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THE PARTIAL PERFORMANCE INTEREST OF THE DEFAULTING EMPLOYEE—PART TWO

CALVIN W. CORMAN

The Voidable Contract

Consideration has thus far been given to the effect of the employee's abandonment after part performance of a valid contract. When the contract is voidable at the employee's election, as in the employment of a minor, or at the election of either party, such as contracts within the terms of the Statute of Frauds, the sanctity of the legal promise should become less important as a reason for barring relief when weighed in comparison with the judicial desire to restore unjust enrichment. The infant's contract is also protected by the desire of the judiciary to defend such employee from his own immaturity. What then of the legal development of the voidable employment contract?

Where an Infant Employee Abandons Employment

The early English cases clearly did not distinguish between default by the infant and adult. Neither was allowed to recover for part performance. Relief was denied in 1688; and Lord Mansfield commented in deciding Drury v. Drury that "if an infant pays money with his own hand without a valuable consideration he cannot get it back again." The famous case of Holmes v. Blogg involved an action for money had and received by an infant who avoided an agreement to lease the defendant's house. Justice Gibbs said that the infant might avoid the lease and covenants and escape the burden of rent, but this is all that he could do. "He cannot by putting an end to the lease recover back any consideration he has paid for it."

The earliest reported case in the United States involving a minor

4 Holmes v. Blogg, 8 Taunt. 508. Holmes, an infant, with his partner, Taylor, had agreed with the defendant to take a lease on his house. Part of the money was paid on the contract by Holmes while still an infant. When he came of age he disaffirmed the lease on the basis of his infancy and sued to recover the money paid by him on the ground of failure of consideration. Held that he could not recover.
who disaffirmed an employment contract after part performance and sued to recover the value of completed service arose in Massachusetts in 1824.\(^5\) Recovery was allowed to the infant on the ground that the contract had been avoided, and an indebitatus assumpsit action upon a quantum meruit lies "as it would if no contract had been made." The Court, however, placed restriction upon the recovery, to the extent of allowing the jury to make allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract. The relief therefore is identical with that granted to the defaulting adult employee ten years later in Britton v. Turner. The employer's right to damage set-off, however, did not long prevail and had been overruled in Massachusetts by 1837.\(^6\)

Judge Savage sat upon the New York appellate court bench during the 1820's, and it fell to him to decide the course that New York would take in employment default cases both as to adult and infant employees. The adult employee in Lantry v. Parks\(^7\) had worked ten and one half months of his contract for one year, but this did not influence Savage, who denied all relief. Neither could Savage perceive a distinction so far as right to compensation for work performed was concerned between the defaulting infant and adult. Thus, in the same year, he also denied the claim of the infant in McCoy v. Huffman.\(^8\) This judgment rests upon Lord Mansfield's *obiter dicta* and Holmes v. Blogg. The Lantry case influenced the trend of future cases throughout the United States; however, McCoy v. Huffman lasted less than twenty years within New York.\(^9\) During this time it swayed only two opinions from other states, one from New Hampshire and the other from Indiana. Weeks v. Leighton from New Hampshire in 1831 at least recognized the existing split of authority in this country by acknowledging the existence of Mosses v. Stevens. The Mosses case from Massachusetts had been decided adversely to Savage's McCoy decision three years before that opinion. It was not cited, however, by Justice Savage. The influence of Savage and the English decision of Holmes v. Blogg is observed in the New Hampshire court's comment that "to enable him

\(^5\) Mosses v. Stevens, 2 Pick. 332 (Mass. 1824).
\(^6\) Vent v. Osgood, 19 Pick. 572 (Mass. 1837); see also Whitemarsh v. Hall, 3 Denio 373 (N.Y. 1846), refusing to adopt the off-set damage rule in New York.
\(^7\) Lantry v. Parks, 8 Cowen 63 (N.Y. 1827).
\(^8\) 8 Cowen 83 (N.Y. 1827).
\(^9\) Medbury v. Watrous, 7 Hill 110 (N.Y. 1845). Justice Beardsley expressed the belief that Savage was wrong in relying on Holmes v. Blogg as authority for denying recovery in the McCoy v. Hoffman decision. The infant in the Holmes case had received equivalent benefit for the money paid, justifying denial to him of recovery; while in both the McCoy case and the Medbury decision, the infant had received no benefit prior to his disaffirmance of the contract. The footnote annotation following the Mosses v. Stevens decision in commenting on Holmes v. Blogg says, "it has been so limited and explained that it would no longer be regarded in the court where is was decided as an authority for the position taken in Weeks v. Leighton and McCoy v. Hoffman."
to recover for what he may have done under the contract he abandons, is to permit him, not merely to avoid his contract but to change it into a different contract at his own election without the consent of the other party. This is not reasonable, and would be in many cases to put a sword instead of a shield into his hand.”

The Indiana decision in 1837 was based upon the Court’s view that to allow the infant to recover for his part performance would “enable him to practice upon others the fraud and imposition against which his privilege of infancy was designed to protect himself.” 1852, the year that the New Hampshire opinion was overruled in that state, was also the year that the Indiana Supreme Court upset the earlier view and allowed recovery to the infant disaffirming his contract on the basis of defective capacity.

These three decisions from New York, New Hampshire and Indiana, having been overruled, the issue became settled. The infant employee could quit his employment without justifiable cause and, relying upon his right to disaffirm the agreement, recover the value of the service performed up to the date of abandonment. This became a universal rule throughout the United States. Protection of the infant and prevention of unjust enrichment were felt to be of greater importance than protection of the contract promise by imposition of a

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10 Compare with Mosses v. Stevens, supra note 5: “... recovery upon quantum meruit lies as if no contract had been made.”

11 Compare with Vent v. Osgood, supra note 6: “Should the adult keep the ship or the farm and the money advanced? We do not think that such is the law. If it were so, instead of covering him with a shield it would put him to the sword.”


13 Dallas v. Hollingsworth, 3 Ind. 537 (1852), see also Wheatley v. Miscal, 5 Ind. 143 (1854).

14 INDIANA: Supra note 13.

IOWA: Byerlee v. Mendel, 39 Iowa 382 (1874) (Employer allowed damage offset).

MAINE: Judkins v. Walker, 17 Me. 38 (1840); Deroche v. Continental Mills, 58 Me. 217 (1870).

MASSACHUSETTS: Mosses v. Stevens, 2 Pick. 332 (1824); Vent v. Osgood, 19 Pick. 572 (1837).

NEW YORK: Medbury v. Watrous, 7 Hill 110 (N.Y. 1845); Whitemarsh v. Hall, 3 Denio 373 (N.Y. 1846).


NOTE: It should be noted that the issue under consideration involves disaffirmance by the infant when part of the contract is still executory. When the disaffirmance comes after the contract is completely executed there is a split of authority depending in some jurisdictions upon whether the infant can return the adult to status quo. Recovery was denied to the infant in the following cases unless he could restore the status quo: Middleton v. Hoge, 5 Bush. 478 (Ky. 1869); Bryant v. Pottinger, 6 Bush. 473 (Ky. 1869); Welsh v. Welsh 103 Mass. 562 (1870); Heath v. Stevens, 46 N.H. 251 (1869); Locke v. Smith, 41 N.H. 346 (1860); Breed v. Judd, 1 Gray 455 (Mass. 1854); Contra: Price v. Fitch, 20 Vt. 268 (1855); Kitchen v. Lee, 7 Paige 107; Boody v. McKinney, 23 Me. 517 (1844); Bartlett v. Drake, 100 Mass. 174 (1888).
penalty. This is certainly a sounder approach than the early English view that a total forfeiture of part performance should be imposed. When the infant is close to adulthood at the time he contracts, there has been suggestion that some distinction should be drawn. This distinction might possibly take the form of applying the *Britton v. Turner* rule. Only restitution of unjust enrichment would be recoverable. Damages resulting to the adult employer as a result of the infant's abandonment would be allowed as recoupment. The eighteen year old minor would lose some of his common law protection, but a forfeiture would not be imposed. This is in conformity with the legislative view of some of the Western states that require the eighteen year old to return the goods or value received, when he desires to disaffirm an *executed* contract. A distinction based upon age may, therefore, also be justified in the executory default case.

**Statute of Frauds**

Two sections of the Statute of Frauds are often found in employment breach cases: section four, relating to real estate transactions, and section five involving the agreement not to be performed within one year.

**Contracts Not to be Performed Within One Year**

This type of employment default situation was first adjudicated in the Northeastern states of New York, Vermont and Connecticut, all before the middle of the nineteenth century. The New York court allowed recovery for part performance but exercised the joint grounds of *void* contract under the Statute of Frauds and possibility of mutual termination of agreement by the parties. The Vermont opinion denied relief on the basis of a forfeiture clause within the oral contract. The effect is to give the contract partial recognition. The stipulation within the unenforceable agreement is legally recognized as a defense. Limited recognition of the unenforceable contract is also to be found when the courts that grant quasi-contract recovery limit the amount thereof to the contract price. The reason given for the latter approach is that the defaulting promisor should not be allowed to recover more for the work performed than he could have recovered if he had completed his agreement. Minnesota has also recognized the forfeiture stipulation within oral contracts in order to deny recovery to the defaulter. This also gives limited recognition in order to restrict recovery. When certain provisions are given full recognition and the balance of the agreement

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15 Shute v. Dorr, 5 Wend. 204 (N.Y. 1830) Note, the fact that the employee was an infant was not considered.
16 Philbrook v. Belknap, 6 Vt. 383 (1834).
17 WILLISTON ON CONTRACTS §538 approves such recognition. See also RESTATEMENT, CONTRACTS §537; Clark v. Terry, 25 Conn. 395 (1856).
18 Kriger v. Lepel, 42 Minn. 6, 43 N.W. 484 (1889) (Voidable rather than void).
is disregarded, it becomes clear that the court does not consider the agreement "void" in the true sense.

