default Under a Contract, N.Y. Leg. Doc. No. 65 (f) 1942; proposed section 242. "In an action or counterclaim the party seeking restitution for such net benefit shall have the burden of proving the amount thereof."

\(^{125}\) Although this recommendation in 1942 involving the defaulting employee was not adopted by the New York legislature, that legislature has, as of 1952, adopted a Law Revision Committee recommendation allowing the defaulting buyer of goods to recover his part performance in excess of twenty percent of contract value or $500, whichever is less.
employer’s normally greater responsibility, coupled with the inability to obtain specific performance of the contract against the employee, justifies the present existence of the majority rule disallowing any recovery to the employee who quits his employment. Credit must be extended when performance and payment cannot be simultaneous. Whether the employee should extend credit for his work or the employer by advance payment is now clearly decided to the advantage of the employer. However, during the formulative period of the nineteenth century, the employer not only assumed greater general responsibility, but also financial responsibility as a class. It was customary for the employer to extend board and lodging as the work progressed. To this extent the employer extended credit to the laborer. It has been suggested, therefore, that the custom during the early eighteenth century would have logically led to the supposition that custom would generally be in favor of general extension of credit by the employer. The extension of credit by the employer in the form of board and lodging, however, was necessary and, therefore, became the custom, just as today it is sometimes customary for the seed company or the owner of the land to extend planting seed to the lessee or sharecropper as credit until harvest time. Lack of assets by the sharecropper requires this custom today just as it did for the laborer at that time. The laborer however did not need his wages paid in advance in order to perform the tasks of employment, and therefore this custom never arose. The advantageous economic position of the employer prevented the employee from acquiring it through process of bargain.

The practice requiring the worker to extend credit to his employer in the form of completed labor has been said to be based upon the usual practice of the community, and the Restatement of Contracts comments that this practice became settled “Centuries ago.” Yet, Justice Parker in writing the Britton v. Turner decision in 1834 placed his decision partly upon the ground that “there is abundant reason to believe that the general understanding of the community is that the hired laborer shall be entitled to compensation for the services actually performed.” Little evidence has been found to substantiate Parker’s statement as to community attitude during the early nineteenth century. There is abundant evidence that the judicial attitude of that time dis-
agreed with Parker; and if there had been widespread divergence of view between community custom and law, it would probably have been revealed within the tenor of judicial opinion. The law of quasi-contract had not developed as a separate classification in 1834, and it was not until Keener's book in 1893 that the first attempt was made to unify the various aspects of quasi-contract as a separate body of law. In addition, the general law of employer-employee relation was less favorable to the employee during the nineteenth century than it is today. This is evidenced by the later development of doctrines of assumption of risk and the fellow-servant rule.

8) "Wilfulness" of the Employee's Breach: The reason most frequently advanced for denying relief to the defaulting employee is that he "wilfully" breached his contract. The decisions have yielded few definitions, and less discussion, for determining whether the given acts constitute wilfulness. The matter has generally resided with the court's discretion in considering the facts of each case. The term "wilful" has been used to deny recovery when under the given facts it could only be defined as the intentional exercise of the employee's free will. Thus, relief has been denied to the employee who "voluntarily" quit because of physical disability, because his wife was in an advanced stage of pregnancy and required his attention, because the employer, without justification, required the employee-husband to change to the night shift while his wife was forced to continue working the day shift. Still other examples include a dockworker who terminated work because of threat of physical injury by striking fellow-workers, a case wherein fire destroyed part of the employer's law library and the employee-clerk thereafter felt it was impossible to complete his agreement to copy the laws of the state, the employee who "resigned" when his employer requested him to sign false financial statements. Nor has the definition of wilfulness of the breach been affected by the amount of the contract completed at the time the employee "voluntarily" left the employment. All relief was denied to the employee who had worked 27 days out of a contract for one month, and again where he had completed

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132 Jennings v. Lyons, 39 Wis. 553 (1876). Husband held to have "abandoned" work because he should have foreseen the wife's advanced pregnancy condition.
133 Sullivan v. Boeing Aircraft Co., 187 P.2d 312 (Wash. 1948): "We do not consider the inconveniences sufficient to outweigh the necessities of production requirements under the circumstances presented here."
134 Walsh v. Esher, 102 Wis. 172, 78 N.W. 437 (1899).
135 Martin v. Massie, 127 Ala. 504, 29 So. 31 (1900).
28 days out of the 30-day contract. A comparison with the building construction contract reveals a greater tendency to allow relief under comparable degree of performance where the facts reveal "good faith" performance.

