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REMEDIES OF A WRONGFULLY DISCHARGED EMPLOYE.

CONTRACT—RES ADJUDICATA—JUDGMENT A BAR TO SECOND SUIT UPON SAME CAUSE OF ACTION.—*Allen* v. *Colliery Engineers Co.*, 46 Atl. R. (Pa.) 899, (1900). A few cases may with advantage be added to the interesting note (39 Am. Law Reg. N. S., 428) upon *Alie* v. *Nadeau*, 44 Atl. 891, (1899), holding that a wrongfully discharged employe may bring only one action. *Alie* v. *Nadeau* is not only not the law of Pennsylvania, but is contrary to the weight of authority. The Supreme Court of Pennsylvania, in an opinion handed down by Mr. Justice Fell, on July 11, 1900 (after the July issue of this magazine went to print), decided that where a servant whose wages are payable periodically is wrongfully discharged he may maintain separate actions for each installment of salary: *Allen*

v. *Colliery Engineers Company*, 46 Atlantic Reporter, 899, (1900), the Court said:

"The generally recognized rule is that an employe for a fixed period who has been wrongfully discharged may either treat the contract as existing and sue for his salary as it becomes due, not on a *quantum meruit*, but by virtue of the special contract, *his readiness to serve being considered equivalent to actual service*, or he may sue for the breach of contract at once or at the end of the contract period, but for the breach he can have but one action; 2 Smith's Leading Cases, note to *Cutter* v. *Powell*, 7 Am. Law Reg. (N. S.), 148, note to *Huntington* v. *R. R. Co.* Our cases are in entire harmony with this rule. In *Algeo* v. *Algeo*, 10 S. & R, 235, it was held that where the performance of the services had been prevented by the discharge of the employe, he must declare on the special agreement and could not recover on the implied promise, as the law would infer the promise from the acts of the plaintiff only and not from the acts of prevention by the defendant. In *Clay Telephone Co.* v. *Root*, 17 W. N. C., 200, the plaintiff sued during the contract period on an agreement which, as in this case, was severable because the consideration was apportioned. In the opinion in *Kirk* v. *Hartman*, 63 Pa. 97, it was said by Sharswood J., that a servant dismissed without cause before the expiration of a definite period of employment could maintain an action of debt on the special agreement.

"It follows that if the recovery in the New York Court was *for the installments of salary then due*, as alleged in the declaration in this case, the plaintiff may maintain his action; if it was for damages for breach of the contract as averred in the plea filed, he is concluded by it."

This decision of course supersedes *Eisenhower* v. *School District*, 13 Pa. Superior Court, 57, (February 16, 1900), in which a precisely opposite conclusion was reached by the Superior Court of Pennsylvania.

Allen v. *Colliery Engineers Company* is supported by the great weight of authority.

"It is not a matter of doubt that when a contract is made for personal services, for a particular term, at stipulated wages, if the party employed is, without cause, discharged during the term . . . he is not compelled to accept the breach of his employer as a termination of the contract. . . . If the wages are payable by installments, he may sue for and recover each installment as it becomes due:" *Strauss* v. *Meertief*, 64 Ala. 299, (1879); *Liddell* v. *Chidester*, 84 Ala. 508, (1887).

"The salary being payable weekly, she could, at any time, sue for all due her at the time of commencing suit, without barring her right to afterward sue for and recover salary subsequently becoming due." *McEvoy* v. *Bock*, 37 Minn. 402, (1887).

Where wages are payable weekly or monthly, each installment gives rise to a separate cause of action: *Britton* v. *Turner*, 6 N. H. 481, (1834); *Whitaker* v. *Sandifer*, 1 Duvall (Ky.) 261, (1864);

Armfield v. *Nash*, 31 Miss. 361, (1856); *Blun* v. *Sterne*, 53 Ga. 82, (1874); *Badger* v. *Titcomb*, 15 Pick 409, (1834).

Where money is payable by installments, a distinct cause of action arises upon the falling due of each installment, and they may be recovered in successive actions; nor will a recovery for one such installment bar an action for another which falls due after the commencement of the first action: *Hamm* v. *Beaver*, 31 Pa. 58, (1857); *Armfield* v. *Nash*, 31 Miss. 361, (1856); *Priest* v. *Deaver*, 22 Mo. App. 276, (1886); *Weiler* v. *Henarie* (Oreg.), 13 Pac. Rep. 614, (1887).

Alie v. *Nadeau* assumes that a contract of employment, with wages payable in installments, is indivisible; in fact, counsel in that case seem to have so admitted. But that very question is the vital point in the case. When the consideration is expressly or impliedly apportioned, the contract is not entire but *severable*, and successive actions lie: *Lucesco Oil Co.* v. *Brewer*, 66 Pa. 355, (1870); *Rugg* v. *Moore*, 110 Pa. 236, (1885); *Gill* v. *Lumber Co.*, 151 Pa. 534, (1892); *McLaughlin* v. *Hess*, 164 Pa. 570, (1894).

The maxim "*nemo debit vexari si constet curiæ quod si pro una et eadem causa*" can therefore have no application, for there are, in fact and in law, several distinct and separate causes of action for the various installments of salary as they fall due. Of course, as pointed out by Mr. Justice Fell, the discharged employe may, if he so elect, "sue for the breach of contract at once or at the end of the period," [See *Wilke* v. *Harrison*, 166 Pa. 202, (1895)], but possibly the wiser plan would be to sue for salary as salary, after it has in fact accrued, and not compel the jury to guess as to the plaintiff's probable earnings during the remainder of the term. "An employe for a determinate period, if improperly dismissed before the term of service has expired, is *prima facie* entitled to recover the stipulated compensation for the whole term": *Kirk* v. *Hartman*, 63 Pa. 107, (1869); *King* v. *Steiren*, 44 Pa. 105, (1862).

"Subject . . . to a reduction by the amount of what he has earned, or might have earned, in the meantime by other employment": Note to *Huntington* v. *R. R. Co.*, 7 Law Reg. (N. S. 148), 1867.

Although evidence of plaintiff's earnings elsewhere is technically matter for affirmative defence, as a matter of practice it is as well to frankly prove, while the plaintiff is on the stand, his diligent efforts to secure other employment, and the amount earned therein.

Ira Jewell Williams.

August, 1900.