Connecticut serves as an example on the shifting attitude of the courts on the problem and also of the use of limited recognition of the voidable contract. In the 1840’s, the Connecticut court refused to presume an intention of forfeiture by the contracting parties when none was expressed, and therefore allowed a recovery for the completed performance;19 however, by the 1850’s this attitude was restricted to the employee who brought his action after the due date for payment of the debt as provided in the contract.20 Once again, the contract, although recognized as falling within the one year performance provision of the Statute of Frauds, was given limited recognition in order to defeat the employee’s claim for restitution.

During the second half of the nineteenth century, decisions from Illinois21 and New York22 denied recovery to the employee, but before the turn of the twentieth century both decisions had been reversed.23 When the oral employment agreement could not be performed within one year, the employee not only had the right to terminate the contract with the Statute of Frauds to justify his action, but the work performed before the date of termination created an enrichment of the employer that must be returned to the employee. The valid written contract involved the factor of breach of promise; a distinction could therefore be drawn between degrees of breach causation. However, regardless of the moral issue of standing by a given promise, no legal obligation existed when the promise was oral. If recovery of the restitution interest was to be judicially denied, the courts would have to afford greater importance to the possible option of employee performance than to employer enrichment. Only the executory and not the executed part of the oral agreement would fall within the protection of the Statute of Frauds. The decision of the court therefore became a balancing of interests, primarily a question of importance to be given to the “one year performance” provision of the Statute of Frauds.

There have been few cases during the twentieth century disallowing recovery to the plaintiff for part performance of the service contract that could not be performed within one year;24 while in contrast a num-

19 Comes v. Lanson, 16 Conn. 246 (1844).
23 Overruled in Illinois by Collins v. Thayer, 74 Ill. 138 (1874); in New York by Hartwell v. Young, 67 Hun. 472, 22 N.Y.S. 486 (1893) (Points out that the holding on the present issue in Galvin v. Prentice was merely obiter dicta and "can scarcely be regarded as an authority upon the question raised here").
24 Recovery was denied in Perlberg v. Geminder, 89 A.2d 448 (N.J. Super. 1952); but the reason was that the plaintiff failed to prove the value of his services and the New Jersey statute R.S. 25; 1-5 (e) N.J.S.A. classifies the contract as "void".
ber of opinions have recognized the employee’s restitution interest, primarily during the latter part of the nineteenth century.25

ENGLISH DECISIONS

Halsbury’s Laws of England states that where work is done at the request of the defendant, from which he has benefited, the plaintiff can recover on a quantum meruit notwithstanding that the respective contracts were within the Statute.26 Professor Williams, however, relying upon the early English cases of Thomas v. Brown27 and Jones v. Jones,28 proposes that when the contract has been partly executed by one party, that party cannot subsequently claim, purely on the ground that the contract does not comply with the Statute, the right to undo what he has already done. “If money be paid, or the property in goods or land has passed or a security has been given, these matters can be supported by the defendant by reference to the unenforceable contract.”29 While seeming at first to be contradictory, these views are reconcilable when one notes that Williams limits his statement to money paid or property in goods or land. The employment service contract is not specifically considered. Similar attention has been accorded the problem by Corbin in his recent treatise on Contracts where he states in his text that “the courts in most such cases allow the defendant to set up the oral contract in defense”30 (emphasis added), but qualifies the statement in the footnote discussing specifically the service contract with the comment that “in this class of cases most courts allow a recovery.”31

Indiana: Tague v. Hayward, 25 Ind. 427 (1865) “To allow the defendant to avail himself of it as defense would be to enforce it in his favor, while the same right is denied to the other party, thus defeating the very object of the statute.” (Emphasis added.)
Wisconsin: Salb v. Campbell, 65 Wis. 405 (1886) (The parties stand in the same relation to each other as though no express contract existed between them); Draheim v. Evison 112 Wis. 27 (1901). See discussion of case by Jeanblanc, Restitution Under the Statute of Frauds: What Constitutes An Unjust Retention, 48 Mich. L. Rev. 923, 939-40; Chase v. Hinckley, 126 Wis. 75, 105 N.W. 230 (1905); Estate of Hippe, 200 Wis. 373 (1930).
30 2 Corbin on Contracts, sec. 332, pp. 177-178.
31 Supra note 30, p. 178, note 70.
In England, the employee's part performance interest under oral agreements not performable within one year has not been squarely decided by appellate judicial decision. A recent service employment case involved sickness of the employee rather than intentional abandonment of performance. Recovery was granted, but the allowance has been criticized by Denning on the premise that the valid contract was still subsisting and thereby precluded recovery under implied contract. If the employee had resigned rather than fallen ill, it is evident that in England, where the contract is valid, Denning's statement could not be questioned. However, when the case rests within the Statute of Frauds and either party elects to terminate performance relying upon the Statute, the election constitutes a rescission of the express agreement; therefore, use of the implied contract should no longer be precluded. Criticism has been leveled at the English axiom that the implied contract is precluded by the continued existence of the express agreement as it creates an automatic forfeiture of the intentionally defaulting employee's executed performance. The criticism has even greater justification when the promise is oral and comes within the "one year performance" provision of the Statute of Frauds. The employee's promise of performance creates at best a voidable obligation. A distinction should be recognized between the valid and voidable obligation. The equal denial of the employee's restitution interest in both situations does not adequately express this difference.

Law in Canada

Early litigation in Canada held that the employee did not possess the right to sue his employer for wrongful discharge when the contract fell within the Statute of Frauds. Either party could justifiably terminate the contract at any time. However, it was soon held that should the employer exercise his prerogative, the employee could then recover under the common counts for the value of the service performed.

When the specific issue arose questioning whether the right would be

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32 Savage v. Canning, 1 Ir.R.C.L. 434 (1867), involved completed performance of a construction contract; Scarisbrick v. Parkinson [1869] 20 L.R. 175, 17 W.R. 467, also involved completed performance of a service-employment contract; Scott v. Pattison [1923] 39 T.L.R. 557, 12 Digest 166, 1214a, 129 L.T.Rep. 830. Here Justice Salter stated that "If the plaintiff can satisfy the court that he has not been paid all that is fair and reasonable that he should receive in all the circumstances, he will succeed." The employee's reason for failure of performance, however, is sickness, rather than intentional abandonment of performance. Even this approach however has been criticized by Denning, Quantum Meruit and The Statute of Frauds, 41 L.Q. Rev. 79 (1925), on the ground that the contract was still subsisting and unrescinded, and thus suit could not be brought on implied contract while the express contract subsisted.

33 Scott v. Pattison, supra note 32.
34 Supra note 32.
36 Harner v. Davies, 45 U.C.Q.B.R. 442 (1880) : "I do not see however, how he could have withdrawn the plaintiff's claim upon the common counts from the jury".
afforded when the election to use the Statute of Frauds was exercised by the employee rather than the employer, the Ontario court refused recovery stating that

"No English or Canadian case has, though counsel have searched diligently, been found to authorize his recovering for his service where he has abandoned his employment voluntarily under a contract unenforceable under the statute." ⑤

The same distinction is thus drawn between discharge and abandonment when the contract is unenforceable because of the Statute of Frauds as when enforceable under a valid agreement.

SECTION FOUR OF THE STATUTE OF FRAUDS

The part performance interest of the defaulter in oral agreements involving real estate is separately considered, since the courts have been influenced in their decisions by the law of real property. The typical situation involves an oral promise of care and support of the aged real estate owner in exchange for conveyance of the realty at a future date, often upon the owner’s death. It has been established from an early date, that the vendee of real estate who terminates his oral contract to purchase real estate forfeits his down payment. The distinction between “payment” for care and support by promise to convey and “exchange” of real estate for money is slim. In both situations real estate is exchanged for bargained value.

Courts which have not followed the precedent of Britton v. Turner in valid contract cases have allowed recovery to the plaintiff under the oral contract not performable within one year;⑥ however, the only states that grant relief to the defaulter when section four of the Statute of Frauds is involved are those offering recovery when the contract is valid.⑦ Justice Parker, who wrote the Britton v. Turner decision for the New Hampshire Supreme Court, also granted recovery to the defaulter on a land contract case falling within the Statute of Frauds;⑧

⑤ Collins v. Smith; Campbell v. McWilliams [1908] 11 O.W.R. 350; Judge Doull in a recent decision stated “The only time when the contract which is within the statute can be admitted as a defense is when the plaintiff is seeking to recover money or property which has passed in pursuance of the contract; e.g., if I am sued for the return of a deposit, I can justify my retaining it by showing an oral agreement for the sale of land which the plaintiff refused to complete.” (Emphasis added). Coady v. Lewis & Sons [1951] 3 D.L.R. 845,848.

Note: the court uses the term “property” but limits his example to a money deposit. Does his term include personal services in an employment contract?