The courts have consistently drawn a distinction between abandoned performance and negligence. If the employee attempts to complete his contract, but the work is improperly done because of his inability or negligence, he is usually allowed to recover on contract less damages. If risk of outside events which affect the employee's decision to continue control the "wilfulness" of his breach, should the employee also assume the risk that he possesses the skill to properly carry out his promise of performance? As Justice Clark recently commented, "Here the libellant's default was based on his conclusion—apparently sound—that his harried night estimates were improvident. Is that business judgment wilful, whereas had he merely stalled completion or otherwise been unbusinesslike, he would have been only negligent? I endorse Professor Corbin's view that we ought to reject these emotional grounds of decision. . . ."

On the other hand, Professor Patterson rightly points out that the effect of Britton v. Turner is to completely disregard the cause of breach. "The employee who quits without warning for the malicious purpose of disrupting his employer's business would pay no more damages than an employee who quits for any other reason short of legal justification." It is clear that an indiscriminate disregard of the cause of default may be as unwarranted as the automatic denial of any relief on grounds of "wilful" breach. Most American decisions have allowed recovery to the employee who is discharged for cause; and yet some courts, typified by New York decisions, have drawn a distinction when the reason for discharge is malum in se. If the act is malicious with intent to do harm to the employer, then perhaps the employee's part performance interest should be completely forfeited regardless of the issue of employer's enrichment. The basis for such decisions, however, should be punishment of the employee for the nature of his breach. A penalty is being imposed and should be clearly stated as the basis of the judicial decision. When "wilfulness" is defined in this manner, within

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139 Harris v. The Cecil N. Bean, 197 F.2d 919 (2d Cir. 1952). Concurring Opinion by Judge Clark. Judge Chase seems to place the burden of proving the breach to be non-wilful upon the defaulting employee. Cf. "Except for the attempted justification for his default, based on the claim that he had been required to do more work than called for in the specifications, which the commissioner and the court rejected, the only reason given for the breach was that contained in the letter to the claimant. That shows a wilful default made without regard for the obligation imposed by the contract into which he had entered . . . ." (The employee's default seems to be assumed to be wilful until proven by the employee to be otherwise.)
140 Supra note 130, p. 39.
the abandoned performance cases, the use of the term may be justified. A distinction, therefore, should be drawn between the use of the term "wilful" as applied in the above situations, and its use in cases such as those where the employee intentionally deceived the employer as to the expenses incurred by him in operating the employer's farm; where the employee left during the height of the fall sales season to compete with his former employer by organizing a new company; or where the employee persistently and intentionally violated a provision of the contract whereby he agreed not to solicit applications for burial policies for other burial associations during the life of the contract. Malice within the act rather than its voluntary nature justifies the forfeiture of the employee's part performance. Complete forfeiture as opposed to breach damages must have a justifiable purpose; and, although it is still necessary to evaluate the facts of each case, a standard that recognizes the punitive nature of the strict forfeiture rule should be applied by the courts.

VIII. LAW OF ENGLAND

There are indications that as early as 1431 failure to complete an entire contract of service resulted in the loss of the value of all work performed. This attitude was reaffirmed in 1470. Not until 1688, however, was it clearly established that the service-employment contract being entire, there could be no recovery for the completed part performance. In that year, in the Plymouth v. Throgmorton decision, Throgmorton had been appointed receiver of rents for one year at a salary of £100, and after three quarters of the year his employer died. In an action of debt against the executor of the employer's estate, it was held by the court of Kings Bench in error from the Court of Common Pleas that the employee not only could not collect £75 for three-fourths of the year's salary, but was entitled to no payment because the contract was entire and had not been fully performed.

