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Recommended Citation

Koppelman, Esther L. (1930) "Survival of Accrued Rights Upon the Cancellation of Employment Contracts," *St. John's Law Review*: Vol. 4 : No. 2 , Article 9.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol4/iss2/9>

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be to grant separate trials in every case where a co-defendant *might* be prejudiced by the confessions, admissions or declarations of a co-defendant and not leave it to conjecture or chance that he *may not* be prejudiced.

BERTRAM R. BERNSTEIN.

SURVIVAL OF ACCRUED RIGHTS UPON THE CANCELLATION OF
EMPLOYMENT CONTRACTS.

It has been the rule in this state since an early date that where a contract is terminated by the mutual consent of the parties, no claim with respect to the rights already accrued thereunder can be enforced unless expressly or impliedly reserved in the agreement which terminates the contract.¹ Yet not until recently did the Court of Appeals apply this rule to a case of a simple contract of hiring and service, upon the termination of which no further relationship was contemplated by the parties.

In the case of *Coletti v. Knox Hat Co., Inc.*,² decided in January of this year, the Court of Appeals reversed an order granting a motion for summary judgment which had been affirmed by the Appellate Division. The complaint alleged that on or about January 1, 1925, the plaintiff and defendant had entered into an oral contract, the terms of which were contained in a letter memorandum, which was renewed in 1926 with slight modifications as to drawing account and territory. The plaintiff was to be employed by the defendant in the capacity of sales agent for a certain territory, with a drawing account of \$10,000 per year, payable bi-monthly, and traveling expenses for the year, both to be deducted from total commissions. His commissions were to be paid at the rate of 10% of the aggregate on the first \$150,000 sales for the calendar year, and 2% on all sales beyond that amount. A check for the balance of the total commissions for the year was to be given him as soon after January 1, as practical.

The complaint further alleges "That the plaintiff continued in the employ of the defendant up to on or about September 1, 1926, pursuant to and in accordance with said agreement * * * at which

a judgment where a right conferred by law has been disregarded it weakens the force of the law. Indeed, the reasonable fear of the court where guilt is clearly established it is impeding the course of justice may result in decisions which make trial judges careless, and encourage public officers and prosecuting attorneys in the view which often obtains the approval of the unthinking, that a guilty man, even before his guilt is established according to law, has no constitutional rights." From an address delivered by Judge Lehman before the Association of the Bar, February 27, 1930.

¹ *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198 (1890).

² 252 N. Y. 468, 169 N. E. 648 (1930).

time the employment of the plaintiff by defendant *was terminated by the consent and agreement of both plaintiff and defendant.*"³ The complaint demands judgment for \$5,972.24 with interest from the date of termination, as the amount alleged to be due for commissions earned and unpaid at that date, based on the rates contained in the contract. The defendant's answer substantially admits all of the facts alleged.

The Court held that since the contract was terminated by mutual consent, and (so far as appears in the papers) the parties *did not reserve payment of past commissions in the agreement of termination*, which agreement must govern the rights of the parties at that time, there can be no recovery by the plaintiff in this action. The question of whether or not any reservation has in fact been made is one for the jury.⁴ Should a jury find that a contract of hiring has been terminated by the mutual consent of the parties, and at the time of termination nothing was said, nor was anything done to show an intent to reserve payment for past services, the servant would be precluded from any recovery by the doctrine enunciated in this decision. For even to recover the reasonable value of his services, an expressed or implied intention to consider the contract totally rescinded *ab initio* would have to be found.⁵

The decision in this case is based on the doctrine of *Lamburn v. Cruden*,⁶ decided in England almost a century ago. There a servant who was engaged at a yearly salary, payable quarterly, left his employment with the consent of his master one month after the end of a quarter, making no arrangements for compensation for that period. After considering the case—one in *quantum meruit*—the Court decided that the yearly rate could not be apportioned for the month, unless the jury should find that the facts warranted an inference that an agreement to pay for the month's labor had been made. *Tindal, Ch.J.*, said:

"No new contract arises, by implication of law, upon a simple dissolution of a special contract of hiring and service, in respect of services performed under such special contract previously to its being dissolved."⁷

The case was followed in England a few years later in *De Bernardy v. Harding*,⁸ where again a mutually terminated contract for services was under consideration. There it was held: "it was a question for the jury, whether, under the circumstances, the original contract was

³ *Ibid.* at 471, 169 N. E. at 649 (italics ours).