⑥ See decisions from Massachusetts, New York and Wisconsin supra note 25.


⑧ Crawford v. Parsons, 18 N.H. 293 (1846). Parker: “There being no sufficient consideration for the plaintiff’s promise to labor for the term, he might stop at his pleasure and is not obliged to invoke the aid of Britton v. Turner to enable him to recover. . . .”
however, this decision has now been overruled, both in the nineteenth and twentieth centuries.\textsuperscript{42}

Where the partially performing party's promise is voidable at his election,\textsuperscript{43} as in the case of the minor, relief is uniformly granted. There is a tendency in the same direction when the oral employment promise is for the performance of services that cannot be completed within the year. The judicial reluctance is found in the attempt to extend relief to partial performance of the oral promise of services in exchange for real estate.

\textbf{Position of the Text Commentator}

Divided opinion regarding the right to recover for part performance of the parol contract is discernible in text commentaries as well as in judicial decisions. Browne, writing on Frauds,\textsuperscript{44} and Wood, on the Law of Master and Servant,\textsuperscript{45} contend that recovery should be allowed; while Keener, in his text on Quasi Contracts, in 1893, expressed strong opposition to such view. Woodward, Williston, and Corbin state that recovery is generally not allowed; but Williston separates those states that classify the Statute of Frauds cases as void rather than voidable, and Corbin by footnote eliminates from his general statement the employment service contract. Mechem, in his work on Agency, contents himself with the statement that whether recovery may be had is "not entirely agreed upon by the authorities."\textsuperscript{46} The Restatement of Contracts suggests that there be no recovery "... except to the extent that such a right would exist if the requirements of the Statute were satisfied and the contract an enforceable one."\textsuperscript{47} Thus the employee

\textsuperscript{41}Clements v. Marston, 52 N.H. 31 (1872).
\textsuperscript{43}The infant's contract is uniformly classified today as voidable rather than void. The same uniformity, however, is not to be found in contracts falling within the provisions of the Statute of Frauds. It is generally, however, the states that classify such contracts as voidable that refuse relief, thereby justifying a consideration of Statute of Fraud cases under the general topic of voidable promises.
\textsuperscript{44}"The clear rule of law is that an oral contract within the Statute of Frauds cannot be made the ground of a defense any more than of a demand; the obligation of the plaintiff to perform it is no more available to the defendant in the former case than the obligation of the defendant to perform it would be to the plaintiff in the latter case." \textsc{Browne on Frauds} sec. 131 (4th ed. 1980).
\textsuperscript{45}"... the fact that a person that has contracted to serve another one year, to commence at a future date, enters upon the performance of his contract does not take the case out of the statute, and the servant may quit at any time during the term and recover the value of his services rendered upon a quantum meruit without deduction for any loss to the employer. ..." \textsc{Wood on Master and Servant} 373.
\textsuperscript{46}1 \textsc{Mechem on Agency} §1579, p. 1181 (2nd ed. 1914).
\textsuperscript{47}\textsc{Restatement, Contracts} §217 (1) (b) and §355(4); "A and B enter into an oral contract for the performance of services by A extending over a period of two years. B promises to pay $5,000 for these services when they have been rendered. After six months work A, without other justification than the Statute, declines to proceed further and sues for the value of what he has done. B requests that the contract be fully performed and states that he will
who relies solely upon the Statute of Frauds as the foundation for ceasing performance forfeits his part performance equally with the employee who breaches the valid enforceable agreement. The Restatement justifies this joint classification with the comment that "the fact that the contract is unenforceable by reason of the Statute does not put the plaintiff in a worse position in this respect." (Emphasis added.) The issue is not whether it is worse but whether it should be better. Should there be a distinction drawn between terminating a valid and a voidable agreement? The Restatement suggests that no distinction be drawn when the employer is (1) ready and willing to perform or (2) there is a refusal to sign a submitted memorandum. The written memorandum, originally proposed by Woodward and adopted by the Restatement, has merit in that it converts an unenforceable agreement into a valid contract; but its use is not compulsory, and the alternative suggested by the Restatement does not give the employee equal assurance. That the employer is desirous of continued performance at the time the employee contemplates termination of the oral promise is not assurance that the employer may not have a change of attitude as the work progresses. The benefit of part performance is held by the employer, and therefore the pressure for continued performance is disproportionate.

Keener would deny all relief to the party terminating performance on the voidable contract because to allow recovery "confers a right upon the defaulter, notwithstanding his failure to perform the contract." and because

"It is a strange result to reach that a statute enacted to give a defense, where but for the statute the party would be liable for breach of contract not only gives a defense, but also confers upon the party guilty of a breach of contract a right against the party not in default." (Emphasis added.)

No distinction is drawn by Keener between the intentional breach of the enforceable contract and the termination of performance under an unenforceable oral agreement. The Statute of Frauds is available for use as a defense, but the party so using it becomes "guilty of breach pay for the services when they have been rendered. A cannot recover." Example 2, §217 (b). Note: The comment to §355 (4) expresses the view that the non-defaulting party to the oral contract is not a wrongdoer, a point that has never been questioned, but the issue is whether the plaintiff who terminates his performance because the oral contract is subject to avoidance by the other party at any time is a wrongdoer to the extent that he should forfeit his part performance.

48 Comment on subsection 4 of §355 of Restatement, Contracts.

49 The suggestion of the written memorandum originally proposed by Woodward, p. 156, sec. 98 was accepted as sound by Williston, Williston on Contracts sec. 538, p. 1565 (1936 ed.), and adopted by the Restatement (see supra note 47). See also 2 Corbin on Contracts, sec. 332, p. 180. (1951).

50 Keener on Quasi Contracts p. 235 (1893).

51 Ibid. p. 236.
of contract." The inconsistency stems from the strict view taken when performance is promised and then not fulfilled.

Restoration of the value of part performance has also been denied on the ground that the jurisdiction involved classifies the Statute of Frauds agreement as "voidable" rather than "void." Being voidable, it is in effect classified as valid until the right to disaffirm is exercised. Executory performance is excused, but having been the one to exercise the right to disaffirm, the employee cannot claim a return of executed performance. It is in effect a "leave the parties where the court finds them" attitude, once prevalent in cases involving illegal contracts and agreements impossible of complete performance. The infant's contract is also classified as "voidable"; and it is uniformly held that he is allowed recovery for the reasonable value of part performance prior to the time that he quits his employment. Voidability is therefore the basis for denying recovery in one situation and allowing it in another. Although voidability is often used as the ground for denying restitution relief to the defaulter, this fact does not underlie the distinction. The difference in approach is based on a distinction in social policy.62

The infant is given the opportunity to avoid his promise because of the desire to afford protection against too great a discrepancy in bargaining capacity. The infant needs protection from himself. This protection loses a great deal of its value when the infant's disaffirmance only excuses executory performance. The protection must necessarily extend to a restoration of the value the infant has already conferred. The policy reason underlying the Statute of Frauds is not unilateral as with the infant, but bilateral in that both contracting parties need the same degree of protection. There is not any greater possibility of the employee forgetting details of the agreement, or defrauding the employer because of the oral nature of the agreement, than there is of the employer.63 Both parties as well as the community in general require the certainty and definiteness of the written agreement. The protection of the infant necessitates that he receive restitution for part performance; but it has been argued that similar protection need not be afforded to the adult who bases his agreement upon the oral promise. The purpose of the right of avoidance must be kept in mind.

52 "Some of the decisions are based upon the idea that the statute should prevent the indirect enforcement of a contract as well as its direct enforcement, and should be usable in defense as well as in attack. This may be partly a matter of statutory interpretation, but it is more largely a matter of opinion as to social policy." 2 CORBIN ON CONTRACTS sec. 334, p. 183.

53 Not only does the transaction involving real estate involve descriptive details of the property involved, but especially during early use of the Statute of Frauds the value of real estate involved in contracts was usually greater than in personal property. The importance of the value involved can be seen in the requirement that a contract for the sale of personal property over $500 must be in writing. (Originally 50£ and now reduced in some states to as low as $50.)
During the seventeenth and eighteenth centuries, the sole purpose of the Statute of Frauds was to prevent fraud and deceit. The defendant thus could not admit the existence of the oral contract and at the same time set it up as a defense to the action to recover the down payment; he was required to deny that the alleged oral promise was ever made or that the fraud ran to a particular portion of the agreement. Today this attitude has changed and the Statute of Frauds serves as a defense when there is no allegation of fraud or deceit. It is of more importance that the plaintiff complete his oral promise than that the defendant allege that the oral promise involves fraud or deceit.

The disadvantage of the present day attitude towards the Statute of Frauds is that the same pressure for continued performance by the employee, found in the enforceable written contract, also exists in the oral agreement; but there is not the same assurance that the employer will continue to recognize the oral agreement. If the employer should decide to avoid the oral agreement (a written memorandum not being involved), the plaintiff will still not recover the reasonable value of his completed performance because there will still be no compensation for the losses and expenditures that he has suffered in performance that do not result in pecuniary benefit to the defendant. Although continued performance with the right to restitution when the employer avoids the oral agreement is better than forfeiture if the employee should decide to exercise the option, it leaves him at a considerable disadvantage in comparison with the position of the employer who does not extend credit.