This seventeenth century case, and the paramount case of the eighteenth century, Cutler v. Powell, involved death rather than abandon-
ment of performance as the cause of the employee's failure to complete his contract. Both, however, were significant in demonstrating the attitude of the English courts regarding performance of entire contracts. Lord Kenyon based his decision in Cutler v. Powell upon two precepts: first, when contracting parties have come to an express agreement, none can thereafter be implied as long as the express contract exists; second, that the specific case involved an aleatory contract. The seaman had stipulated for a larger sum than ordinarily paid, based upon the understanding that payment would be conditioned upon completed performance. As has been shown, however, the decision has been cited in England and America as authority for disallowing relief in service contract cases that did not involve an aleatory factor. The contract was entire, the seaman assumed the risk of non-performance, and completion was condition precedent to payment. Wilfulness, fault or breach causation were not involved. As Lord Ashurst commented in his opinion, "the seaman was not indeed to blame for not doing it, but still as this was a condition precedent and as he did not perform it, his representative is not entitled to recover." It was not "wilfulness" but "condition precedent" that controlled the decision in 1795.

The earliest English case in which the employee abandoned performance and attempted to collect for part performance is Huttman v. Boulinois decided in 1826. Lord Abbott refused to grant any relief; but at a rehearing, a partial payment of £15 was awarded and Lord Tenterden advised the employee, "As you must admit the defendant has a right to bring a cross action, would it not be better to take £15 without costs upon the understanding that no cross action shall be brought." This proposition was acceded to.

The primary litigation in England regarding the partial performance interest of the abandoning employee fall within a short span of six years, between 1874 and 1880. During this short period the cases of Walsh v. Walley, Saunders v. Whittle, Gregson v. Watson and Warburton v. Heyworth were adjudicated. By 1874, it had become common practice within the English weaving mills to compute on a specified day in the middle of the week the amount earned by the weavers during the previous week, but payment was not made until the following week-end. In the Walsh case the weavers' wages were computed on Thursday, to be paid on Saturday. The employee quit without notice on Friday afternoon. Recovery for the work performed between Thursday and Friday afternoon was refused by Lord Cockburn because (irrespective of a

149 Supra note 41.
150 2 C. & P. 510, 172 Eng. Rep: 231 (1826). As his reasons for quitting, the employee wrote the following letter of resignation to his employer. "So many things stare me in the face which are undone and so many difficulties do I anticipate, which I am quite unable to accomplish that I am in some measure bewildered by the thoughts of them, and unable to perform those duties which require immediate attention."
forfeiture clause) "the wages of the current week would have been forfeited under the general law."\(^{151}\)

In both the *Gregson* and *Warburton* cases the factory worker was a woman. In 1875, the Employers' and Workmen's Act had been passed.\(^{152}\) Section 4 of this act protected women and children workers against forfeitures, and section 11 gave children, young persons and women subject to the provisions of the Factory Acts of 1833 to 1874, the right upon terminating their employment to recover the value of their executed performance then due that exceeds damages resulting from the breach. The *Gregson v. Watson*\(^{153}\) case arose in 1876 immediately following the passage of the above Act. Justice Cleasby, placing emphasis upon the word "due" within section 11 of the Act, found nothing due for the work performed since the date of the last accounting; and thus the value of this work was forfeited by quitting. The *Warburton v. Heyworth* decision, still relying upon the distinction between performed work and accrued debt, found that the employee's wages became due at the time of booking at Wednesday noon rather than at 3 P.M. Wednesday afternoon when the work week ended. The employee was thereby allowed to recover the amount booked, and the forfeiture clause in her employment contract did not apply to this performance.\(^{154}\)

The *Saunders* case\(^{155}\) also decided by Justice Cleasby in 1876 involved a painter hired by the week. Offended at his employer's criticism of his work, he quit in the middle of the week. The court, in refusing recovery for the portion of the week completed, pointed out that the *Button v. Thompson* decision allowed recovery only for accrued wages and that *Culler v. Powell* still applied so that the employee had no right to recover the value of labor performed for which an indebtedness had not accrued. The development of the judicial pattern in the 1870's based upon the "factory weaver" cases clearly established the trend in England in employment default cases. The employee who resigns after part performance is not entitled to recover for services performed unless the wages have accrued and are due prior to default. The work performed between accrual date and termination date is forfeited.\(^{156}\)

\(^{151}\) Walsh v. Walley, 9 Q.B. 367; 34 Digest 94, 692 (1874). The employee also lost his compensation for the work done before Thursday because of the forfeiture clause which provided "failure to give fourteen days notice before quitting will forfeit all wages due."

