St. John's Law Review

Volume 4
Issue 1 *Volume 4, December 1929, Number 1*

Article 14

June 2014

An Application of the Law of Contracts For Personal Services

Thomas E. McDade

not an unreasonable exercise of such legislative prerogative to create a new cause of action against a wrongdoer responsible for death by means of which such wrongdoer is compelled to contribute to the funds employed to effectuate the benevolent and charitable purposes of the Workmen's Compensation Law.

SIDNEY MOERMAN.

AN APPLICATION OF THE LAW OF CONTRACTS FOR PERSONAL SERVICES.

The general rule applicable under common law and under the statutes [1] of the several states is that actions based on contract survive the death of either party and may be enforced by or against his heirs or executors.[2] It is with the exception to this well-established rule that we are concerned—the exception found in contracts involving personal services.[3]

That one may choose with whom he will contract is a basic principle of law. The courts early recognized [4] that when people contract with each other for services essentially personal no assignment or substitution can be satisfactory, and the original party cannot be succeeded by his personal representative. A personal service contract requires the exercise of personal skill and knowledge, it cannot be delegated to another.[5] The long line of authorities has led to the crystallization of the rule in Lorillard v. Clyde,[6] followed by later decisions, in which the Court laid the test to determine whether a given case fitted within this exception. The Court said:

> "It is well settled that when performance depends on the continued existence of a given person or thing and such continued existence was assumed as the basis of the agreement,

---

[1] New York State Decedent Estate Law, Sec. 16, L. 1909, ch. 18.

[2] C. J. 181, Sec. 326; Livermore v. Bainbridge, 49 N. Y. 125 (1872); Zabriski v. Smith, 13 N. Y. 322, 64 Amer. D. 551 (1855); Robinson v. Thomas, 123 App. Div. 411, 107 N. Y. Supp. 110 (1908); McGregor v. McGregor, 35 N. Y. 218 (1866); Allen v. Confederate Pub. Co., 49 S. E. 782, 121 Ga. 773 (1905); White v. Allen, 133 Mass. 423 (1882); McCartney v. Corbine's Estate, 108 Ill. App. 282 (1903).

[3] Lorillard v. Clyde *et al.*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113 (1894); Dexter v. Norton, 47 N. Y. 62, 7 Amer. Rep. 415 (1871); Spaulding v. Rosa, 71 N. Y. 40, 27 Amer. Rep. 7 (1877); Wheeler v. Conn. Mut. Life Ins., 82 N. Y. 543, 37 Amer. Rep. 549 (1880); Dolan v. Rodgers, 149 N. Y. 489, 44 N. E. 167 (1896).

[4] Babcock v. Goodrich, 3 How. Pr. (N. S.) 52.

[5] 3 Williston, Contracts 3299.

[6] *Supra* Note 3.

the death of the person or destruction of the thing puts an end to the obligation."

With the doctrine as settled as it appears, its application has proved more difficult than might be expected. The recent case of Brearton v. DeWitt [7] is an interesting illustration.

Elden C. DeWitt innoculated Mae E. Brearton with the germs of a serious disease. Six years later, December, 1925, both parties entered into an agreement. Mrs. Brearton promised to give up her position, isolate herself from her friends and subject herself to the control of DeWitt for cures and treatment. In consideration DeWitt was to pay Mrs. Brearton the sum of $1,000 a month for life. Payments were made from December, 1925 to May, 1926. March, 1927, sixteen months after the agreement was entered into DeWitt died. Mrs. Brearton attempted to collect from DeWitt's executors who refused to pay; therefore, plaintiff brings an action for breach of contract against DeWitt's estate.

Here a vital term of the plaintiff's obligation was to subject herself to cures and treatments to be administered to her, by or under the direction of DeWitt—that such treatment was to come from DeWitt personally. Plaintiff could not possibly have meant to subject herself to the treatment determined by DeWitt's executors.

In the Appellate Division Judge O'Malley wrote a dissenting opinion in which Judge Finch concurred, arguing that the agreement survives because in addition to personal services the agreement involves a non-personal element, namely, an obligation to pay money, which was founded upon a consideration fully executed on plaintiff's part.

The contract seems to be entire, the consideration on plaintiff's side being her isolation and subjection for the whole period of her life to enable defendant's testator to attempt cures by personal supervision and direction. We cannot say that her carrying out of her part of the agreement for one month or sixteen months was proportionate to $1,000 or $16,000. It is analogous to the case of a builder who agrees to build a house. For convenience the agreement may provide for payment in installments as the work progresses, but that does not say that the contract is not entire or that the work completed is proportionate to the amount paid. We do not believe that "the obligation to pay money is founded upon a consideration fully executed," but, as Judge Proskauer points out in the prevailing opinion, that by DeWitt's death "plaintiff was no longer able to perform an important part of her obligation."

It was *held* on motion for a judgment on the pleadings that the complaint must be dismissed on the grounds that the contract is so

---

[7] 234 N. Y. Supp. 716 (May, 1929).

essentially personal in its nature that no obligation survives the death of the promisor.[8]

We have found that this is a personal service contract. We have discovered that the general rule in New York and throughout the United States is that contracts involving personal service do not survive. The tendency of our courts is to abide by the rule laid down by precedent and judicial opinion where common justice and public policy do not demand a change.

The rule may seem harsh when we consider that the plaintiff is living a life of torture, unable to associate with friends and companions and with no means of support. But the inoculation took place six years prior to this agreement and formed no part of the consideration. The plaintiff knew what she was contracting for and, in our opinion, no injustice was wrought. It must be borne in mind that practical justice can only be the measure of what would be fair in the greatest number of cases.

Public policy in this case, far from being a reason for disregarding precedent, demands that the law should not be changed. The state is constantly endeavoring to improve health conditions and the courts should encourage this good work by refusing its aid to desperate persons, unwise persons—criminal offenders who, for pecuniary compensation, agree knowingly and foreseeingly to contracts which endanger their own health and that of the community. If we should allow recovery to this plaintiff who subjected herself absolutely to the control of a person to do as he saw fit, experimenting to the injury of her health, it would encourage other people to do likewise in similar cases.

THOMAS E. MCDADE.

SAVINGS BANK TRUST DEPOSITS AND CREDITORS' RIGHTS.

It is today the law of this jurisdiction that where A deposits money in a savings bank in his own name, in trust for B, it does not in itself establish an irrevocable trust, during the life-time of the depositor, but is merely a tentative trust, revocable at the depositor's will, until his death or until such time as he completes the gift in his life-time by some unequivocal act or declaration. At his death a presumption arises that an absolute trust was created as to those funds

[8] It might well be contended however that at the death of DeWitt, plaintiff's obligation under the contract had been fulfilled. The main object of the agreement being to allow *him* to experiment on her physical person, it follows that there was nothing more for her to do in pursuance of the contract, because the contemplated purpose of the contract had been effected.