Finally, the proposal of the Restatement that the same standards be used for the defaulter under the Statute of Frauds as in the enforceable written contract makes "wilfulness" of the default the controlling factor. When an employee working under an oral agreement terminates his employment relying upon the Statute of Frauds "as his only justification for failure to complete performance," is his breach as "wilful" as the intentional defaulter on the written contract who does not have the Statute of Frauds to vindicate his abandoning performance? The Restatement draws no distinction between the two defaulters when the defendant has not "refused to perform." Complete protection is presently given the infant, and in most jurisdictions to the service contract employee when the contract cannot be performed within one year. In Canada, recovery under the latter circumstance is refused, and there may still be some doubt upon this question in England. When, how-

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54 It is typical, however, for the alleged fraud to run to a particular term or portion of the oral agreement. To admit the existence of the oral agreement should not prevent the defendant from setting up the fraud as to the individual particular within the contract.
55 See 2 CORBIN ON CONTRACTS sec. 332, pp. 179-80.
56 RESTATEMENT OF CONTRACTS §217 (1) (b).
57 Ibid.
ever, the oral contract falls within section four of the Statute of Frauds, compensation for the partly performed services (care and support for the aged real property owner) is today uniformly denied in the United States, except in the several states that adhere strictly to the Britton v. Turner rule. A written memorandum has been suggested by text writers and adopted by the Restatement of Contracts as a method of lightening the continued performance pressure placed upon both parties to the oral agreement. The Restatement, however, does not distinguish between sections four and five of the Statute of Frauds and reverts to the "wilful" test used in determining the right to restitution in valid contracts—a test which has been consistently criticized by writers and used by the courts only to supplement proper evaluation of the truly conflicting issues.

**Divisibility of the Employment Contract**

During the 1820's, the general rule was established in New York and Massachusetts to the effect that termination of an entire term service contract precluded any recovery for the completed performance. A decade later the modification of Britton v. Turner was proposed but the "forfeiture rule" was too strongly established. The writers and commentators were more impressed with the apparent equities of the decision than were the courts in subsequent eighteenth century litigation relating to employment contracts.

During this same period the argument for pro rata recovery on the basis of divisibility of contract was launched. It was argued by the defaulting employee's counsel that when the contract provided for yearly employment at a specific rate of pay per month, the contract became divisible on a monthly basis. The judiciary, however, uniformly denied the argument, declaring that this was merely a means used by

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58 As early as 1880 the following explanation was suggested as grounds for a distinction between the right to recover for partially performed services and the purchase money for land: "In the case of the suit to recover the purchase-money of the land all that remains to be performed is required of the defendant, and he may waive the privilege afforded by the statute of refusing to convey. In the case of the suit to recover for partial services rendered, the defence is that the plaintiff is bound to perform additional services; but these services the plaintiff may refuse to perform, as his contract to that effect is within the statute and not binding without writing. In the former case, that which is within the statute is to be done by the defendant; and if he is willing to do it, the plaintiff cannot force him to stand upon the statute. In the latter case, that which is within the statute is to be done in part by the plaintiff, and to force him to do it, by setting up the verbal contract as a bar to his recovery for the value of services rendered would be to enforce the verbal contract by way of defence." Browne on the Statute of Frauds sec. 122a, p. 141 (4th ed. 1880).

59 Wright v. Turner, 1 Stewart 29 (Ala. 1827); De Camp v. Stevens, 4 Blackf. 24 (Ind. 1835); McMillan v. Vanderlip, 12 Johns. 165 (N.Y. 1815) (To be paid a specified amount for each run of year spun, yet employee to work at spinning job for entire year); Reab v. Moor, 19 Johns. 337 (N.Y. 1822): "appellant was to pay him $104 or 13 dollars per month, not 13 dollars at the end of every month ...."; Lantry v. Parks, 8 Cowen 63 (N.Y. 1827).
the contracting parties for conveniently calculating the entire sum. Rate of payment did not create divisibility of contract.

In 1836, a distinction was drawn between rate of payment and obligation to actually make periodic payment. The distinction was acceptable to create divisibility at the level of the lower court; however, the Vermont Supreme Court was not ready to accept the distinction. During the 1840's, however, the same argument was presented in the Southern states of Alabama and North Carolina, and both states accepted the distinction granting contract relief to the defaulting employee for the completed month's service. The contract called for payment of salary on a periodic basis; divisibility of contract was thereby created, and the abandoning employee recovered for service performed to the date required for the last payment prior to default. All that the employee forfeits by quitting without cause is the performance rendered subsequent to this last pay period. He, of course, is still subject to provable damages resulting from breach of his employment contract.

The Alabama decision followed by only two years a denial of restitution by the same court for services on an entire contract that had been terminated by the death of the employee. The promise to pay periodically made the contract divisible, allowing the intentionally defaulting employee to hurdle the requirement of condition precedent; on the other hand, when the contract failed to specify the time of payment, even death of the employee did not justify compensation for completed performance. This indicates the unrealistic nature of judicial decisions in attempting to evaluate the interest of the defaulter. Fortunately, denial by reason of death was later repudiated by the Alabama court. This aspect of Cutler v. Powell has now been renounced both in England and in the United States. Default in performance due to the employee's illness likewise is no longer reason for denying the obligation to pay for benefit received.

60 St. Albans Steamboat Co. v. Wilkins, 8 Vt. 54 (1836): "The defendant's right to retain full pay does not depend upon the fact, whether the hiring was by the month or by the year." p. 56.
61 Davis v. Preston, 6 Ala. 83 (1844). Employed as superintendent of mill for one year to be paid at end of six and twelve months. Completed six months and therefore entitled to this payment.
62 Dover v. Plemons, 32 N.C. 23 (1848). Six months at $8.00 per month, contract providing for payments each month.
64 Recovery allowed: Coe v. Smith, 4 Ind. 779 (1853); Persons v. McKibben, 5 Ind. 261 (1854); Ricks v. Yates, 5 Ind. 115 (1854); Stanley v. Kimball, 80 N.H. 431, 118 Atl. 636 (1922); Parker v. Brown, 136 N.C. 285, 48 S.E. 657 (1904); Stubbs v. Holywell [1867] 36 L.J. Ex. 166; L.R., 2 Exch. 311, 16 L.T. 631; 15 W.R. 769, Digest 393, 4934 (now 5154); See also 6 Eng. Rul. Cas. 639 (Annotation discussing American cases involving Cutler v. Powell).
65 FEDERAL: Sickerko v. Union Pac. R.R. Co., 111 F.2d 746 (9th Cir. 1940).
ALABAMA: Green v. Linton, 7 Porter 133 (Ala. 1838).
CONNECTICUT: Ryan v. Dayton, 25 Conn. 188 (1856).
MAINE: Preble v. Prebel, 115 Me. 26, 97 Atl. 9 (1916); King v. Barker, 62 Atl. 211 (Me. 1948).
During the 1850's the concept of divisibility based upon the contractual provision for periodic payment was first adopted in the Eastern states, and by the turn of the nineteenth century it had become clearly established as a contract concept for recovery by the defaulting employee. The test of divisibility, in the employment contract as in other agreements, is primarily a question of the intent of the contracting parties. Finding such intent from the express stipulation of periodic payment in the contract creates little difficulty; however, before the beginning of the twentieth century some courts had progressed to the point of finding divisibility based upon the sole fact that the employer had previously made certain payments to the employee as his work progressed. Within less than a century the judicial attitude toward use of divisibility in term employment contracts had completely changed.

During this same period with its increase in industrial labor contracts it became customary to provide for term contract payments on a periodic basis. To a lesser extent the same was true of the agricultural contract. The farm hand no longer lived on the owner's farm, nor did he receive his meals and lodging for his family as part of his agreement to work on the farm. Many farm contracts still provided for seasonal employment, but payment necessarily had to be made at shorter intervals. The farm employee did not have the assets to carry him through the season, and it was no longer customary for the employer to furnish necessaries as the principal part of the farm laborer's compensation. These inducements for periodic payments to both the industrial laborer and the farm employee, when coupled with the judicial interpretation

Vermont: Fenton v. Clark, 11 Vt. 557 (1839); Leaver v. Morse, 20 Vt. 620 (1847).
Wisconsin: Greene v. Gilbert, 21 Wis. 401 (1867); see, however, Jennings v. Lyons, 39 Wis. 553 (1876); denied on ground of foreseeability of sickness.

66 Dayton v. Dean, 23 Conn. 99 (1854); White v. Atkins, 8 Cush. 367 (Mass. 1851) (pointing out that Reab v. Moor, 19 Johns. 337 (N.Y.) in denying recovery had specifically remarked that there was no promise to pay monthly). Cf. Davis v. Maxwell, 12 Metc. 286 (Mass. 1847) denying relief because "There is no time fixed for payment and the law therefore fixes the time. . . ."

67 Peck v. Burr, 10 N.Y. 300 (Illegal contract, but Justice Foot's dissent as obiter dicta again distinguishes Reab v. Moor); Tipton v. Feitner, 20 N.Y. 423 (1859) (Obiter dicta by Justice Denio making same distinction based upon time of payment); Winterhalter v. Johnson, 1 Ohio Dec. 575 (1851).


of divisibility of contract based upon periodic wage payment, combined to reduce steadily the harshness of the common law forfeiture rule for abandoning contract performance. Recovery was permitted based on the contract and at the contract rate of periodic payment. The quasi contractual element involved only the element of performance since the date of last required payment. This amount became material only when the required periodic payments were widely spaced or the nature of the employment still required complete performance before any wages had to be paid.