\(^{152}\) Employers and Workmen Act of 1875, Statute 38 and 39 Vict. ch. 90. Sec. 11: "In the case of a child, young person, or woman subject to the provisions of the Factory Acts of 1833 to 1874, any forfeiture on the ground of absence or leaving work, shall not be deducted from or offset against a claim for wages or other sum due for work done, before such absence or leaving work, except to the amount of damages (if any) which the employer may have sustained by reason of such absence or leaving work."

\(^{153}\) 34 L.T. 143, 34 Digest 94, 695 (1876).

\(^{154}\) 6 Q.B.D. 1 (1880).

\(^{155}\) Saunders v. Whittle, 33 L.T. 816 (1876).

\(^{156}\) In the absence of a provision forfeiting wages, the master remains liable,
Implied contracts in the non-consensual sense have passed through two stages in the law of England. In the seventeenth and eighteenth centuries, during the period of development, its range was ever expanding; but since the middle of the nineteenth century, the pendulum has swung, the common law courts restricting the remedy. It has been of only very recent date that the English courts have entered a third phase of gradual expansion. The strict use of the forms of action in England prevented the separate classification by English writers of agreements implied in law until the latter half of the nineteenth century. Leake's *Law of Contracts* in 1857 was the first text to establish a third classification, which has become our modern day quasi-contract obligation.

**IX. Law of Canada**

The problem of the employee's right to recover for part performance prior to default did not arise in Canada until the beginning of the twentieth century. Most of the cases reaching the appellate level involved farm labor. In 1903, an unusually harsh decision was rendered in the Quebec province, the court holding that the employee who quit not only forfeited his right to wages for the work completed, but in addition the employer was permitted recovery on his cross action for damages ensuing from the breach. The employer recovered double and the employee paid twice, in labor and again in monetary damages. There can be little question that the intent of such decision is deliberate punishment for breach of legal promise.

In *Farrow v. Gardner* a farm laborer quit at the end of three months because his employer had failed to furnish a previously promised house and had paid only one of three month's salary. The court in 1913 ruled that the employer had not repudiated the contract by omit-

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157 Within the field of impossibility of performance and frustrated contracts, see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32, 2 All Eng. 122 (1942); and *Williams, Law Reform (Frustrated Contracts) Act, 1943 (1944)* for recent English change.


159 McKee v. C.P.R. [1903] 23 C.L.T. 121 (Que.).

INTEREST OF DEFAULTING EMPLOYEE

...ting to pay wages at the time agreed or to furnish the promised house for plaintiff, inasmuch as the defendant had requested the plaintiff to continue in his service, promising to pay the wage arrears in a few days. The employee's departure under such circumstances, without giving a month's notice, created a voluntary breach of contract and forfeited the unpaid wages. Two years later, a farm employee, in *La Plante v. Kinnon*, hired for the season, quit because of a misunderstanding as to the amount of wages he was to receive during the harvest time. Relief was again denied.

Finally two cases were decided in 1917, the first in Saskatchewan, involving a contract for farm labor by husband and wife, with the agreement that most of their pay for the eight months would be withheld until the end of the season. The wife became ill, and some of the withheld compensation was needed. The employer refused to release any of the money covering the period of completed service whereupon the husband and wife left. The court found that the employees were not justified in quitting and referred to the *La Plante* decision in denying the claim. In the second case, a fisherman deserted his ship when it had to be returned for temporary repairs. Relief for part performance over damages was again denied based on the English decision, *Boston Deep Sea Fishing Co. v. Ansell*.

The earlier judicial development in the United States and England has therefore been applied uniformly in Canadian adjudications. Alberta by statute has attempted to penalize equally the delinquent employer as well as the employee for breach of contract, but compensation over damages is not granted to the defaulter.

This same judicial approach to the problem has been taken in other parts of the British Empire, with decisions denying any recovery in South Africa and India. Mexico imposes the same severe penalty upon the defaulting employee as the initial Canadian case of 1903. The employee dare not default in performance because he subjects himself to monetary damages as well as loss of completed performance.

To be Continued in Next Issue

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164 Selig v. Arenburg [1917] 51 N.S.R. 198; 35 D.L.R. 608; See also Kennedy v. Royce, 31 O.W.N. 266 (C.A.) (obiter dicta, as suit was brought on a contract).
169 See WHELLESS, *COMpendium OF the LAWS OF MEXICO*; art. 431, p. 240.