⁴ *Lamburn v. Cruden*, 2 Man. & G. 253, S. C. 2 Scott N. R. 533 (1841).

⁵ *Supra* Note 2 at 472, 169 N. E. at 649.

⁶ *Supra* Note 4.

⁷ *Ibid.* at 256.

⁸ 8 Exch. 822 (1853).

not abandoned, and whether there was not an implied understanding between the parties that the plaintiff should be paid for the work actually done as upon a *quantum meruit*."⁹ Leake restates the principle thus:¹⁰

"Where, after part execution of the consideration, the contract is rescinded by mutual agreement, the claim for the part executed consideration must be referred to the agreement for rescission; and in the absence of any express stipulation, or implied understanding upon the matter, no claim can be made."

The New York Court of Appeals first adopted this doctrine in *McCreery v. Day*,¹¹ and expressly approved it in *Eames Vacuum Brake Co. v. Prosser*.¹² On its facts, *Coletti v. Knox Hat Co.* is distinguishable from both of these cases. In each, new agreements, superseding and rescinding the old, provided for further acts on both sides, and it may therefore well have been just to apply the rule. At the time of rescission, new bases of remuneration were discussed and agreed upon, and it is reasonable to assume that men looking to payment for future services will have in mind those rendered in the past. Having them in mind, it becomes their duty to indicate their intentions concerning them. Is it just as reasonable to assume that men terminating a contract without contemplating any future relationship, as in the instant case, must have the same state of mind, and the same duty? We think not. Still, these cases are in turn based on *Lamburn v. Cruden*, which is indistinguishable on its facts, and hence the Court, whether justified or not in reason, at least has authority for its decision.¹³

But the soundness of applying the English rule to all contracts of hiring and service is by no means free from doubt. In a situation where, in fact, no intention with regard to payment for commissions earned is present in the minds of the parties at the time of termination, it is submitted that serious injustice will follow from the application of the rule. Because at the moment a man is not thinking of his past labors, it seems unfair that a technical rule of law should deprive him of the fruits thereof, while the other party, equally without intention as to such payments, is allowed to benefit. Further than this, the indiscriminate application of the rule will easily allow an employer to indulge in sharp practice by remaining silent when aware of the benefits he may derive from his failure to speak.

The whole doctrine of entire contracts, to which this rule applies, is a highly technical fiction, indulged in by the courts for the avowed

⁹ *Ibid.* at 824.

¹⁰ Leake on Contracts (6th Ed. 1912), 40.

¹¹ *Supra* Note 1.

¹² 157 N. Y. 289, 51 N. E. 986 (1898).

¹³ *Cf.* *Natalzizio v. Valentino*, 71 N. J. L. 500, 59 Atl. 8 (1904).

purpose of rendering true justice and safeguarding the rights of the parties where no partial performance is within the contemplation of the parties. But in utilizing this doctrine in contracts of hiring and service, as in the instant case, where a daily benefit accrues to the master, whose injury may be limited to the expense of procuring a new servant, an injury waived by his consent to the termination of the employment,¹⁴ manifest injustice may result. The precise formula which is evolved from it should not be universally applied. It is applied in *Coletti v. Knox Hat Co.*, and we think unjustly. In adopting the view of Professor Williston¹⁵ that in the case of termination of such a contract the presumption is that the parties "agree simply to forego future performance," the Court says:

"In this view the plaintiff was discharged from the obligation of rendering further services, while the defendant was discharged from the obligation of making further payments. As the commissions provided for by the contract would not have been payable until January 1, 1927, the defendant was released from the duty of paying."¹⁶

In *Britton v. Turner*,¹⁷ decided by the Supreme Court of New Hampshire early in the 19th century, the Court refused to apply the doctrine of entire contracts—"which is supposed to prevent any apportionment of the wages"¹⁸—to engagements of hire and service, distinguishing that class of contract from agreements to build houses, wherein the other party might accept or reject the labor wrongly performed, or prematurely ended, the learned Judge saying:

"In fact we think the technical reasoning that the performance of the whole labor is a condition precedent and the right to recover anything dependent upon it—that the contract being entire there can be no apportionment—and that there being an express contract no other can be implied, even upon the subsequent performance of service—is not properly applicable to this species of contract, where a beneficial service has actually been performed; for we have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the

¹⁴ *Bailey v. Bourn Rubber Co.*, Sup. Ct. R. I., 67 Atl. 427 (1907) (which held, further, that since the damages were waived by the defendant, the master, by his agreement to treat the contract as cancelled, the servant could recover wages for the work already done up to the time of cancellation, *i.e.*, as on a contract terminated by mutual consent).

¹⁵ 3 Williston, Contracts (1920), Sec. 1827.

¹⁶ *Supra* Note 2 at 472, 169 N. E. at 649.

¹⁷ 6 N. H. 481 (1834).

¹⁸ 2 Parsons, Contracts (8th Ed. 1883) 40.

entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary."¹⁹

In that case the laborer had wrongfully left his employment, yet we feel that the strong language of the Court is fully justified.

We think the better doctrine to be applied in cases of this nature, is that even where no intent is expressed or can be implied at the time of termination, the servant should recover pro rata at the contract rate for services already performed under the contract. This view is by no means unsupported by authority. Both text writers and decisions have upheld it. Thus, Parsons says:²⁰

"But if the contract be dissolved by mutual consent, he (the servant) may recover wages pro rata, without any express contract to that effect."

Labatt, in his work on Master and Servant,²¹ states it to be the American rule and, in fact, many jurisdictions have adopted it.²² In criticizing the New Jersey case of *Freudenberger v. Sternberg and Co.*,²³ which implied approval of the English rule, Labatt says:

"But such a doctrine can scarcely be correct. The mere fact that the amount of the commission was to be computed at the end of the year would not, it is submitted, warrant the inference that the parties understood that the servant, irrespective of whether the contract should or should not have been terminated by mutual agreement, was not to be entitled to any part of his commissions, unless he should continue to work up to the end of the year."²⁴

In some jurisdictions the courts have gone even further,²⁵ and have permitted an action in *quantum meruit* to servants who have

¹⁹ *Supra* Note 17 at 493.

²⁰ *Supra* Note 18 at 42. (The author states the proposition, but erroneously cites *Lamburn v. Cruden*, *supra*, Note 4, as authority.)

²¹ 2 Labatt, *Master and Servant* (2nd Ed. 1913), 1388.

²² *White v. Gray*, 4 Ill. App. 228 (1879); *Bowdish v. Briggs*, 5 App. Div. 592, 39 N. Y. Supp. 371 (1896); *Sims v. Harris*, 1 Ont. L. Rep. (C. A.) 445 (1901); *Hoar v. Clute*, 15 Johns. 224 (1818) (where the doctrine was implied); *Hildebrandt v. American Fine Art Co.*, 109 Wisc. 171 (where the doctrine was applied to the measure of damages, the plaintiff having been dismissed); *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463 (1826) (where it was stated in general terms that *indebitatus assumpsit* was maintainable, if after partial performance of a contract of employment, further execution was stayed by both parties); *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564 (1868); *Bailey v. Bourn Rubber Co.*, *supra* Note 14.

²³ 67 N. J. L. 297, 51 Atl. 699 (1902). The New Jersey Court has expressly approved the doctrine in the *Natalzizio* case, *supra* Note 13.

²⁴ *Supra* Note 21 at 1391.

²⁵ *Britton v. Turner*, *supra* Note 17; *Fenton v. Clark*, 11 Vt. 557 (1839) (approving *Britton v. Turner*); *Gilman v. Hall*, 11 *id.* 510; *Byerlee v. Mendel*, 39 Iowa 382 (1874); *Ryan v. Dayton*, 25 Conn. 188 (1856).

wrongfully left their employment, on the same basic principle that one man should not unjustly reap the benefits of another man's labor. In allowing a recovery in *quantum meruit* to an employee who had quit because of illness, the Connecticut court, criticizing the application of the rule to an entire contract of hire, said:²⁶

"But this rigid and unreasonable rule has recently been relaxed, and it is now generally, if not universally, held that wages may in particular cases be apportioned; which, in our judgment, is much more in accordance with the true character of such a contract, the presumed intention of the parties, and the demands of justice."

If this is true, and we think it is, where a laborer has wrongfully left his employment, with how much more force it applies to a contract for services which has been amicably terminated by the consent of the parties. It would be simple enough to determine the amount due to the servant where he has been receiving a salary of a certain amount at stated intervals; the mere fact that his compensation is to be computed at varying rates of percentage for commissions, should present no greater difficulty than a mathematical one. The principle is the same, and equally applicable.

It is a penalty, which our law abhors, to deny payment for labor done because of the servant's wrongful failure to complete his term, to the unjust enrichment of the master, whose actual damages would be far below the value of the services he has received.²⁷ Surely it is a greater penalty to deny payment to the innocent man who leaves his employment with his master's consent, merely because he failed, by words or acts to reserve it. The law cannot reasonably go

²⁶ Ryan v. Dayton, *supra* Note 25 at 190.

²⁷ Parker, J., in Britton v. Turner, *supra* Note 17, at p. 494, lays down an excellent set of rules, both logical and just, whereby the rights of the master and servant alike are carefully safeguarded. He says of them:

"This rule, by binding the employer to pay the value of the services he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his services, near the close of his term, by ill treatment, in order to escape from payment, nor to the latter to desert his service before the stipulated time, without sufficient reason. In effect, these rules are:

a. Where a party undertakes to pay, upon a special contract for the performance of labor, he is not liable to be charged upon the contract until the money is earned according to its terms; and where there is an express contract, the law implies no new provisions except upon further transactions.

b. Where a special contract is not performed because of the servant's default and no money is due under the special contract and the nature of the work is such as may be rejected by the master, who may refuse to accept part performance, the servant cannot recover.

c. But if the master actually receives a benefit, over and above the damage resulting from the breach, then the labor done and services

so far as to presume a gift in that case. It need not "now interpolate a contract provision which the parties themselves neglected to make,"²⁸ to which the Court objects, and rightly, in *Coletti v. Knox Hat Co.* The contract provision which is said to be lacking, is implicit in the mere fact of termination and, we submit, should be presumed as a matter of law.²⁹ This is the sounder rule, resting on greater considerations than *stare decisis*—it stands the tests of both reason and justice.

ESTHER L. KOPPELMAN.

RIGHTS AND OBLIGATIONS OF ASSIGNEES OF CONTRACTS FOR THE
SALE OF REAL PROPERTY.

In the absence of stipulations to the contrary, contracts for the sale of real property can be assigned freely.¹ The extent of the rights and obligations which an assignee takes under an assignment has been the subject of frequent decisions in our courts. It has been held that the assignee can enforce specific performance against the vendor;² and that the vendor cannot obtain specific performance

received furnish a new consideration for a new agreement to pay the reasonable value of the services.

d. The master may set up in defense the breach, and damages; the implied promise being to pay over and above the cost to procure completion and the damages; but if the damages exceed the value of the services, the plaintiff cannot recover.

e. Master may elect to recover damages in another action, but if he elects to have them considered in this, he is deemed to concede that they are no more than the actual value of the services performed, and he cannot sue in another action for more."

²⁸ *Supra* Note 2 at 473, 169 N. E. at 650.

²⁹ *Supra* Note 17 at 492, where the Court said: "But if, where a contract is made of such a character, a party actually receives labor, or materials, and therefore derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, *the labor actually done, and the value received furnish a new consideration, and the law thereupon raises a promise to pay* to the extent of the reasonable worth of such excess" (italics ours). This case concerned an employee who had left his employment, but we consider the same principle applicable to the instant case, going further, and claiming a presumption to pay at the contract rate, which the parties determined for themselves was the value of the services performed.

In the states in which legislation favorable to our view has been passed, the tendency has been to base the amount of the recovery of the plaintiff on the proportion of the contract completed, and not on the principles of quasi-contractual law which would enable him to recover only the reasonable value of the services performed. For a discussion of the legislative treatment of this subject see (1930) 43 Harv. L. Rev. 647 and cases cited therein.

¹ *Lewis v. Bollinger*, 115 Misc. 221, 187 N. Y. Supp. 553 (1921); *Davidson v. Dingeldine*, 295 Ill. 367, 129 N. E. 79 (1920); *Epstein v. Gluckin*, *infra* Note 2; *Gerard Real Property*, Sec. 1153.

² *Epstein v. Gluckin*, 233 N. Y. 490, 135 N. E. 861 (1922); *Hugel v. Habel*, 132 App. Div. 327 (1st Dept. 1909), 117 N. Y. Supp. 78; *Midland Co. v. Prouty*, 158 Mich. 656, 123 N. W. 549 (1909).