**The Law of England**

The application of divisibility of the employment contract based upon accrued periodic payments developed in the United States in the 1840's and 1850's. During this same period the famous English case of *Taylor v. Laird* was decided. This case involved the captain of a ship who abandoned performance of his contract before completion. The defendant's offer to the captain used the words "Your pay to be at the rate of 50£ per month." Plaintiff's letter in reply used the expression "pay of 50£ per month" accepted. Lord Pollock saw the contract as divisible due to the requirement of periodic pay periods: "the words were plain, and no mercantile man would doubt what was meant." Underlying the decision, however, is Pollock's comment that

"if the meaning is not given, the result would be, that had the plaintiff died or the voyage failed at the last moment, nothing would be payable by the defendant, because, according to his contention, the performance of the entire work contracted for was a condition precedent to the right to receive anything. This cannot have been intended." (Emphasis added.)

The severity of the English attitude towards impossibility of performance stemming from *Cutler v. Powell* directly affected Pollock's approach to the issue of contract divisibility. The sea-captain had not died but had abandoned performance; yet to Pollock the requirement of condition precedent in entire contracts could recognize no distinction based upon the cause of default. It, therefore, became necessary to extend recovery based upon the contract to the defaulter. This recovery came in the form of implied divisibility founded on the employer's contractual obligation to make periodic wage payments. The result cannot be criticized as it greatly reduced the employee's wage forfeiture.

True contract divisibility is supposed to be founded on the intent of the contracting parties. In *Taylor v. Laird* it was suggested to the Court that defendant

"would never have agreed to pay the plaintiff at the rate of 50£ a month if the latter had not agreed to go the whole voyage.

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The case is similar to that of a contract to make a perfect article for a certain sum of money; in which case, unless it is completed, the workman cannot recover either for the materials used or for the work done."

If this was the employer's intent, then it certainly could not also be claimed that he also intended to create a divisible contract by means of the provision for periodic payments. Defendant's argument carries us back to similar reasoning used in Cutler v. Powell. Both contracts involved a sea captain, and in both there was a promise to complete performance. The intent to create an aleatory contract was found in the Cutler decision primarily on the basis of the amount that the seaman was to receive as compared to the usual rate of pay. This issue was not considered in Taylor v. Laird, and Pollock's reply to the issue of the parties' intent was merely the suggestion that

"the agreements should be construed as though made on the supposition that both parties would observe them, not break them, and on the supposition that plaintiff's construction is reasonable, and the defendant's is not."

Should the supposition that both parties at the same time they signed the employment contract intended in good faith to complete agreed performance influence the issue as to their intent as to what rights would be created by part performance? If the contract payments had been disproportionately large, then it might be argued that the defendant-employer desired to shift the risk of non-performance onto the plaintiff-seaman; but the mere presumption of good faith performance should not create the same inference. And as to Pollock's suggestion that plaintiff's construction (of divisibility) is more reasonable than defendant's (condition precedent), reasonableness of construction must either be based upon intent of the parties (subjective) or general intent as interpreted by the court (objective). From Pollock's statement the grounds for his construction are not apparent. It is submitted that the obstacle of condition precedent required the Court to "imply" divisibility based, at best, upon an objective standard of construction of intent.

The English courts' broad application of divisibility lead Justice Montague Smith, a decade later, into the use of the same reasoning on divisibility as his predecessor. In Button v. Thompson, again involving the employment of a seaman, it was clearly established that he had been left behind because, as the jury found, he had been "guilty of drunkenness and abusive language subversive of discipline." His inability to complete his contract was found to be the result of his own "negligence and misconduct." Yet, in deciding whether the contract

words “per calendar month” created a divisible contract, Justice Smith commented that similar words were to be found in the *Taylor v. Laird* contract and that he desired to apply the same construction previously used in that case by the Court of Exchequer. This reluctance to create a forfeiture underlies the liberal interpretation of divisibility, and is observed in Justice Smith’s statement that

“If the defendant’s construction were to prevail, the plaintiff, notwithstanding he had faithfully served in the ship during the intermediate voyages mentioned in the articles, yet, if being ashore at the last port at which the ship touched, he was unable to rejoin her from some negligence however slight, or even from accident or mistake, would be unable to recover any part of his wages.” (Emphasis added.)

Apprehension in the 1850’s of possible forfeiture in cases of default resulting from death, and by negligence, accident or mistake in the 1860’s, created a liberal interpretation of term employment contract divisibility. This apprehension of forfeiture resulted in contract recovery for part performance to the sea captain who refused to complete his contract, and to the seaman who because of his own misconduct was unable to perform.

The twentieth century English decisions of *Parkin v. South Hetton Coal Company*\(^71\) and *George v. Davies*\(^72\) follow the earlier view that a requirement for periodic payment creates a divisibility of contract. This same concept of divisibility has now been applied in England in a case where an employee who would not resign was discharged by his employer because, as managing director of the defendant’s company, he had transmitted to the defendant false and misleading reports and accounts of the business.\(^73\)

**Law of Canada**

Canadian cases on divisibility of the employment contract did not arise until near the end of the nineteenth century, at which time recovery was allowed in several decisions.\(^74\) All of these cases relied on *Taylor v. Laird*\(^75\) as their authority. In 1907, in *Mousseau v. Tone*,\(^76\) the Canadian court followed the English and American position that contractual provision for periodic payment created an implied divisibility.

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\(^{71}\) [1907] 98 LT. 162, 24 T.L.R. 193 C.A. (Amount due for each days work ascertained daily but paid every 14 days).

\(^{72}\) [1911] 2 K.B. 445: Based partly upon custom within community that employee could quit at end of first month and get paid for that month's services.

\(^{73}\) Healey v. Societe Anonyme Francaise Rubastic [1917] 1 K.B. 946. (Salary of 2500£ per annum payable monthly and previously paid at end of each month).


\(^{75}\) See Supra note 69.

bility in favor of the defaulting employee. Subsequent decisions in 1911\(^7\) and 1920\(^8\) reaffirmed this view.

The question of interpretation arose in 1927 in *Cowan v. Eisler\(^7\) involving the hiring of a farm laborer for the season at "wages of $55 per month." The defendant asserted that the language was used only to fix the rate of compensation, an argument that had at one time received favorable hearing on both sides of the Atlantic. The Canadian Court, recognizing the effect of forfeiture that would result from such interpretation, expressed the view that "such a result should be provided for by nothing less than clear language or unequivocal implications ..."\(^8\) Similar language in favor of presumed divisibility and the presumption of implied forfeiture is also found in several decisions in the United States.\(^9\) This concept of divisibility based on the contract requirement of periodic payments is now firmly established, having recently been reaffirmed.\(^10\)

**STATUTORY DISABILITY**

The collective bargaining strength of the industrial employee has increased materially in the United States since the beginning of the twentieth century. The employee, however, continued to be dependent upon the current receipt of his contract wages. He often had little assets other than his wages, and, due to the absence of collateral security, he could not secure extended credit to cover his subsistence for extended periods. The employer, therefore, retained a forceful weapon by means of his power to withhold the employee’s earned wages. In addition some of the large industrial firms also used the device of compelling the employee to accept his compensation in payment other than legal tender. The usual payment consisted in a right to goods from the company store. In order to alleviate the injustice caused by these devices to the employee, the English Parliament during the nineteenth century passed the Truck Acts requiring that all employees receive payment for their work in legal tender. Similar statutes have now been passed in most of the United States.\(^11\)

After the turn of the twentieth century the legislatures of various states in the United States began to pass statutes regulating the time and manner of payment of the industrial employee’s wages. The year


\(^{80}\) Supra note 79 p. 714.

\(^{81}\) See Supra note 68.

\(^{82}\) R. v. Wagner (1951) 14 C.R. 167, 4 W.W.R. (N.S.) 666 (Sask.).

of 1919 saw a great influx in the passage of statutes of this nature. These statutes generally covered all persons, firms and corporations engaged in manufacturing and industrial occupations, but few of them specifically included farming or domestic service. The overwhelming majority of states today have passed statutes requiring that certain employees receive their wages periodically. The most common period of required payment is semi-monthly, a few states requiring payment weekly, and none of the statutes allowing the employer to withhold payment of earned wages beyond one month. These periodic payment statutes are set forth and analyzed in the appendix following this article. Many of these statutes include provisions relating to the employee who abandons performance or who is discharged before the contract is executed.

The principal purpose motivating enactment of these statutes was the legislative desire to deprive the employer of too potent a weapon with which to combat strikes and collective bargaining by the employee. The indirect result, however, was to reduce the extent of forfeiture imposed by the earlier judicial decisions on the defaulting employee. Shortening the time permitted between pay periods lessens performance value that can be lost by the abandoning employee. The judicial interpretation of divisibility assured payment through the pay period preceding date of termination. This, coupled with the legislation reducing the possible length of the periodic pay period, very nearly eliminated the legal problem of wage forfeiture for many employees.

A number of legal articles have dealt with these divisibility statutes; and it is agreed by both McGowan and Corbin that these enactments should reduce the problem of the abandoning employee's performance interest and that the small amount of litigation that will remain should receive sympathetic consideration from the courts based upon liberal interpretation of these statutes. Such favorable judicial interpretation of divisibility assured payment through the pay period preceding date of termination. This, coupled with the legislation reducing the possible length of the periodic pay period, very nearly eliminated the legal problem of wage forfeiture for many employees.

Appendix A following this article sets forth the general statutes relating to periodic pay periods, and Appendix B includes those statutes dealing specifically with the employee's abandonment or discharge.

McGowan, The Divisibility of Employment Contracts, 21 Iowa L. Rev. 50 (1935); Smith, The Constitutionality of Bimonthly Pay Day Laws, 16 Tenn. L. Rev. 940 (1941); Statutes Regulating Defaulting Employee's Recovery For Services Rendered, 43 Harv. L. Rev. 947 (1929); Legislative Regulation of Wage Payment and Collection, 39 Col. L. Rev. 238, 249 (1939).

McGowan, supra note 86 at p. 74.

5 Corbin on Contracts sec. 1127, pp. 566-7.

"It is believed that modern labor legislation and the attitude displayed by the courts interpreting and applying it will tend strongly in support of allowing recovery as was done more than a century ago in Britton v. Turner." Ibid., p. 566. Professor McGowan in 1935, however, disagreed with Williston as to the majority view of the courts as to finding the defaulting employee's contract divisible. McGowan finds that although "A lining up of the cases chronologically indicates a trend toward a more liberal view, it is not very marked..."
construction of these statutes will create substantial justice between the contracting parties. The employee is permitted to recover compensation for his performance, and, at the same time, the employer is allowed recoupment in the form of monetary damages for the injury sustained.\textsuperscript{90} The disadvantage of forcing an unwilling employer to accept the burden of proving the extent of his injury and transposing this into monetary terms is still involved, but this disadvantage should not outweigh the advantages running to both parties from the use of the concept of divisibility. Recovery in quasi contract today requires a judicial determination distinguishing the deserving from the undeserving employee. Fault, and the intangible will-o’-the-wisp “wilfulness,” have to be reckoned with, while divisibility as a contract concept cuts through these complexities and allows recovery on the simple basis of accrued debt.

The amount of litigation involving recovery for partial performance by the abandoning employee has greatly decreased during the past quarter century. This is in part attributable to the judicial attitude toward divisibility, and in part to the twentieth century legislative enactments shortening periodic wage payment periods. In addition, however, there are several other factors that have reduced the amount of litigation reaching the appellate level. Modern employment contracts do not often involve long periods of performance, and consequently the amount involved at the time the employee quits is often too small for prolonged litigation. In addition, the employee signing the long term employment contract is frequently sufficiently acute to protect his own interests, or has received adequate legal advice so that the contract specifies the interests of the parties upon the contingency of default. The advent of collective bargaining and the increased strength of the employees’ union have also reduced the amount of litigation. Arbitration of employees’ disputes has also reduced litigation.

There has also been a general change in attitude as to the purpose of the employment contract. Today the industrial employer must adjust his production by means of a fairly flexible employment policy. Short term employment contracts have frequently become economically advisable in order that the employer can adjust his production to variance in demand. The employee loses some of his security but to a certain extent has substituted the protection of seniority and union membership. Flexible employment is at times an advantage to the employee as well as his employer.

Although flexible employment contracts with mutual termination rights upon monthly notice have become more frequent, the problem of

\textsuperscript{90} See similar judicial expression by Minnesota court in McGrath v. Cannon, 55 Minn. 457, 57 N.W. 150 (1893).
the defaulting employee nonetheless has not been completely solved. McGowan estimates that not more than one-half of the nation's wage earners are included within the terms of periodic wage payment statutes, and many of these statutes apply only to specified types of employment.\textsuperscript{91} Many do not contain provisions for the employee who is discharged or abandons performance.\textsuperscript{92} The number of appellate reported cases involving attempted recovery for part performance by the defaulting employee has declined during the past few decades; however, it has been pointed out that the majority of earlier appellate decisions involved farm hands, sharecroppers, contracts based upon promises to support in exchange for money or devise of land, and occasionally the contract for a specific piece of labor.\textsuperscript{93} These contracts lie outside of present statutory protection in many jurisdictions. Two seemingly conflicting reasons have been offered to explain this decline in appellate litigation: first, many defaulting laborers choose to suffer a loss rather than incur the expense of carrying a case through the courts with the ultimate possibility of an unfavorable decision; and second, because trial courts are disposing of these cases in a sensible manner.\textsuperscript{94}

Both of the above reasons may be applicable; however, the change in attitude towards long term fixed employment contracts and the social tendency to adjust compensation upon default rather than create large forfeitures, have also influenced this reduction in litigation. In addition, the advent of collective bargaining, increased use of arbitration of employment disputes, the shift of the United States from an agrarian to an industrial nation, and the judicial use of the concept of divisibility of contract based upon contractual obligation of periodic payment have all combined in varying degree to reduce the seriousness of the forfeiture of the abandoning employee. Emphasis today in employment default cases has shifted to bonus rights, profits sharing plan interest and accrued vacation interest. The problem of forfeiture of completed performance on the long term employment contract still affects the seasonal farm employment contract and the contract for support of the aged relative as well as other long term employment agreements. What solution is feasible to protect both the interests of the employer and the defaulting employee? In 1942, the New York Law Revision Commission studied the problem and suggested a solution that,

\textsuperscript{91} McGowan, \textit{The Divisibility of Employment Contracts}, 21 Iowa L. Rev. 50, 57.
\textsuperscript{92} McGowan, \textit{supra} note 86, p. 74. The statutes of Oregon, Utah and Wisconsin (Wis. Stats. (1953) §103.39) extend only to the abandoning employee who is not under contract.
\textsuperscript{93} Mulder, \textit{The Defaulting Plaintiff in North Carolina}, 15 N.C. L. Rev. 255, 266 (1937).
\textsuperscript{94} \textit{Ibid.}, p. 265, note 68. It should be pointed out that Mulder's survey of cases is limited primarily to North Carolina: however, the State's combined agricultural and industrial makeup should be fairly representative.
Although not adopted in New York, has considerable merit. One of the basic provisions within this suggested legislation was that twenty percent of contract value could be retained by the employer, as an automatic forfeiture for the employee’s default. Petty and inconsequential performance suits are thereby eliminated from litigation; the employer is saved the burden of proving small damages and is assured of some retention of compensation to compensate for those damages incapable of evidentiary proof. The employee is given the protection against complete forfeiture of his completed performance and is therefore often safeguarded against major loss when a substantial amount of the contract had been completed at the time he quit.

The legal position of the defaulting employee has materially changed within the past century. Condition precedent, entirety of contract, and willfulness of breach are terms still to be reckoned with, as well as the legal philosophy of discouraging breach by imposing forfeiture, and the reluctance to “rewrite the contract” or to impose implied contracts where express agreements still exist. These expressions are still to be found in employment contract decisions, but the effect of the nineteenth century attitude towards the defaulter has now diminished.

Sir Henry Maime, writing in 1861, expressed the view that the “movement of the progressive societies has hitherto been a movement from status to contract.” The twentieth century has shown a closing of the circle. Modern employment legislation, whether it relate to unemployment insurance, Workman’s Compensation Acts, Minimum Hour and Wage Laws, or the presently considered periodic wage payment statutes, has shown a gradual reversal from the nineteenth century individualism with its contractual freedom without security. The trend is again toward status with its increase in individualistic security and corresponding reduction in contractual rights. Status, however, no longer connotes master and servant relationship, but rights and duties created by legislative control. “It is to be hoped that this status will allow enjoyment of freedom of action and greater flexibility than the ‘status’ of primitive law.”

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95 Sir Henry Maime, Ancient Law (1861).
APPENDIX A

PERIODIC EMPLOYMENT WAGE PAYMENT STATUTES

ALABAMA: ALA. REV. CODE (1940) §48-474: Provides that "Every public service corporation engaged in transportation doing business in this state, employing as many as fifty or more employees" is "Required to make full payment to employees for services performed as often as once every two weeks or twice during each calendar month and such payment or settlement shall include all amounts due for labour or services performed up to not less than 15 days previous to the time of payment." Penalty: "Violators shall be guilty of a misdemeanor and upon conviction fined not less than $25 nor more than $250 for each offense and each day's violation against each employee shall constitute a separate offense." (Held constitutional: Rep. Atty. Gen. of Alabama 1932-34, p. 143.)

ARIZONA: ARIZ. CODE (1939) §43-1601: Applied to the State and every company or corporation doing business and employing labor within the State. Payment: Twice in every month not more than 16 days apart. Penalty: Misdemeanor with fine of not less than $50 nor more than $300.

ARKANSAS: ARK. STAT. (1947) §81:301: Applies to corporations. Payment: Semi-monthly; Penalty: Violation constitutes a misdemeanor with fine of not less than $50 nor more than $500 for each offense.

CALIFORNIA: CALIF. LABOR CODE (1944) §204: General statute coverage; Payment: Semi-monthly; Penalty: Both criminal and civil penalties. Applied to wages that are "earned." First passed in 1919. §205: Applies to farm laborers and domestic help when boarded and lodged by employer; Payment must be made at least once every month. §§3001-3002: (§3001) "A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; at a daily rate for one day; a hiring by piecework, for no specific time." (§3002) "In the absence of any agreement or custom as to the term of service, the time of payment, or the rate of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages to be paid when the service is performed."

COLORADO: COLO. STAT. ANN. (1935) §97:200. Applies only to corporations; Payment: Semi-monthly; Penalty: Five per cent of wages due and not paid.

CONNECTICUT: CONN. GEN. LAWS REV. (1949) §7361. Payment required every week. Penalty: Fine of $200 or not more than 30 days imprisonment or both.


INDIANA: BURNS' IND. STAT. ANN. (1933) §40:101. Applies to "person, firm corporation or association," but farmers are not covered. Payment: Semi-monthly; Penalty: Payment not to exceed wages due and unpaid plus ten per cent payable "if requested." §40:104: Payment must be made every week if requested by employees in mining and manufacturing businesses. Earlier statute making regular payment of wages mandatory held unconstitutional. Superior Laundry Co. v. Rose, 193 Ind. 138, 137 N.E. 761 (1923).

IOWA: IOWA CODE (1950) §477.51; 477.52. Applies only to railroads. Payment: Semi-monthly.

KANSAS: KAN. GEN. STAT. (1949) §44-301: Applies only to corporations; §44-312 (general application) Payment: Semi-monthly. Civil penalty.


LOUISIANA: LA. REV. STAT. (1950) §23:633. Applies to employers of more than ten persons in manufacturing, mining, oil industries and public service corporations. Does not apply to a clerical force or salesmen of public
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service corporations. Payment: Semi-monthly. Penalty for violation: Not less than $25 nor more than $250 in fine or not less than ten days imprisonment or both.

MAINE: ME. REV. STAT. (1944) §38:556. Broad coverage: Applies to every person, partnership and corporation engaged in the manufacturing, mechanical, mining, quarrying, mercantile, restaurant, street railway, telephone and telegraph business, in any building trade, in all public works, to railroads, water works and the like, to the State, its officials, boards, and commissions and to counties, cities and towns. Payment must be made every week. Criminal penalty for violation. (See Smith, The Constitutionality of Bi-Monthly Pay Day Laws, 16 TENN. L. REV. 940 at 943 (1941), comparing the broad Maine statute with the limited act of Maryland).

MARYLAND: MD. ANN. CODE (1951) Art. 23, §135. Statute applies to "every association or corporation doing business within the State of Maryland." At one time statute applied only to corporations incorporated under the laws of the State and engaged in mining and shipping coal in Allegheny County. See Smith, The Constitutionality of Bi-Monthly Pay Day Laws, 16 TENN. L. REV. 940 at 943 (1941). Payment must be semi-monthly; violation constitutes a misdemeanor with a maximum fine of $200.

MASSACHUSETTS: MASS. GEN. LAWS (1951) Ch. 149, §148. Does not apply to hospitals or co-operative associations. Payment weekly except agricultural workers and domestic servants who are paid monthly. Penalty: $50 fine or two months imprisonment or both. Persons cannot contract away statutory rights.

MICHIGAN: MICH. COMP. LAWS (1948) §408.541. General coverage of almost all employees. Payment must be made at least semi-monthly.

MINNESOTA: MINN. STAT. (1949) §§181.08, 181.09. Applies to public service corporations. Payment to be made semi-monthly. Originally passed in 1915. Penalty consists only in the payment of small extra costs in case of suit. §181.10. Applies to persons engaged in labor of a transitory nature. Must be paid every fifteen days. Penalty: No penalty is specifically provided for violation of this section. "Apparently it is purely regulatory legislation." See 16 TENN. L. REV. 940 at 941 (1941).

MISSISSIPPI: Miss. ANN. CODE (1942) §6994. Applies only to manufacturers who employ fifty or more people. Payment must be at least semi-monthly.

MISSOURI: Mo. REV. STAT. (1949) §290.080. General statute applying to all corporations. Payment must be made at least semi-monthly. Penalty: $50 to $500 fine for each offense. §290.090. Specific statute applying to manufacturers. Payment must be made every 15 days. Penalty: Double the sum due such employee at the time of such failure to pay the wages due, to be recovered by civil action. Statutory provisions cannot be waived.

MONTANA: MONT. REV. CODE (1947) §§1:1301; 1:1303 Agricultural labor expected. Payment to be made every 15 days. Penalty: Five per cent of wages due and unpaid as civil penalty. Violation constitutes a misdemeanor.

NEBRASKA: NEB. COMP. STAT. (1943) (1950 reissue) §74:585. Applies only to railroad employees. Payment: Semi-monthly. Penalty: $25 for each violation, one half to the person suing and the other half to the State.

NEVADA: NEV. COMP. LAWS (1929) §2775. General statute. Payment: At least semi-monthly. Both civil and criminal penalty. Forbids the parties to avoid the provisions of the statute.

NEW HAMPSHIRE: N.H. STAT. (1951) Ch. 124, §1; Ch. 212, §§15, 16. Statute worded so as to protect only the employee who works by the day or week. Criminal punishment for violation.


NEW YORK: N.Y. LABOR LAW (Supp. 1938) §196: General statute requiring
payment weekly; exception for steam surface railroads where employees must be paid semi-monthly ($196). Penalty: Both civil and criminal. Fine of $50 per offense ($198). Provisions cannot be waived ($193(3)). "Wages," however, has been defined as hourly pay for manual labor as opposed to salary or fee. 179 Misc. 225, 38 N.Y.S. 2d 684 (1942).

Patterson commenting on the New York statute: "The Labor Law provision, if it does affect the severability of personal service contracts, leaves important gaps with respect to (a) the class of persons rendering personal service, (b) the class of persons to whom the services are rendered, (c) the units or portions of service to which compensation is apportioned." Restitution for Benefit Conferred by a Party in Default Under a Contract, N.Y. Leg. Doc. No. 65 (f) 1942, p. 46.

NORTH CAROLINA: N.C. Code (1950) §60-55. Applies only to railroads and repair shops which work at least ten persons. Payment: Semi-monthly. Penalty: No penalty either civil or criminal. (See Smith, The Constitutionality of Bi-Monthly Pay Day Laws, 16 TENN. L. Rev. 940, 941 n.6. Smith places North Carolina in a separate classification as "the statute provides for no penalty, either civil or criminal for failure to comply").


OHIO: Ohio Gen. Code (Baldwin 1948) §12-946-1. General statute coverage, but employer must employ at least five people. Payment: Semi-monthly. Penalty: Fine of $25 to $100 per offense. §12-946-2 forbids the parties to avoid the effect of the statute.

OKLAHOMA: Okla. Stat. §40-162; §40-164 (General statute). Payment: Semi-monthly. §45-305: Coal mining employing more than three people. Payment of wages must be demanded.

OREGON: Ore. Code Ann. §102-602. General coverage. Requires payment monthly, but mutually satisfactory agreements between employer and employee to pay at a future time are permissible. (§102-602) Punishment: Violation is a misdemeanor. Fine of not more than $500. (§102-603).

RHODE ISLAND: R.I. Stat. (1941) ch. 1069; (1942) ch. 1237. “Every employer other than religious, literary or charitable corporations, the state or any political subdivision thereof, must pay weekly to employees except those whose compensation is fixed at yearly, monthly or semi-monthly rate.” Weekly pay. Penalty: $50 to $100 fine or 10 to 90 day imprisonment or both.


SOUTH DAKOTA: S.D. Code (1939) §17.0503. Wages are presumed, in absence of contrary agreement, to be monthly and payable when the services are performed.


TEXAS: Tex. Civ. Stat. Ann. (Vernon’s Supp. 1938) §5155. Coverage: Every corporation or any person or firm engaged in public work for state, county or municipal corporation must pay employees’ wages semi-monthly. Formerly applied only when ten or more persons employed, now amended to cover “one or more” employees. Civil penalty.

UTAH: Utah Laws (1953) §34-10-4. General statute coverage: Payment:
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Semi-monthly; but if on a yearly salary, payment may be on a monthly basis with pay day to be on the seventh of the month. Both civil and criminal penalty.


WISCONSIN: Wis. Stat. (1953) §103.39: "When wages payable: Pay orders. (1) Every person, firm or corporation engaged in any enterprise or business for pecuniary profit within the state of Wisconsin shall as often as on the fifteenth and on the last day of each month pay to every employee engaged in its business, except those employees engaged in hospitals, or sanatoriums, logging operations, farm labor, domestic service, or employees employed on a salary basis equal to at least $350 per month, all wages or salaries earned by such employee to a day not more than 16 days prior to the date of such payment. Any such employee who is absent at the time fixed for payment or who for any other reason is not paid at that time shall be paid thereafter at any time upon 6 days demand. . . . No person, firm or corporation coming within the meaning of this section shall by special contract with employees, or by any other means secure exception from the provisions of this section, and each and every employee coming within the meaning of this section shall have a right of action against any such person, firm or corporation for the full amount of his wages due on each regular pay day as herein provided, in any court of competent jurisdiction. Whenever such regular payments cover wages earned to a date more than 8 days prior to the day of payment in the event the day fixed for the semi-monthly payment falls on Sunday, or a holiday, payment shall be made on the previous business day." (Emphasis added.) Subsection (3) provides that "In an action by an employee against his employer on a wage claim, no security for payment of costs shall be required . . . . " However, in State ex rel Martin v. Reis, 230 Wis. 683, 284 N.W. 582 (1939), it was held that "employer" did not include the State of Wisconsin, and therefore bond for court costs had to be furnished in a suit by an employee for services performed for the State as employer.

APPENDIX B

WAGE PAYMENT STATUTES WHEN EMPLOYEE TERMINATES EMPLOYMENT

ALASKA: Alaska Comp. Laws Ann. (1949) §43-2-11: "Where the laborer's or employee's services are terminated regardless of the cause of termination, all wages, salaries, or other compensation for labor or services shall become due immediately and shall be paid within 24 hours after such termination." (Emphasis added.) Penalty: Fine of not more than $1,000 for each offense or imprisonment for not more than one year or both, and each day's continuance of the violation is a separate offense (§41-1-12). Alaska's periodic wage payment statute (same citation) requires wages be paid at least once each month and applies to both individual employers and
corporations. Provisions of the statute can be changed by written contract of the parties.

ARIZONA: Ariz. Rev. Code (1939) §§43.1602. Covers both the employee who "quits the service or is discharged therefrom." Payment of wages that are due must be paid at once and violation of statute is a misdemeanor. See Arizona Power Co. v. State, 19 Ariz. 114, 166 Pac. 275 (1917). Employee of Power Co. quit on 23rd of September. $22.07 was due and unpaid. Not paid until next regular pay day on October 5. Held: Power Co. violated the Arizona statute.

ARKANSAS: Ark. Stat. (1947) §§51-508: "If any laborer shall without good cause abandon his employment before the expiration of his contract he shall be liable to such employer for the full amount of any account he may owe him, and shall forfeit to his employer all wages or share of crops which might become due him from his employer." (Emphasis added.) See Latham v. Barwick, 27 Ark. 328, 113 S.W. 646 (1908), which denies recovery to farm hand. "A statute of this state enacted in 1883 puts the question entirely at rest." The statute has been observed to be "reminiscent of the Ancient Statute of Laborers." See also Rand v. Walton, 130 Ark. 431, 197 S.W. 852 (1917); Crawford v. Slatten, 155 Ark. 283, 244 S.W. 321 (1922).

§81-308 permitting recovery for due wages to discharged employee has been specifically held not applicable to the employee who quits his employment without cause. See Caldwell v. Missouri Pacific R.R. Co., 137 Ark. 439, 208 S.W. 790 (1918).

CALIFORNIA: Cal. Labor Code (1944) §202: "If an employee not having a written contract for a definite period quits his employment, his wages shall become due and payable not later than 72 hours thereafter." (If employee gives 72 hours advance notice of quitting, then he must be paid at time employment terminated). (Emphasis added.) See also Labor Code §2927.

CANAL ZONE CODE: (1934) §§1347, 1348. Employee not hired for a specified time is entitled to compensation for his services up to the date of discharge, whether quitting or being dismissed.

COLORADO: Col. Ann. Stat. §97-202. Permits recovery of earned wages to discharged employee but provides that "Nothing in this section shall apply to the employee who quits of his own accord." (Emphasis added.)

CONNECTICUT: Conn. Gen. Stat. (1949) §7361: "If he voluntarily leaves, he must be paid in full on next regular pay day." Maximum fine for violation of the statute is $200 or imprisonment for not more than 30 days or both.

ILLINOIS: Ill. Rev. Stat. (1953) §48:36. Applies only to corporation employees: "Any employee leaving his or her employment or discharged therefrom shall be paid in full following his or her dismissal or voluntarily leaving at any time within three days after leaving. Nothing in this act shall apply to earnings on a commission basis." (Cannot contract right away.) §48:39(h). If the employee makes less than $200 per month, his employer must pay earned wages not later than five days after discharge, and at the next regular pay day when employee quits—unless employee gives five days' notice before quitting.

INDIANA: Burns' Ind. Stat. Ann. (1933) (1952 Replacement) §40-101: "Should any employee voluntarily leave his employment, either permanently or temporarily, such employer shall not be required to pay such employee any amount due such employee until the next usual and regular day for payment of wages as established by such employer."

IOWA: Iowa Code (1950) §§477.51, 477.52: "... and any employee leaving his or her employment or discharged therefrom shall be paid in full following his or her dismissal or voluntarily leaving his or her employment at any time upon six days demand." (Part of Iowa periodic wage payment statute which is limited to railway employees).

KANSAS: Kan. Rev. Stat. (1949) §§44-307, 44-308: If employee (limited to corporation employees) resigns or is discharged, his employer must pay earned wages within ten days or employee will be entitled to draw his
regular salary until payment is made. Limit: sixty days or date suit is initiated, whichever is earlier.

LOUISIANA: LA. REV. STAT. (1950) §§23-631; 23-632. Extends to virtually all employees and allows penalty wages to accumulate indefinitely. (Indiana has held a similar statute unconstitutional.) Applies when "employee discharged or when he has resigned." Payment must be made within 24 hours upon demand.

MAINE: ME. REV. STAT. (1944) §38, p. 556: "... but any employee leaving his or her employment shall be paid in full on demand at the office of the employer where pay rolls are kept and wages are paid ..." Applies only to public utility corporations or corporations engaged in mining or manufacturing. Maximum fine for violation: $50. See also §39, p. 556: (Contract right to one week's advance notice).

MASSACHUSETTS: MASS. GEN. LAWS (1951) ch. 149 §148: "An employee leaving his employment shall be paid in full on the following regular pay day, and in the absence of a regular pay day on the following Saturday ..." (Modified for certification of pay rolls in city of Boston.) Penalty for violation: Maximum fine of $50 or imprisonment for two months or both. (Since 1951, above statute also includes farm laborers.) See Ferry v. Kinsley Iron and Machine Co., 195 Mass. 548, 81 N.E. 305 (1907) (contract right to ten days' advance notice; wages forfeited); Commonwealth v. Dunn, 170 Mass. 140, 48 N.E. 110 (1898). Wages must be "due" at time of quitting for statute to apply. Complaint defective for failure to so allege.

MICHIGAN: MICH. COMP. LAWS §408.541. General coverage statute. Employee quitting before pay day must be paid three days after demand. (Discharged employee must be paid as soon as amount can be ascertained.)

MINNESOTA: MINN. STAT. (1949) §181.13. Extends to most employees; requires payment of earned wages to both discharged employees and employees quitting employment. Originally passed in 1919. Penalty for employer's violation: Accumulation of daily wages for a maximum of 15 days.

NEVADA: NEV. COMP. LAW: §2776. Broad coverage of employees. Employee who quits must be paid earned wages within 24 hours after demand (discharged employee to be paid immediately). Penalty: Fine of $300 to $500 and accumulation of additional daily wages for not more than 30 days.

NEW HAMPSHIRE: N.H. STAT. (1942) ch. 212, §20. If the employee quits and "does not have a written contract for a definite period" he must be paid earned wages on the next regular pay day. Penalty for violation: Continuation of employee's wages at contract rate for a maximum of one additional week after termination. (Discharged employee must be paid within 72 hours if he works at employer's principal place of business.)

OREGON: ORE. CODE ANN. §102-607: "Where the employee not having a contract for a definite period quits, all wages earned become payable not more than three days after quitting." (Emphasis added.) (When discharged, employee must be paid immediately upon discharge—except for seasonal employment contracts.)

UTAH: UTAH CODE ANN. (1953) §34-10-1: When the employee not having a contract for a definite period quits, then his earned wages are payable at the next regular pay day. Penalty: Accumulation of additional daily wages for a maximum of ten days. (Discharged employee must be paid immediately.)

WASHINGTON: WASH. COMP. STAT. §49.48.010. "When any laborer performing work or labor ceases to work whether by discharge or by voluntary withdrawal, the wages due must be paid forthwith ..." (Emphasis added.)

WISCONSIN: Wis. Stat. (1953) §103.39(1): "... any such employee, except sales agents employed on a commission basis, not having a written contract for a definite period who quits his employment shall be paid in full upon three days demand, and any employee who is discharged shall be paid in full within three days ..." (Emphasis added.)

Penalty: §103.39(4): "Any person, firm or corporation violating the provisions of this section, who having the ability to pay, shall fail to pay the wages due and payable as herein provided, or shall falsely deny the amount or validity thereof, or that the same is due, with intent to secure any discount upon such indebtedness or with intent to annoy, harass, hinder or defraud the person to whom such wages are due, shall be punished by a fine of not less than twenty five dollars or more than one hundred dollars or by imprisonment in the county jail for not less than ten days nor more than ninety days, or by both such fine and imprisonment. Each and every failure or refusal to pay each employee the amount of wages due him at the time, or under the conditions required in this section shall constitute a separate offense. In addition to the criminal penalty herein provided, every person, firm or corporation violating the provisions of this section shall be liable for the payment of the following increased wages or salaries: Ten per cent if the delay does not exceed three days; twenty per cent if the delay is more than three days, but does not exceed ten days; thirty per cent if the delay is more than ten days but does not exceed twenty days; forty per cent if the delay is more than twenty days, but does not exceed thirty days; fifty per cent if the delay is more than thirty days; but in no event shall such increased wages or salaries exceed $50." (Emphasis added.)

WYOMING: Wyo. Comp. Stat. (1945) §§54-604; 54-605: Covers most employees. Employee who quits must be paid earned wages within 72 hours (discharged employee within 24 hours). Penalty: Maximum fine of $100.

NOTE: The following states by statute require payment of earned wages only to the discharged employee and do not have provision as to employee who quits his employment: