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THE DEFAULTING EMPLOYEE—BRITTON v. TURNER RE-VIEWED

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Just a century has passed since the Supreme Court of New Hampshire decided the celebrated case of *Britton v. Turner*.¹ The plaintiff, who had agreed to work for the defendant for a year for \$120, voluntarily abandoned his contract at the end of ten months. There was no evidence that the failure of the plaintiff to fulfill his contract caused any damage to the defendant. Although guilty of a deliberate default, the plaintiff was allowed by the court a quasi-contractual recovery for the services which he had rendered. For a hundred years, this famous case has been a source of controversy.²

Its cogent reasoning has been commended even by courts which have refused to follow it.³ Although courts which have adopted the opposite view have been slow to change their position, it has been predicted that the manifest justice of its doctrine will grow in favor until it is universally recognized.⁴ One court, although not disposed to dispute the equity of the decision, was not prepared to make so radical a change in the legal effect of entire contracts—a change which should originate with the legislature and not the judiciary.⁵ To another court, its more humane doctrine seems to have supplanted the common law doctrine.⁶ At least, it is often believed

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1. 6 N. H. 481 (1834).

2. Clearly, it marked a departure from the technical rule of common law. *Parcell v. McComber*, 11 Neb. 209, 211, 7 N. W. 529, 530 (1881); Note (1881) 26 AM. DEC. 722.

3. *Smith v. Brady*, 17 N. Y. 173, 185 (1858); *Thurston v. Nutter*, 125 Me. 411, 417, 134 Atl. 506, 508 (1926). See also *Lynn v. Seby*, 29 N. D. 420, 424, 151 N. W. 31, 32 (1915); *Riggs v. Horde*, 25 Tex. Supp. 456 (1860); Notes (1880) 19 AM. DEC. 272; (1881) 26 AM. DEC. 722.

4. FIELD, DAMAGES (1876) § 335; Note L. R. A. 1916E 790, 812.

5. *Larkin v. Buck*, 11 Ohio St. 561, 568 (1860). Accord: *Timberlake v. Thayer*, 71 Miss. 279, 281, 14 So. 446 (1893).

6. *Humphrey v. Johnson*, 73 Ind. App. 551, 554, 127 N. E. 819, 821 (1920).

to have the support of the majority of the later cases,⁷ notably among the western states.⁸

On the other hand, *Britton v. Turner* has been considered "so far from being founded on the law" as to be "an evasion of all law",⁹ contrary to the current of authority both in America and England, and certainly against reason.¹⁰ Ashley says that it is generally regarded that the case was incorrectly decided and to discuss it from a quasi-contractual point of view merely leads to confusion, since no quasi-contractual obligation is involved.¹¹ After a careful analysis of the grounds set forth in the opinion, Woodward concludes that considerations both of justice and policy forbid its approval.¹²

Admittedly, the best jurists and the ablest legal thinkers have differed radically as to its merits.¹³ Justice Dillon has said:

"That celebrated case has been criticized, doubted and denied to be sound. It is frequently said to be good equity,¹⁴ but bad law. Yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law, as found in the older cases."¹⁵

The effective formulation of its defects by Woodward has had a marked influence upon current legal thought. Perhaps the weakness of Woodward's classical criticism is that it is based largely upon the conventional principles of contracts. One may justify the result which the court reached, although its rationalization of it may have been defective. A rationalization may be made upon irrational grounds,¹⁶ for the test of rationality is merely the habit of taking into account all the relevant evidence.¹⁷ The validity of a conclusion can not be determined by a rule of common law for that rule may be based upon an erroneous presupposition. The irreconcilable conflict between Woodward and Dillon may be explained on that basis. The vitality of that conflict in modern social philosophy is exemplified by the fact that in the *Restatement of the Law of Contracts* the American Law Institute has revived the common law rule, in spite of the fact that the tendency of labor legislation for a generation has been to nullify it.

7. *Duncan v. Baker*, 21 Kan. 99, 105 (1878); *Murphy v. Sampson*, 2 Neb. (unof.) 297, 298, 96 N. W. 494 (1902). See also Note (1924) 24 COL. L. REV. 885, 889.

8. See *Parcell v. McComber*, 11 Neb. 209, 212, 7 N. W. 529, 530 (1881).

9. *Miller v. Goddard*, 34 Me. 102, 103 (1852).

10. *Diffenback v. Stark*, 56 Wis. 462, 465 (1883). But see *Lynn v. Seby*, 29 N. D. 420, 424, 151 N. W. 31, 32 (1915).

11. Ashley, *Britton v. Turner* (1915) 24 YALE L. J. 544.

12. WOODWARD, QUASI CONTRACTS (1913) § 172.

13. *McClay v. Hedge*, 18 Iowa 66, 67 (1864).

14. *Roundy v. Thatcher*, 49 N. H. 526, 530 (1870); *Bedow v. Tonkin*, 5 S. D. 432, 437, 59 N. W. 222, 223 (1894).

15. *McClay v. Hedge*, 18 Iowa 66, 68 (1864).

16. THOULESS, STRAIGHT AND CROOKED THINKING (1932) 205.

17. RUSSELL, SCEPTICAL ESSAYS (1928) 46.

The Condition Precedent

It is a rule of common law that where an entire service is to be performed for an entire compensation to be paid at its completion, the performance of the service is a condition precedent to the recovery of the compensation.¹⁸ "This", says Parsons, "is an old and deep-rooted principle of the common law, and though it sometimes has the appearance of harshness, it would be difficult to contend against it upon principle."¹⁹ For part performance there can be no recovery. To permit recovery would be to violate the very "nature of entire contracts."²⁰

This theory has had an artificial influence on personal service contracts.²¹ So inexorable has the rule relating to the condition precedent been regarded in Alabama that it has been held that where a servant hired for a term died before full performance, no recovery could be had by his administratrix for the wages earned at the time of his death.²² Ten years later, the Alabama Code nullified the decision and allowed *pro rata* compensation for services, notwithstanding the entirety of the contract.²³ Generally, courts grant relief in such cases.²⁴

One needs only to turn to the dissenting decision in *Fenton v. Clark*²⁵ to observe how warped the judicial mind may become in its devotion to "a rigid scheme of deductions from *a priori* conceptions."²⁶ In that case, Redfield, J., dissenting, said:

"It is true, no doubt, in the present case, that the plaintiff did not anticipate being hindered from the performance of his contract by sickness. But knowing that such might be the case, it was his own folly not to provide against such a contingency. . . . Under these circum-

18. See *Miller v. Goddard*, 34 Me. 102, 105 (1852).

19. 2 PARSONS, CONTRACTS (9th ed. 1853) *521. For Lord Mansfield's formulation of the rule, see *Boone v. Eyre*, 1 H. Bl. 273 n. (K. B. 1789). See also, *Britton v. Turner*, 6 N. H. 481, 493; WILLISTON, SOME MODERN TENDENCIES IN THE LAW (1929) 21. In *Philbrook v. Belknap*, 6 Vt. 383, 385 (1834), Phelps, J., observed:

"The subject of dependent and independent covenants, or promises, is much perplexed, and so much ingenuity and learning have been expended upon it, that, like some other branches of the law, it seems to be involved in a sort of artificial embarrassment."

20. Note (1880) 19 AM. DEC. 272.

21. *Hulle v. Heightman*, 2 East 145 (K. B. 1802). See also *Towers v. Barrett*, 1 T. R. 133 (K. B. 1786).

22. *Givhan v. Dailey's Adm'x*, 4 Ala. 336 (1842). *Cutter v. Powell*, 6 T. R. 320 (K. B. 1795), much cited by American courts, has often been said to sustain this proposition, although it appears to have been decided on the basis of a peculiar provision of the contract. See also *Posey v. Garth*, 7 Mo. 94, 97 (1841); Note (1924) 24 COL. L. REV. 885, 890; WOOD, MASTER AND SERVANT (2d ed. 1886) 170.

23. *Martin v. Massie*, 127 Ala. 504, 510, 29 So. 31, 33 (1900).

24. Note (1924) 24 COL. L. REV. 885, 888. However, as late as 1922, it was necessary for the New Hampshire court to say: "It is not important whether the obligation to make compensation in cases like this is called *quasi* contract or some other appropriate designation. The important thing is that the law of this state is that in such a situation there is right to compensation and a duty to pay." *Stanley v. Kimball*, 80 N. H. 431, 434, 118 Atl. 636, 637 (1922).

25. 11 Vt. 557 (1839).

26. Pound, *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 605, 608.

stances, I see no more reason to allow the plaintiff to recover for part performance, than exists in almost all cases of this character, where, from some accident, the situation of affairs becomes changed, and it is inconvenient for the party to perform his contract. If a condition precedent is to be got rid of thus readily, they are not made of such 'stern stuff' as we have been taught to consider them." ²⁷

Such legal thinking suffers from its own sterility, which a lively sense of reality should have precluded. Its limitation is the imaginary barrier of conventional thought about the condition precedent.

Britton v. Turner was the first case ²⁸ to ignore the common law doctrine and to allow an employee who had failed, without cause, to perform the service which he had engaged to perform, to recover its reasonable value. How shocking such an innovation was, the words of Lincoln, J., pronounced a decade before, reveal.

"It cannot but seem strange to those who are in any degree familiar with the fundamental principles of law, that doubts should ever have been entertained upon a question of this nature. . . . And it is no less repugnant to the well established rules of civil jurisprudence, than to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it." ²⁹

Yet the New Hampshire court reached an opposite conclusion, fully realizing that it was contrary to the well settled rule of law on the subject. ³⁰

Measure of Damages

Field has observed that courts have been driven to some ingenuity for arguments to overcome the mere technical objections to the liberal doctrine of *Britton v. Turner*, although the hardship of the common law rule was, in many cases, so manifest. It is difficult to understand why any ingenuity was required to expose the fallacy of the common law rule. Its glaring defect is self-evident. An indefensible pronouncement, like that of the Maine court in *Miller v. Goddard*, would seem to be its own condemnation.

"If the defendant discharged the plaintiff before the expiration of the time for which he was employed, without justifiable cause, the plaintiff will be entitled to recover all the damages, which he has sustained, by the breach of contract; but if the plaintiff has departed from it, without justifiable cause, he cannot recover anything." ³¹

27. At 567. See also *Appleby v. Dods*, 8 East 300 (K. B. 1807).

28. Note L. R. A. 1916E 790, 810.

29. *Stark v. Parker*, 2 Pick. 267, 271 (Mass. 1824).

30. 6 N. H. at 486.

31. 34 Me. 102, 107 (1852).

When the employee leaves the service before the end of his term without cause, he loses his right to the wages he has earned although the employer has suffered no damages. But if the employer is guilty of a breach of the same contract, he is liable only for the damages which result. Such an artificial distinction³² seems to persist only because familiarity with the traditional rule has blinded the profession to its indefensible social implications. Yet Ashley says that *Britton v. Turner* lays down a false rule for the measure of recovery by an employee who is guilty of default.³³

Woodward has declared that to allow the employer to retain a sum in excess of adequate compensatory damages for the breach is perhaps the strongest argument that can be urged against the rule. But the hardship to the employee seems to him to be outweighed distinctly by the consideration that the denial of relief must have a salutary effect in discouraging the wilful breach of contracts.³⁴ It is remarkable that the only case³⁵ which seems to have noted the unsoundness of the application of different rules of recovery for employer and employee was decided in Minnesota in 1864, fifty years before Woodward's classic volume on quasi-contracts was published. The illuminating observation of the court on such indefensible discrimination between employee and employer makes Ashley's attempt to solve on the basis of implied conditions the problem which confronted the court in *Britton v. Turner* seem as artificial as the usual attempt to defeat recovery by the theory of conditions precedent.

The rule of recovery laid down in *Britton v. Turner* was:

"The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; . . . the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non fulfilment of the contract." ³⁶

Why is this rule not equitable? If the employer dismisses his employee before the end of his term of service, the employee can not remain idle.³⁷ It is incumbent upon the injured party to do whatever he can to lessen the injury. The employee is entitled only to actual indemnity.³⁸ The damages

32. "The human mind is not content with a distinction that rests on no substantial difference." Stone, C. J., in *Sharp v. Hall*, 86 Ala. 110, 113, 5 So. 497, 498 (1889). See also OGDEN, *MEANING OF PSYCHOLOGY* (1926) 230.

33. *Supra* note 11 at 546.

34. WOODWARD, *QUASI CONTRACTS* (1913) § 169 (b).

35. *Williams v. Anderson*, 9 Minn. 50, 54 (1864).

36. 6 N. H. at 494.

37. See *Howard v. Daly*, 61 N. Y. 362, 370 (1875), cited *infra* note 40; *Chamberlain v. Morgan*, 68 Pa. 168, 169 (1871).

38. Note (1907) 6 L. R. A. (N. S.) 49, 84.

recovered against the employer must be reduced, not only by sums which the employee has earned in the meantime, but by what he might have earned by due diligence.³⁹ Society is interested in the industry of its members. It is the duty of the employee to reduce damages inflicted by his wrongful discharge by using due diligence to secure employment elsewhere.⁴⁰ States which deny the defaulting employee the right to recover any wages praise the wisdom of the rule which protects the defaulting employer.⁴¹

Some courts have felt that the rule established in *Britton v. Turner* would be quite inadequate to indemnify the employer in most cases.⁴² To allow a defaulting employee to recover seemed to Keener to be a clear usurpation on the part of the court.⁴³ The effective answer to that position is that the courts which have defeated the right of the defaulting employee to recover have done so by a rule of their own creation. Of course, one should not be able to profit by his own wrong;⁴⁴ he who injures another should compensate him to the extent of that injury.⁴⁵ But to surcharge the defaulting employee under the guise of social welfare signifies a confused social outlook.

The friction between employers and employees upon industrial questions can be eliminated only when these questions are approached from a social point of view.⁴⁶ Although "justice between man and man" has been regarded as a "vague jurisprudence . . . attractively styled",⁴⁷ yet one can not condemn Gompers, as a leader of labor in search of industrial justice, for refusing to seek the definition of it in "befogged legal opinions",⁴⁸ in the light of the decisions which oppose *Britton v. Turner*. In *Harriston v. Sale* counsel urged that it was a well settled rule of law that if an employee abandons his contract, he can not recover. He added:

"If this be a settled rule of law it is a settled rule of justice; for, to the mind at all acquainted with or informed as to the true nature of our jurisprudence, a distinction between a rule of law and a rule of justice would seem to be absurd."⁴⁹

39. *Mount Hope Cemetery Ass'n v. Weidenmann*, 139 Ill. 67, 79, 28 N. E. 834, 836 (1891).

40. SEDGWICK, DAMAGES (9th ed. 1912) § 667.

41. *Hamilton v. McPherson*, 28 N. Y. 72, 76 (1863); *Howard v. Daly*, 61 N. Y. 362, 370 (1875). See also Note (1907) 6 L. R. A. (N. S.) 49, 94, 100.

42. *Diffenback v. Stark*, 56 Wis. 462, 465 (1883); see *M'Millan v. Vanderlip*, 12 Johns. 165, 167 (N. Y. 1815). *Contra*: 2 PARSONS, CONTRACTS (1st ed. 1853) *39. Cf. Ballantine, *Forfeiture for Breach of Contract* (1921) 5 MINN. L. REV. 329, 341.

43. KEENER, QUASI CONTRACTS (1893) 222.

44. *Kitchen v. Hill*, 215 Mich. 668, 672, 184 N. W. 465, 467 (1921).

45. *State v. Skinner*, 25 N. C. 564, 567 (1843).

46. HOWERTH, LIFE AND WORK (1913) 51.

47. *Baylis v. Bishop of London*, [1913] 1 Ch. 127, 140.

48. GOMPERS, LABOR AND THE EMPLOYER (1920) 3.

49. 14 Miss. 634, 637 (1846).

Such an argument merely indicates that tradition and authority may be arrayed against justice.⁵⁰ However, it is clear that the human race can not forever exist half-exploiter and half-exploited, even under the sanction of law.⁵¹

The Moral Issue

The court in *Britton v. Turner* is said to have overlooked the principle that no person has any right to recover compensation under a special contract unless he has at least attempted in good faith to perform all of its conditions.⁵² According to Metcalf, in 1867 all known decisions excepting one conformed to this principle.⁵³ In *Stark v. Parker*, the court declared that to hold otherwise would be "a flagrant violation of the first principles of justice."⁵⁴ The security of public and private morality is believed to be dependent upon the observance of contract obligation.⁵⁵ The law regarding the sanctity of contract is said to rest upon a solid foundation of reason and justice which public policy supports.⁵⁶

But Ashley thought that to criticize *Britton v. Turner* because the plaintiff voluntarily committed a breach of his contract was to proceed upon a lame ground.⁵⁷ It would seem a fictitious devotion to morality. To require a restitution of benefits does not encourage breach of contracts with impunity.⁵⁸ To permit the employer to recoup the damages he has suffered by set off is to enforce the principle of reparation. He who is required to repair the damage he has done, does not violate his contract with impunity.⁵⁹ Reparation by the defaulting employee, and not enrichment by the employer, is the principle of substantial justice. The tearful utterances about the sacredness of solemn contracts is but the patter of solemn nonsense. They indicate an overzealous apprehension.⁶⁰ Although the venerable history of the condition precedent has enshrined it as a principle of justice, it now seems crudely superficial.⁶¹

50. RUSSELL, PRINCIPLES OF SOCIAL RECONSTRUCTION (1916) 26. See also Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454, 463.

51. FORD, MY LIFE AND WORK (1923) 244.

52. *Veazie v. City of Bangor*, 51 Me. 509, 513 (1863).

53. METCALF, CONTRACTS (1867) 8.

54. 2 Pick. 267, 274 (Mass. 1824).

55. *Citizens' Light, Heat & Power Co. v. Montana Light & Water Co.*, 171 Fed. 553, 561 (M. D. Ala. 1909).

56. *Second Nat. Bank v. Samuel & Sons*, 12 F. (2d) 963, 966 (C. C. A. 2d, 1926); *Thurston v. Nutter*, 125 Me. 411, 418, 134 Atl. 506, 508 (1926); *Smith v. Brady*, 17 N. Y. 173, 186 (1858).

57. *Supra* note II, at 547.

58. "The law should consider the degree of moral delinquency, the extent of non-performance, and the ratio of damages to benefit received." Ballantine, *Forfeiture for Breach of Contract* (1921) 5 MINN. L. REV. 329, 334.

59. *Cf. Hughes v. Cannon*, 33 Tenn. 622, 627 (1854). See also *Byrd v. Boyd*, 4 McCord, 246, 248 (S. C. 1827).

60. Note (1924) 24 COL. L. REV. 885, 890.

61. See *Combe v. Edwards*, 3 P. D. 103, 142 (1878).

Ashley would allow the recovery of the employee to rest upon the strength or weakness of the employer's case.⁶² At any rate, it is clear that one can not teach morality to men merely to exploit them.⁶³ The context of a word acquires meaning from experience.⁶⁴ Morality is not a phantom to be linguistically generated. The pages of Blackstone applaud those regulations which punish laborers for deserting their work.⁶⁵ Today, employee and employer alike are at liberty to renounce their contracts, subject to the legal consequences which attach to the renunciation.⁶⁶ But what morality prescribes that those consequences should be different? A Missouri court has said in denying relief to an employee who voluntarily quit his employment:

"There is no hardship to parties in being held to their contracts. Fair dealing between man and man seems to require that a person should be aware that a wilful violation of his own obligations releases the other party to the contract from corresponding obligations. No rule of ethics seems to demand that persons should be released from forfeitures wantonly and wilfully incurred."⁶⁷

Two fallacies vitiate this pronouncement. The recovery of a defaulting employee is not upon the contract, but in quasi-contract.⁶⁸ The law imposes the obligation in spite of the breach. Secondly, the ethical conception of the court has no factual foundation.

The most effective repudiation of the attitude of the Missouri court is to be found in an old Scottish case, where the fault lay with the employer. The judge who delivered the opinion felt keenly the responsibility of the employer. He said:

"The servant, on such occasions, suffers a severe disappointment, undergoes a sort of indignity and humiliation, and is exposed to the risk of a loss of character; and it seems to be no more than just, that for these injuries some allowance should be made him; and that something should even be added, in the way of censure, and for the sake of example, just as against the servant in the opposite case, as in a matter of police in some measure, and a thing of such frequent occurrence."⁶⁹

The opinion then ironically concludes that the Bench did not agree with these notions on this subject. The Bench did not favor taking the same punitive measure against employers as were employed in dealing with employees. A dual morality precluded social justice.

62. *Supra* note II, at 548.

63. FORD, *MY LIFE AND WORK* (1923) 255.

64. OGDEN AND RICHARDS, *THE MEANING OF MEANING* (1930) 175, 248.

65. 1 BL. COMM. *427.

66. LABATT, *MASTER AND SERVANT* (2d ed. 1913) 638.

67. *Gruetzner v. Aude Furniture Co.*, 28 Mo. App. 263, 267 (1887).

68. Note (1924) 24 COL. L. REV. 885, 889.

69. *Stuart v. Richardson*, Hume 390, 391 (Scot. 1806).

Punitive Damages

Vindictive or punitive damages can not be allowed for a mere breach of contract.⁷⁰ In Missouri, where a defaulting employee can recover nothing, it is error to award punitive damages against an employer who has breached his contract.⁷¹

"The cardinal rule in the assessment of damages for the violation of a contract is actual compensation to the injured party. Punitive damages are unknown to the law of private contracts and will not be awarded even when the parties stipulate for them."⁷²

It is error for the court to instruct the jury that they may allow damages for violation of faith. The violation of most contracts involves a breach of faith. If the promisor must respond in damages for the violation of faith as well as for the violation of his promise, he must make duplicate satisfaction.⁷³

Liability for breach of contract is not concerned ordinarily with motives.⁷⁴ Where an employer wrongfully discharged his employee, the North Carolina court said:

"It would seem to be a dictate of reason that if one party to a contract be injured by a breach of it by the other, he ought to be put into the same condition as if the contract had been fully performed on both sides. He certainly ought not to be a loser by the fault of the other; nor can he be a gainer without introducing into a broken contract the idea of something like vindictive damages. The true rule then is, to give him neither more nor less than the damages which he has actually sustained, and so we find the authorities to be" ⁷⁵

Yet Williston says that where an employee wilfully defaults he should recover nothing.⁷⁶ Compensatory damages are deemed adequate in the law of contracts ⁷⁷ and particularly for the violation of a contract by the employer. His motives are not to be considered in awarding damages. But to deny a defaulting employee all relief has a salutary effect in discouraging a breach of contract. Such a profane mixture of law and morals is clearly sophistry.

70. *Guildford v. Anglo-French Steamship Co.*, 9 Can. Sup. Ct. 303, 309 (1883); *Richardson v. Wilmington & W. R. R.*, 126 N. C. 100, 102, 35 S. E. 235 (1900); *Gordon v. Brewster*, 7 Wis. 355, 363 (1858).

71. *Puller v. Royal Casualty Co.*, 271 Mo. 369, 196 S. W. 755 (1917).

72. *Norris v. Letchworth*, 167 Mo. App. 553, 557, 152 S. W. 421, 423 (1912). Cf. *Monkton v. Shepardson*, 3 Per. & Dav. 182, 185, 18 L. J. R. (N. S.) 134 (Q. B. 1840).

73. *Hoy v. Grenoble*, 34 Pa. 9, 10 (1859); see *Hood v. Moffett*, 109 Miss. 757, 767, 69 So. 664, 666 (1915).

74. *Horton's Estate v. Sherwin*, 63 Okla. 259, 260, 164 Pac. 469, 470 (1917); *Welborn v. Dixon*, 70 S. C. 108, 115, 49 S. E. 232, 235 (1904); SUTHERLAND, DAMAGES (3d ed. 1903) § 390.

75. *Hendrickson v. Anderson*, 50 N. C. 246, 249 (1858).

76. 3 WILLISTON, CONTRACTS (1920) § 1477.

77. 6 PAGE, CONTRACTS (1922) § 3183. See also Note ANN. CAS. 1917E 412.

Penalties and Forfeitures

To chancery fell the task of moulding penalties and forfeitures to humane standards of conduct. Equity will permit no advantage to be taken of a penalty or forfeiture, where compensation can be made.⁷⁸

"There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties which are constantly interfered with by Courts of Equity upon the broad ground of public policy or the pure principles of natural justice."⁷⁹

Courts of law as well as courts of equity are at liberty to disregard express conditions where they are harsh or penal.⁸⁰ The law as a science would be unworthy of its name if it did not provide, to some extent, means of preventing the mischiefs of improvidence and rashness on the one side and of avarice and cunning on the other.⁸¹

Where, by the terms of the agreement, the measure of damage sustained by non-performance is "not so excessive as to shock the moral sense" of the court, the parties will be bound by their contract.⁸² In a sense, "liquidated damages" is a mere phrase. One who maintains that men have a right to stipulate for liquidated damages regardless of the disproportion to the sum resulting from the breach of contract, mistakes the object and the temper of the law.⁸³ The common law was not so tolerant, but a statute in the fourth year of the reign of Anne⁸⁴ incorporated in it the principles of equity.

The dislike of the courts for forfeitures has led many of them to feel that justice can be done more exactly by giving a right of action in quasi-contract to a plaintiff who is in default.⁸⁵ In Louisiana, a contract which stipulates that the employee shall forfeit his wages on discharge is made unlawful by statute.⁸⁶ Even where the contract may legally provide that the servant shall forfeit his wages if he fails to comply with its terms, the forfeiture can be enforced only to the extent of the damages which were inflicted.⁸⁷ A provision forfeiting all wages which may be due at the time

78. FRANCIS, MAXIMS OF EQUITY (1791) Maxim XII.

79. 2 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 1728; see Loyd, *Penalties and Forfeitures* (1915) 29 HARV. L. REV. 117, 126.

80. Ballantine, *supra* note 42, at 342.

81. 2 STORY, *loc. cit. supra* note 79.

82. Dunn v. Morgenthau, 73 App. Div. 147, 148, 76 N. Y. Supp. 827, 829 (1st Dep't 1902); *aff'd*, 175 N. Y. 518, 67 N. E. 1081 (1903). See also SUTHERLAND, DAMAGES (3d ed. 1903) § 292.

83. Bayse v. Ambrose, 28 Mo. 39, 41 (1859), quoted with approval by SUTHERLAND, *op. cit. supra* note 82, at 721. See also Willson v. Mayor, 83 Md. 203, 211, 34 Atl. 774, 777 (1896); Advance Amusement Co. v. Franke, 269 Ill. 579, 581, 109 N. E. 471, 472 (1915).

84. 4 & 5 ANNE c. 16, §§ 12, 13 (1705); cf. 8 & 9 WILL. III, c. 11, § 8 (1696-1697).

85. 6 PAGE, CONTRACTS (1922) § 3261.

86. LA. GEN. STAT. (Dart 1932) § 4362.

87. Lee v. Davis, 5 Ky. Op. 617, 618 (1871); cf. Gateway Produce Co. v. Davis, 228 S. W. 346 (Tex. Civ. App. 1921); see Ressig v. Waldorf-Astoria Hotel Co., 185 App. Div. 4, 9, 172 N. Y. Supp. 616, 619 (1st Dep't 1918); *aff'd*, 229 N. Y. 553, 129 N. E. 912 (1920).

of leaving, if the employee leaves without notice, will not be enforced because it is harsh and oppressive.⁸⁸

In *Britton v. Turner*, the court believed that the rule which denied relief to the defaulting employee would operate very unequally among employees.⁸⁹ One who attempted to perform would be placed in a much worse position than one who wholly disregarded his contract. The employer would receive much more by the breach of the contract than he would be entitled to in an action for damages. To Keener it seemed a novel suggestion that because the damage was small the person who had done the injury could acquire by his default a right against the person injured.⁹⁰ If the rule operates unequally, says Woodward, it is regrettable, but "one whose hands are soiled by wilful wrongdoing is hardly in a position seriously to complain."⁹¹ However, courts, which abhor forfeitures under the label of "liquidated damages" for breach of contract, have refused to allow defaulting employees to recover for their services.⁹² To invoke morality to bar the one and to ignore it to do justice to the other would seem merely to "splash solemnly about in the vocabulary of ambiguity."

*Lantry v. Parks*⁹³ established the rule in New York that an employee who has violated his contract has failed to perform the condition precedent to recovery. The plaintiff had agreed to work for the defendant for one year at ten dollars a month. After serving ten and one-half months, he left the employment. He left on Saturday and returned on Monday and offered to resume his work, but the defendant would employ him no longer. Clearly, where a laborer's wages amount to only \$120 a year, forfeiture of wages for ten months and a half must have been highly disproportionate to the damages which the violation of his contract inflicted.⁹⁴ The Vermont court, which has rigidly enforced the rule of condition precedent against defaulting employees, has regarded *Lantry v. Parks* as an excellent illustration of the manifest injustice which can be done by a refusal to apportion the wages of laborers who are hired for a fixed period.⁹⁵ Forfeitures involving wages of from three to five months on contracts of employment ranging from four months to a year have been common.⁹⁶

88. Ballantine, *supra* note 42, at 343.

89. 6 N. H. at 486. Cf. argument of counsel in *Huttman v. Boulnois*, 2 C. & P. 510, 511 (K. B. 1826).

90. *Op. cit. supra* note 43, at 221.

91. *Op. cit. supra* note 12, § 168 (a).

92. Note (1924) 24 COL. L. REV. 885.

93. 8 Cow. 63 (N. Y. 1827).

94. In *Pettigrew v. Bishop*, 3 Ala. 440 (1842), the defaulting employee forfeited eleven months' wages. In *Chamblee v. Baker*, 95 N. C. 98, 101, 102 (1886), the court held the contract to be divisible, in order to avoid a forfeiture.

95. *Fenton v. Clark*, 11 Vt. 557, 561 (1839).

96. *Eldridge v. Rowe* 7 Ill. 91 (1845) (four months out of eight months); *Swanzy v. Moore*, 22 Ill. 63 (1859) (over five months out of a year); *Angle v. Hanna*, 22 Ill. 429 (1859) (nearly 3½ months out of 4½ months); *Stark v. Parker*, 2 Pick. 267 (Mass. 1824) (two months out of a year); *Davis v. Maxwell*, 53 Mass. 286 (1847) (three months out of seven

Personal Service Contracts

In *Britton v. Turner*, Mr. Justice Parker thought that the difference between a labor contract and other contracts did not justify the application of a different rule.⁹⁷ Keener says that Mr. Justice Parker properly so thought.⁹⁸ In a case decided three years after *Britton v. Turner*, the Massachusetts court said that to admit of any exception in favor of any class would violate elementary principles of law.

"Laborers, and especially that most improvident part of them, sailors, may excite sympathy; but in a government of equal laws, they must be subject to the same rules and principles as the rest of the community; and a court of justice is almost the only place where sympathy should have no influence."⁹⁹

Certainly the laborer ought to be subject to the same rule of law as his employer, if the application of the rule produces the same results so that the rule operates equally.

"Under the doctrine that the contract is entire, and its performance a condition precedent, the result is, that if the laborer fails to fulfill his contract, but for a single day, he forfeits all that he has done, and in case of what he esteems maltreatment, he must submit to it, or leave his employer, not only subject to answer for such damages as may be sustained, but even at the peril of forfeiting all former earnings, in case it should be found . . . that he left the service without sufficient cause. This forfeiture may be ten, or even a hundred fold, more than sufficient to compensate for all damages arising from a violation of the contract."¹⁰⁰

To the Vermont court which made this pronouncement, this rule seemed no tribute to a "government of equal laws."

Such gross injustice was a sufficient justification for distinguishing between personal service contracts and other contracts. Although sustaining the orthodox position in *Timberlake v. Thayer*,¹⁰¹ the Mississippi court felt keenly the necessity for such a distinction. It is not sympathy but justice that dictates that the employee shall be subjected to the same rule of damages as is applied to the employer when he is guilty of a breach of contract. Equality lies in the application of the law. The validity of a rule of law is not to be ascertained by its verbal form. Its meaning is derived not from its

months); *Kohn v. Fandel*, 29 Minn. 470 (1882) (7½ weeks out of three months); *Banse v. Tate*, 62 Mo. App. 150 (1895) (104 days); *Hughes v. Cannon*, 33 Tenn. 622 (1854) (three months out of eight months).

97. 6 N. H. at 489.

98. *Op. cit. supra* note 43, at 219.

99. *Olmstead v. Beale*, 36 Mass. 528, 529 (1837). Cf. *Diffenback v. Stark*, 56 Wis. 462, 466 (1883).

100. *Fenton v. Clark*, 11 Vt. 557, 562 (1839).

101. 71 Miss. 279, 281, 14 So. 446, 447 (1893).

words but from its context. The fallacy of applying the rule of the condition precedent to both the defaulting employer and employee is that it penalizes the latter and enriches the former under the theory of uniform application of law.

The Vice of Uniformity

According to Dewey, the intellect is too often made a tool for a systematized apology for things "as they are", for a benefit that accrues to some class, while priding itself on its ideal quality.¹⁰² Intellectual perversity refuses to note the plural effects of any rule of law.¹⁰³ An abstract claim of equality often inhibits real equality. Complacent judges defend the artificial injustice of the law by formal righteousness.¹⁰⁴ As long as the law looks at the substance rather than the form, formulas will not be regarded as ends, but as means, and mathematical procedure will not inhibit the check of consistency and common sense.¹⁰⁵

The love of generalization often leads to useful abstraction, but frequently it is attended by vicious consequences.¹⁰⁶ A rule of law that can not be applied to an employee and an employer in the same situation with like results would seem to have little to commend it. The excellence of such uniformity is spurious.¹⁰⁷ Its delusive exactness not only obscures its inhumanity,¹⁰⁸ but is a source of fallacy.¹⁰⁹ The category of language can never dominate the categories of life, although mere words may entangle and pervert the judgment. Casuistry, says Dewey, is simply the systematic effort to secure for particular instances the advantage of a general rule.¹¹⁰ Signs and symbols must be made to signify equivalent realities.¹¹¹

Constructive Service

Lord Ellenborough is generally credited¹¹² with the decision¹¹³ that created the doctrine of "constructive service." The equitable basis of the doctrine is obvious.

102. DEWEY, *HUMAN NATURE AND CONDUCT* (1922) 258.

103. *Id.* at 229. "It must be recognized that an existing rule of law has frequently a way of persisting even when it is reasonably certain that the rule is not the best possible. Sometimes the forces of precedent, logic, and mere inertia due to the fact that a rule exists defeat any effort for immediate change." WILLISTON, *op. cit. supra* note 19, at 146.

104. See *Forburger Stone Co. v. Lion Bonding & Surety Co.*, 103 Neb. 202, 210, 171 N. W. 288 (1919).

105. CHADDOCK, *PRINCIPLES AND METHODS OF STATISTICS* (1925) 87 n.

106. Smith, *Four German Jurists* (1895) 10 POL. SCI. Q. 664, 682.

107. Sutherland, *The Person Versus the Act in Criminology* (1929) 14 CORN. L. Q. 159, 164.

108. "The soundest industrial policy is that which, . . . when human considerations demand it, subordinates profits to welfare. Industrial relations are essentially human relations." ROCKEFELLER, *PERSONAL RELATIONS IN INDUSTRY* (1923) 11.

109. Holmes, J., dissenting in *Truax v. Corrigan*, 257 U. S. 312, 342 (1921).

110. *Op. cit. supra* note 102, at 240.

111. Cardozo, J., in *Matter of Rausch*, 258 N. Y. 327, 332, 179 N. E. 755, 757 (1932).

112. Notes (1920) 8 A. L. R. 338; (1883) 43 AM. DEC. 205.

113. *Gandell v. Pontigny*, 4 Camp. 375 (K. B. 1816).

"The principle is that when a person agrees to work upon the farm, or other business, of another, . . . for a certain time, for a certain sum to be paid for such labor, and quits the service without cause and without the consent of his employer, before the end of the term agreed upon, he cannot recover for his work and labor, as upon a *quantum meruit*. The special contract must govern, and such contracts are mutual and are attended with no hardship, for if the employer discharges his servant without cause, he can recover against him for the whole time agreed upon."¹¹⁴

In 1838, in his *Institutes*, Erskine so declares the law.¹¹⁵ The reason for allowing the servant to recover his full wages when he has been wrongfully discharged, according to *Posey v. Garth*, is that "Reciprocal justice requires that such should be the law of contracts, of this character."¹¹⁶ It would seem too clear for argument that if the employee must lose all his wages when he departs, without justifying cause, before the end of his contract for hire, the employer should be compelled to pay his entire wages if he discharges him, without justifying cause, before the end of the term.¹¹⁷ The theory of the doctrine of constructive service is that the readiness of the employee to perform the services, which the employer prevented, is, in law, the equivalent of performance, or rather a valid excuse for non-performance.¹¹⁸

The "great weight of authority" seems to have rejected the doctrine of constructive service.¹¹⁹ It has been repudiated in England as well as by many courts in the United States, which require an employee to forfeit his wages where he is in default. "Constructive service" has been discarded as a fiction by the later cases as well as by text writers.¹²⁰ Perhaps the reason most generally assigned for rejecting the doctrine is that it can not be reconciled with the rule of damages that a person discharged from service must not remain idle, but must seek employment elsewhere.¹²¹ It is a doctrine which instills in discharged employees the spirit of laziness.¹²² In Illinois, the penalty for breach of contract by the defaulting employee is forfeiture of the wage earned. But the Illinois court, which had previously accepted the doctrine of constructive service, later repudiated it as illogical and unsound because the measure of damages for breach of contract by the employer is the contract price less what the employee earned or could have earned.¹²³ Such is the mystery of judicial logic in Illinois, as well as in

114. *Hansell v. Erickson*, 28 Ill. 257, 258, 259 (1862).

115. Bk. III, tit. iii, § 16.

116. 7 Mo. 94, 95 (1841).

117. *Suber v. Vanlew*, 2 Spear 126, 127 (S. C. 1843).

118. Note (1907) 5 L. R. A. (N. S.) 439, 441.

119. Note (1920) 8 A. L. R. 338, 344.

120. *Howard v. Daly*, 61 N. Y. 362, 369 (1875); Note (1907) 5 L. R. A. (N. S.) 439, 451.

121. Note (1920) 8 A. L. R. 338, 347.

122. Note (1922) 70 U. OF PA. L. REV. 134.

123. *Doherty v. Schipper*, 250 Ill. 128, 134, 95 N. E. 74, 75 (1911).

New York, Missouri and other jurisdictions which do not follow the "cogent reasoning" of *Britton v. Turner*.

The courts have been in some doubt as to whether an employee who has been wrongfully discharged must show a constant readiness to perform the work for which he was employed in order to recover the contract price for the full term of service.¹²⁴ If the test of reciprocal justice is applied, there could be no doubt regarding it. If the employee is wrongfully discharged, why should he owe any greater duty to the employer than the employer owes him when he wrongfully leaves the employment? Reciprocal justice requires that the employee who is wrongfully discharged should be permitted to proceed on the original contract for the wages for the whole term,¹²⁵ if *Britton v. Turner* is not to be followed. Under any critical analysis, the reasons given for repudiating the doctrine of constructive service appear fallacious if equality between employee and employer before the law is assumed.

Yet, so persistent has the common law been in perverting human values that one reads in a recent official publication from the United States Department of Labor¹²⁶ that the law of Louisiana is "peculiar" because it allows the employee who is wrongfully discharged to recover wages for the unexpired term at once,¹²⁷ without reference to his acceptance of other work or his refusal to return to work under the original contract. What is peculiar about a statute that allows the employee to recover full wages upon his wrongful discharge, if by statute he is required to forfeit his wages if he leaves his employment without just cause?¹²⁸ The static character of such thinking would seem closely akin to mythology, if social solidarity is a criterion of valid legal thinking. It lacks a fruitful insight into concrete facts.¹²⁹

The Missouri Doctrine

More than forty years ago, Keener pointed out¹³⁰ that Missouri had taken "the unique position" of allowing recovery for part performance where the conditions had been wilfully broken in the case of a building

124. Note (1920) 8 A. L. R. 338, 347.

125. *Rye v. Stubbs*, 1 Hill 384, 386 (S. C. 1833). In those states where the doctrine of constructive service obtains, an action for wages can not be brought until the expiration of the term, unless the contract is divisible. (1925) 39 C. J. 92. See also *Fowler v. Armour*, 24 Ala. 194 (1854); *Strauss v. Meertief*, 64 Ala. 299 (1879); *American Glucose Co. v. Lubitz*, 71 Ill. App. 638 (1897); *Williams v. Lockett*, 77 Miss. 394, 26 So. 967 (1899); *cf. Colburn v. Woodworth*, 31 Barb. 381 (N. Y. 1860); *Tarbox v. Hartenstein*, 4 Baxt. 78 (Tenn. 1874).

126. *Law Relating to Payment of Wages*, Bulletin 408 (1926) 20.

127. *Kessee v. Mayfield*, 14 La. Ann. 90 (1859); *Sharp v. McBride*, 120 La. 143, 45 So. 41 (1907); *Lurie v. Titcomb*, 139 La. 9, 71 So. 200 (1916); *Wells v. Sherrill Hardwood Lumber Co.*, 151 La. 1081, 92 So. 706 (1922).

128. *Nolan v. Danks*, 1 Rob. 332 (La. 1842); *Taylor v. Peterson*, 9 La. Ann. 251 (1854).

129. Pound, *The Need of a Sociological Jurisprudence* (1907) 19 GREEN BAG 607, 609.

130. *Loc cit. supra* note 43.

contract, while denying it to a defaulting employee. *Gregg v. Dunn*,¹³¹ which is the case that Keener relied upon, was decided in 1889, just four years before his pioneer work on *Quasi Contracts* appeared. The court admitted that the law in Missouri as to building contracts was "very peculiar."

"While the law thus favors a mechanic or contractor, and permits him, in all cases, to sue for and recover the reasonable value of his work, yet he cannot violate his contract with perfect impunity; when he does so, the law will deduct from the value of his work whatever damage the other party has sustained on account of the breach; and in no such case will he be allowed to recover for a sum in excess of the contract price."¹³²

This rule, applied to plumbers, has been felt to be consonant with equity and to do no injustice to either party to the contract.¹³³ This peculiarity of the Missouri law has been said to be due to the fact that the visible and tangible fruit of the builder's part performance is so realistically presented to the judicial eye that equity prevails.¹³⁴ In Missouri, if one agrees to clear eleven acres of land and only partially performs, he can recover for part performance, but the same doctrine does not apply to the employment of a servant who is hired for a certain period at a fixed sum.¹³⁵

The old rule relating to entire contracts has been modified in Missouri so as not to apply to builders, painters, plumbers and grubbers.¹³⁶ To do justice to these vocational interests, the emotional glow of morality is invoked.

"It is, however, generally true in morals, that one who is made richer by the act of another, done without any purpose of donation on the part of the latter, and which the former has accepted, ought to recompense the party, at least so far as he himself is a gainer; and the legal doctrine laid down in *Britton v. Turner* . . . is, we think, a just application of the principle of morality to transactions of this character."¹³⁷

This principle of quasi-contracts, which is laid down in *Britton v. Turner*, has often been applied with approval to defaulting contractors in Missouri,¹³⁸ but the decisions in the state relating to defaulting employees are

131. 38 Mo. App. 283 (1889). Accord: *Muller v. Gillick*, 66 Mo. App. 500 (1896); *Higgins v. Hill*, 245 S. W. 1105 (Mo. App. 1922).

132. *Gregg v. Dunn*, 38 Mo. App. 283, 288 (1889).

133. *Yeats v. Ballantine*, 56 Mo. 530, 537 (1874). The rule has been applied to part performance of a contract to paint a building. *Fleishmann v. Miller*, 38 Mo. App. 177 (1889). *Contra*: *Maxwell v. Moore*, 163 Ala. 490, 50 So. 882 (1909).

134. Note (1924) 24 COL. L. REV. 885, 888.

135. *Lowe v. Sinklear*, 27 Mo. 308 (1858); cf. *Wahnschaffe v. Pontoja*, 63 S. W. 663 (Tex. Civ. App. 1901); *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658 (1916).

136. *Lee v. Ashbrook*, 14 Mo. 378, 385 (1851).

137. *Downey v. Burke*, 23 Mo. 228, 229 (1856).

138. *Ibid.*; *Lamb v. Brolaski*, 38 Mo. 51, 53 (1866); *Yeats v. Ballantine*, 56 Mo. 530, 536 (1874).

adverse to it.¹³⁹ In equity,¹⁴⁰ as well as in law,¹⁴¹ in Missouri, the employee who wilfully fails to perform the conditions of his contract can recover nothing. When Keener called the position of the Missouri court as to defaulting contractors "unique", he obscured the vital issue by the linguistic camouflage of courtesy.

As early as 1858, Missouri repudiated the doctrine of constructive service.¹⁴² Although now the defaulting employee must forfeit his wages to his injured employer, to instruct a jury that the defaulting employer must pay to his discharged employee his wages for the full term is erroneous.¹⁴³ Like New York,¹⁴⁴ it has approved applying to the defaulting employer that "great and beneficent rule of law," that the employee, who forfeits to his employer all his wages when he defaults, must work to reduce his defaulting employer's damages when he is wrongfully discharged,¹⁴⁵ so that the morals of employees may not be undermined by voluntary idleness. Such judicial pronouncements should be regarded as a flagrant abuse of the poetic function of language.

The Law of Sales

In *Britton v. Turner*, the court allowed the defaulting employee to recover in quasi-contract the value of the benefit conferred by part performance, because it felt that such contracts could not be distinguished from sales contracts.¹⁴⁶ Woodward contended that the analogy relied upon failed, as none of the cases cited in the opinion involved a wilful breach.¹⁴⁷ Today, however, it is clear that contracts for the sale of goods are an exception to the general rule that a quasi-contractual claim will not be raised in favor of one who has wilfully broken his contract.¹⁴⁸ The Uniform Sales Act provides that if the buyer has used or disposed of goods delivered before he knows that the seller is not going to perform his contract in full, he will not be liable for more than the fair value of the goods received.¹⁴⁹ Williston says:

"It is true that it has often been laid down that a contract will not be implied by the law in favor of one who is in default under an express

139. *Yeats v. Ballantine*, 56 Mo. 530 (1874).

140. *Paul v. Minneapolis Threshing Machine Co.*, 87 Mo. App. 647 (1901).

141. *Henson v. Hampton*, 32 Mo. 408 (1862); *Aaron v. Moore*, 34 Mo. 79 (1863); *Earp v. Tyler*, 73 Mo. 617 (1881).

142. *Ream v. Watkins*, 27 Mo. 516 (1858).

143. *Id.* at 517.

144. *Howard v. Daly*, 61 N. Y. 362, 373 (1875).

145. *Pond v. Wyman*, 15 Mo. 175 (1851); *Gruetzner v. Aude Furniture Co.*, 28 Mo. App. 263 (1887); *Boland v. Glendale Quarry Co.*, 127 Mo. 520, 30 S. W. 151 (1895); *Tenzer v. Gilmore*, 114 Mo. App. 210, 89 S. W. 341 (1905); *Fuller v. Royal Casualty Co.*, 271 Mo. 369, 196 S. W. 755 (1917); *Osterman v. St. Louis Fish & Oyster Co.*, 218 S. W. 410 (Mo. App. 1920).

146. 6 N. H. at 489.

147. *Op. cit.* *supra* note 12, § 170 (c).

148. *Ballantine*, *supra* note 42, at 335.

149. § 44.

contract, but the injustice of allowing the buyer to retain the benefit of goods without paying for them is so clear that even in England, where *quasi*-contractual rights are generally most strictly limited, recovery has been allowed, and the weight of authority in the United States strongly supports this view"¹⁵⁰

Indeed, the Uniform Sales Act has been adopted by thirty-one states, many of which deny to the defaulting employee any recovery.¹⁵¹

It is not the policy of the law to impose punitive damages for the breach of commercial contracts, except where the circumstances render the breach of duty so flagrant as to be tantamount to a tort.¹⁵² Why should a seller who has wilfully broken his contract be allowed to recover the reasonable value of the goods delivered, while the employee is denied the right to recover for the benefits with which his labor enriches his employer?¹⁵³ That question was asked by the Kansas court over fifty years ago in *Duncan v. Baker*.¹⁵⁴ Missouri courts can not distinguish between building contracts and contracts for the sale of material.¹⁵⁵ Both types of contracts are governed by the same law. The Missouri courts do distinguish, however, between contracts for the sale of material and contracts for the sale of labor.¹⁵⁶ To the detriment of the employee, the law is different. In 1920, Mr. Justice Swayse, relying upon the same analogy upon which *Britton v. Turner* relied, thought that it was of some consequence that contracts to sell and contracts for work and labor should be governed by the same legal principles.¹⁵⁷ Cooley reminds us that the upper class is institutional in its very essence, since it is the control of institutions that makes it the upper class. Successful business men, lawyers, politicians and editors identify themselves with commercial ideals.¹⁵⁸ Only the mental lethargy of the laboring class can account for the persistence of the mythical morality that has been judicially expounded, which is so at variance with the spirit of fair play.

Restatement of the Law of Contracts

Much of what has been said may have seemed painfully obvious. Indeed, it might be regarded as superfluous if the American Law Institute had not attempted to rehabilitate the theory of the condition precedent in the *Restatement of the Law of Contracts*¹⁵⁹ and to endow it with all its ancient

150. 2 WILLISTON, SALES (2d ed. 1924) § 460. See also 3 WILLISTON, CONTRACTS (1920) § 1474.

151. WOODWARD, *loc. cit. supra* note 12; *cf. id.* § 176 (3), § 174 (1).

152. Note (1924) 24 COL. L. REV. 885, 891.

153. Ballantine, *supra* note 42, at 335.

154. 21 Kan. 99, 108 (1878).

155. Halpin Mfg. Co. v. School Dist., 54 Mo. App. 371, 379 (1893).

156. See Note of Commissioners, CONDITIONAL SALES ACT § 19.

157. Englander v. Abrahamson-Kaplan Co., 94 N. J. L. 25, 27, 109 Atl. 307, 308 (1920).

158. COOLEY, SOCIAL ORGANIZATION (1927) 140. See also Pound, *supra* note 50, at 487; HOWERTH, WORK AND LIFE (1913) 127.

159. § 270 (1932).

vigor. To illustrate the application of the condition precedent, the *Restatement* invokes the employee as its victim. Its comment tells us that

"Centuries ago the practice became settled that where work is to be done by one party to the contract, and payment is to be made by the other, the performance of the work, when no relative times for the performances are specified in the contract, must precede the payment"

"Centuries ago" must have been in the age of feudalism. If not, at least that orthodox principle of contracts antedates the democratic movement of the last century.¹⁶⁰ In all humanistic studies, says Malinowsky, there is a strong temptation to play with dead remains instead of grappling with actuality.¹⁶¹ In the present social order, the civilized world has focused attention upon the welfare of labor.¹⁶² Although theorists may refuse to be hampered by facts, the struggle for equality before the law between the employer and the employee will continue.¹⁶³ Dean Pound has aptly said that reverence for institutions of the past will not preserve an institution that touches everyday life as profoundly as does the law.¹⁶⁴

One may find cogent reasons for quarreling with particular generalizations of the *Restatement*.¹⁶⁵ As long as punitive damages are not recoverable from the employer for his wilful breach of contract,¹⁶⁶ while wrongfully discharged employees are required by reasonable diligence to reduce the damages of the defaulting employer¹⁶⁷ and to forfeit their wages for their own default, the restatement of the condition precedent may be regarded as a simplification of the law, but it can scarcely be said to clarify it or to adapt it to social needs so as to secure the better administration of justice.¹⁶⁸ Dean Clark has said that simplification of the law as an end in itself is false. It may be a generality so vague and antiquated as to represent merely an unchallenged statement of past history. If that ideal hampers and stultifies,¹⁶⁹ the courts will quickly repudiate it. When there are social and economic claims which legislation seeks to satisfy, the logical and dogmatic demands of judicial law can not overcome them despite the paralyzing influence of the past.

160. POUND, *The New Feudalism* (1930) 16 A. B. A. J. 553, 558.

161. MALINOWSKY, *CULTURE* (1927) 26.

162. MENDELSON, *SATURATED CIVILIZATION* (1926) 104.

163. GOMPERS, *LABOR AND THE COMMON WELFARE* (1919) 21.

164. POUND, *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 606.

165. GRISMORE, *Restatement of the Law of Contracts* (1933) 31 MICH. L. REV. 741.

166. RESTATEMENT, *CONTRACTS* (1932) § 342.

167. *Id.* § 336.

168. *Id.* at p. viii.

169. CLARK, *The Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643, 653, 654.

Legislation

The law existing in England at the time of the adoption of the Constitution of the United States regulating the employment of servants and laborers was of ancient origin.¹⁷⁰ Modern legislation relating to their employment undoubtedly rests upon different political and economic principles. It is characterized by a conscious effort to remove the servile and parental vestiges of the master and servant stage and to substitute therefor a real equality.¹⁷¹ In Louisiana, the default of the employer incurs the same penalty as the default of the employee.¹⁷² In Alberta, a similar attempt has been made to penalize equally the delinquency of employer and employee for a breach of the contract of employment.¹⁷³

In 1900, Mississippi passed an act which made it a misdemeanor for certain laborers who were employed in writing for less than a year to leave their employment without the consent of the employer and to make a second contract without giving notice of the first contract to the second employer. The statute was held to be unconstitutional.¹⁷⁴ "There is nothing in the law aimed at the other party to the contract, called his employer," said the court. The citizens who were liable to prosecution under the statute belonged to the class of the humble and the poor. Although among the weak, the protection of their right was considered none the less important. Such an abridgement of liberty could not be confined to farm laborers. A similar statute was held unconstitutional by Alabama in 1904.¹⁷⁵ Since *Bailey v. Alabama*,¹⁷⁶ which was decided in 1910 by the Supreme Court of the United States, it is clear that a statute under the pretense of punishing fraud cannot expose to conviction for crime the failure or refusal to perform a contract for personal service in liquidation of a debt because it contravenes the Thirteenth Amendment.¹⁷⁷

In *Stark v. Parker*,¹⁷⁸ Mr. Justice Lincoln thought that the rule which required an employee to forfeit his wages if he abandoned his service would hold out no inducement to the employer to drive the laborer from his employment or to oppress him. Within a half century thereafter, Massachusetts instituted legislation to guarantee to employees the payment of their

170. Opinion of the Justices, 163 Mass. 589, 592, 40 N. E. 713, 715 (1895).

171. COMMON AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (1927) 36.

172. LA. GEN. STAT. (Dart 1932) §§ 2749, 2750. See also cases cited notes 127, 128, *supra*; ARK. DIG. (1921) § 6885.

173. ALBERTA REV. STAT. (1922) c. 180.

174. State v. Armstead, 103 Miss. 790, 794, 799, 60 So. 778, 779, 780 (1912).

175. Toney v. State, 141 Ala. 120, 37 So. 332 (1904).

176. 219 U. S. 219 (1910), *rev'd* 161 Ala. 75 (1909). See also *Jaramillo v. Romero*, 1 N. M. 190 (1857).

177. In *United States v. Reynolds*, 235 U. S. 133, 150 (1914), Holmes, J., thought that there was nothing in the Thirteenth Amendment which prevents a state from making a breach of contract for labor a crime and punishing it as such. See also *Taylor v. United States*, 244 Fed. 321 (1917).

178. 2 Pick. 267, 275 (Mass. 1824).

wages.¹⁷⁹ Legislation of this type was designed to protect the weaker party because of the disadvantage of his position.¹⁸⁰ In view of the amiable attitude of Mr. Justice Lincoln, it is informing to note the five reasons for the non-payment of wages disclosed in a recent survey of the state labor offices of the United States.¹⁸¹ Those reasons are:

1. Inadequate wage-payment legislation.
2. Personal disagreement between the employers and employees, sometimes resulting in discharge or quitting the job.
3. Lack of principle on the part of employers.
4. Lack of understanding as to rates of pay.
5. Insufficient capital for business projects, financial reverses or insolvency.

The first three reasons assigned for the non-payment of wages do not justify the optimism of the Massachusetts court more than a century before.

The failure of employers to pay wages due their employees is recognized as a serious and widespread evil.¹⁸² In some states, complaints of the non-payment of wages are made to State Labor Departments by the thousands annually.¹⁸³ In Colorado, in 1930, men, women and children employed in the sugar beet fields, whose earnings averaged less than \$165 a year, were unable to recover the wages due them.¹⁸⁴ Many of them became dependent upon charity. To relieve them of their distress, the Commission recommended that wages for labor in the beet fields be made a charge upon the crop. In California, the state labor office settled 16,121 claims of the 27,813 claims for wages which came to the attention of the office in 1926, collecting \$976,368. In 1929, it collected \$1,051,925 from the 17,966 claims which were settled of the 28,419 claims for wages which it handled.¹⁸⁵ If the other states had as effective an administration of similar wage settlement statutes, the exploitation of human labor would soon cease to be a social evil. The common laborer and farm hand so frequently have difficulty in collecting their wages that it has often seemed incredible that some similar inexpensive method of collecting wages of employees should not be provided without compelling them to resort to the technical and costly process of bringing suit in civil courts.¹⁸⁶

Courts have often been called upon to pass on the constitutionality of a statute which imposes upon the defaulting employer a penalty for non-pay-

179. Smith, *Administrative Justice* (1923) 18 ILL. L. REV. 211, 218.

180. *Supra* note 126, at 1.

181. *Collection of Wages* (1930) 31 LAB. REV. 869, 877. The order of the reasons are here rearranged for purpose of reference.

182. *Id.* at 869.

183. *Id.* at 878.

184. AM. CHILD (Oct., 1931) 3.

185. *Supra* note 181, at 870, 871.

186. Smith, *supra* note 179, at 220.

ment of wages, where the penalty is so excessive as to be out of all proportion to the actual damage suffered.¹⁸⁷ Although the question is the same as that involved in the forfeiture of all wages earned by the defaulting employee under the orthodox rule of the condition precedent, such statutes have been held to deny to the employer the equal protection of the law.¹⁸⁸ Illinois, which has consistently refused to allow the defaulting employee to recover, declared unconstitutional a statute which required commercial corporations to pay weekly wages under a penalty of fifty dollars.¹⁸⁹ In its tender regard for the laborer, the court glorified the dignity of labor.¹⁹⁰ The year previous to this Illinois decision, Rhode Island held such a statute constitutional,¹⁹¹ although it was denounced as the worst kind of class legislation.¹⁹²

For more than a generation, legislatures have been extremely active in passing laws relating to the contracts between employer and employee, especially those involving wages.¹⁹³ The Illinois court declared unconstitutional the "Truck Store" Act, which required the payment of wages in lawful money, because the legislature was not justified in making such discriminations as favoritism and caprice might dictate.¹⁹⁴ Twenty years ago, Dean Pound said, in criticising this decision, that modern labor legislation had recognized that the necessities of the laborer often placed him at the mercy of the employer and that the inequality could not be perpetuated under the guise of freedom of contract.¹⁹⁵ Sound policy made the payment of laborers a matter of public concern. That fact is so patent that even the Bankruptcy Act gives preference to the wages of workmen and servants, not to exceed \$300, if earned within three months of the commencement of the proceedings.¹⁹⁶ In Indiana, the employee can not waive his right to demand payments at designated intervals.¹⁹⁷

Legislation regulating the payment of wages has been common, whatever may have been its purpose.¹⁹⁸ Many states have enacted laws which direct the payment of wages monthly, semimonthly or weekly. These statutes may be of general application, or they may be restricted to corporations

187. Note (1921) 12 A. L. R. 612, 614.

188. *Superior Laundry Co. v. Rose*, 193 Ind. 138, 137 N. E. 761 (1922); *Davidow v. Wadworth Mfg. Co.*, 211 Mich. 90, 178 N. W. 776 (1920).

189. *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62 (1893).

190. *Id.* at 71, 35 N. E. at 63.

191. *State v. Brown*, 18 R. I. 16, 25 Atl. 246 (1892). See also *Leep v. Railway Co.*, 58 Ark. 407, 25 S. W. 75 (1894); *Saint Louis, I. M. & S. R. R. v. Paul*, 64 Ark. 83, 40 S. W. 705 (1897), *aff'd*, 173 U. S. 404 (1899). On the invalidity of allowance of attorney's fee to laborer, see *Gulf, Colo. & S. F. Ry. v. Ellis*, 165 U. S. 150 (1897), three judges dissenting.

192. *State v. Brown*, 18 R. I. 16, 33, 25 Atl. 246, 253 (1892).

193. *State v. Martin*, 193 Ind. 120, 122, 139 N. E. 282, 283 (1923). See also Note (1930) 43 HARV. L. REV. 647.

194. *Froer v. People*, 141 Ill. 171, 186, 31 N. E. 395, 399 (1892).

195. Pound, *supra* note 50, at 473, 486.

196. 34 STAT. 267 (1906), 11 U. S. C. A. § 104 (1927).

197. *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253 (1899).

198. *Supra* note 126, at 42 *et seq.*

or to certain classes of corporations.¹⁹⁹ In many states, specified employers are required by statute to pay immediately upon discharge all wages which may be due the employee.²⁰⁰ In Wisconsin, such payment of wages must be made by certain employers regardless of whether the employee leaves the employment or is discharged.²⁰¹ Although such legislation may not be of general application, it has nullified in part at least the gross injustice due to forfeiture of wages under the condition precedent. Of course, if employees not in default are unable to collect wages earned because of the cost of litigation, the mere absence of reported cases instituted by defaulting employees to recover in spite of their default does not indicate the absence of a social problem, because even general legislation for the payment of wages often exempts from its operation certain classes of laborers.

The Social Background

The social attitude toward labor in any society creates the legal status of its laboring masses.²⁰² The class atmosphere in which men live determines the premises of their thought.²⁰³ The early relation between master and servant in England was largely one of dependency on the part of the latter. Even when the basis of that relationship became contractual, the subjection of the servant remained.²⁰⁴ Fictitious values and conventional ideas which are rooted in outworn traditions still prevail; the received ideals of the feudal era have survived the Industrial Revolution. But a change in the political center of gravity is emancipating labor from bondage.²⁰⁵

The rise of labor in the last quarter of the nineteenth century from its degradation in the old social order marks an evolutionary process in progress.²⁰⁶ In England, a laborer struggling to improve his condition was confronted until 1813 with laws limiting the amount of wages he might demand.²⁰⁷ Chitty tells us that statutes placed servants in husbandry, laborers and those in particular trades under salutary regulations.²⁰⁸ By a statute of George IV, persons under a contract to labor who did not fulfil it according to its terms were subject to a penalty of three months in the House of Correction,²⁰⁹ Dicey says that their discontent with their miserable condition was so widespread that it is recorded in a series of state trials for sedition, for conspiracy and for treason, extending from 1832 to 1843.²¹⁰

199. *Id.* at 16.

200. *Id.* at 20.

201. WIS. REV. STAT. (1933) § 103.39.

202. Lederer, *Labor* (1932) 8 ENCYC. SOC. SCIENCES 615, 617.

203. COOLEY, HUMAN NATURE AND SOCIAL ORDER (1922) 72.

204. Seagle, *Labor Law* (1932) 8 ENCYC. SOC. SCIENCES 672.

205. DEWEY, RECONSTRUCTION OF PHILOSOPHY (1920) 43.

206. MENDELSON, *op. cit. supra* note 162, at 97.

207. Brandeis, J., dissenting in *Truax v. Corrigan*, 257 U. S. 312, 357 (1921).

208. I CHITTY, PRACTICE OF THE LAW (1st Am. ed. 1834) 72.

209. 4 GEO. IV, c. 34, § 3 (1823).

210. DICEY, LAW AND PUBLIC OPINION IN ENGLAND (1914) 212.

The social hierarchy was but a symbol of the old feudal habits that still controlled national life, gave form to social values and furnished the requisite emotional resonance.²¹¹ Of course, it was the governing class which had a controlling influence in shaping legal rules.²¹²

In France, as well as elsewhere, the most characteristic legislation of the nineteenth century was that regulating the relation of master and servant.²¹³ Prior to 1868, under the French Civil Code,²¹⁴ the master was to be believed, upon his affirmation, as to the amount of wages, as to the payment of salary for the year elapsed and as to installments paid for the current year. It was not until 1890 that a discharged employee could obtain damages for a dismissal abusively given.²¹⁵ Today, a system of progressive legislation accords protection to the workman, who previously had been the victim of economic anarchy.

Labor unions have arisen out of the urgent need of self-defense. The most obvious need to counteract the pressure of the employing interests in influencing legislation and administration to their advantage is class-consciousness.²¹⁶ In the absence of competing ideas,²¹⁷ the ritualism of tradition will supplant reality; legalism will triumph over justice.

Equality Before the Law

Ever since the American Revolution there has been a growing and well-founded faith that democratic principles are permeating our institutions. The principle of equality has evolved into a juristic ideal of equal justice in a civil state.²¹⁸ "Equality before the law" has come to be regarded the first and most essential kind of equality,²¹⁹ since it signifies an integration of national life. It represents a reaction to the idea of privilege. To assume that precedents derived from general principles of English law are of universal applicability and can be applied with justice to contracts of employment is fallacious.²²⁰ Dicey says:

"The most ordinary knowledge of the commonest events shows us that in 1800 the government of England was essentially aristocratic, and

211. DEWEY, *THE MAN AND HIS PHILOSOPHY* (1930) 76.

212. WILLISTON, *op. cit. supra* note 19, at 14; COOLEY, *SOCIAL ORGANIZATION* (1927) 308. See also *Turner v. Mason*, 14 M. & W. 112 (Ex. 1845); *cf. Riggs v. Horde*, 25 Tex. Supp. 456 (1860).

213. Charmont, *The Conflict of Interest Legally Protected in French Civil Law* (1919) 13 ILL. L. REV. 693, 695.

214. Art. 1781.

215. Charmont, *supra* note 213, at 696.

216. COOLEY, *SOCIAL ORGANIZATION* (1927) 286.

217. *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927); *Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928); *State v. Julow*, 129 Mo. 163, 31 S. W. 781 (1895).

218. HOLCOMBE, *FOUNDATIONS OF THE MODERN COMMONWEALTH* (1923) 205.

219. RITCHIE, *NATURAL RIGHTS* (1894) 255; *cf. (1908) 66 CENT. L. J.* 135, 137; WELLS, *THE WAY THE WORLD IS GOING* (1929) 55.

220. Hale, *Labor Law, Anglo-American* (1932) 8 ENCYC. SOC. SCIENCES 667.

that the class which, though never despotic, was decidedly dominant, was the class of landowners and of large merchants; and that the social conditions, the feelings and convictions of Englishmen in 1800, were even more aristocratic than were English political institutions." ²²¹

If social and economic equality can not be maintained, at least there should not be such inequality before the law as to violate the reasonable expectations of the laboring masses who are employed. To create a permanent gulf between legal thought and popular thought is to make law a pseudo-science.²²² The first step in ameliorating the ceaseless struggle between employer and employed is to establish confidence in the tribunals which are empowered to adjudicate their differences. For courts to proclaim that they do not and should not take sides in that ceaseless struggle ²²³ is meaningless if their decisions clearly indicate a perverted sense of justice.

One may resort for a moment to facts. In 1900, there were 443 manufacturing establishments in the United States, each of which had over 1000 employees. In one mill in New York, there were 2689 persons employed.²²⁴ In the absence of legislation requiring the payment of wages weekly, if any one of the 2689 employees had broken his contract of employment, judicial morality in New York would have required penalizing the employee for his delinquency by a forfeiture of his wages for the wage period in which the default occurred. But if the corporate employer were the defaulting party, judicial justice would have required mere reparation. At the close of the decade in which *Britton v. Turner* was decided, there were 17,826 persons engaged in manufacturing in the United States.²²⁵ Less than a century later, 8,838,743 wage earners were employed in 210,959 manufacturing establishments. Of these, 6,257,165 persons were engaged by 16,753 employers.²²⁶ In the absence of mitigating wage-payment legislation and its attending practices, reparation would, under the orthodox rule of contracts, have been the rule of damages applied to the 16,000 employers if any one of them had been guilty of a breach of contract of employment. But if any one of the 6,000,000 employees had voluntarily abandoned his contract of employment, he would have forfeited what he had earned regardless of the damages his employer had suffered. One ought to be able to understand what the court meant in *Britton v. Turner*, when it said:

221. LAW AND PUBLIC OPINION IN ENGLAND (1914) 48; cf. LASKI, STUDIES IN LAW AND POLITICS (1932) 107; WILLISTON, *op. cit. supra* note 19, at 11.

222. Pound, *supra* note 129, at 611; cf. Brandeis, J., dissenting in *Truax v. Corrigan*, 257 U. S. 312, 357 (1921).

223. Crane, J., dissenting in *Exchange Bakery & Restaurant Co. v. Rifkin*, 245 N. Y. 260, 271, 157 N. E. 130, 135 (1927); *Engelmeyer v. Simon*, 148 Misc. 621, 623, 265 N. Y. Supp. 636, 640 (1933).

224. TWELFTH CENSUS, 1900, Manufactures, pt. I, lxxiv.

225. CENSUS OF 1850, lxxx.

226. FIFTEENTH CENSUS, 1930, Manufactures, 1:42.

" . . . 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 entire term contracted for" ²²⁷

The sentiment does credit to the courts which have shared it.²²⁸ In an equal administration of the law, society has an interest which democratic sentiment has quickened, although the impulses which gave birth to it may have been obstructed by centuries of tradition.²²⁹

The Constitutional Question

To be scientific, the law must be responsive to the demand for equal justice.²³⁰ In *Truax v. Corrigan*, Taft, C. J., said that our whole system of law was predicated on the general, fundamental principle of "equality of application" of the law.²³¹ Counsel for the employer has often argued that to allow a defaulting employee to recover would impair the obligation of contract which is held sacred by the federal and state constitutions.²³² Courts which have applied reparation as the rule of damages to the defaulting employer have sustained the argument and made forfeiture the rule of damages for the employee. If "equal protection of the laws is a pledge of protection of equal laws",²³³ it seems that it has no application to defaulting employees. Yet the Fourteenth Amendment was designed to prevent an arbitrary spoliation of property.²³⁴

Classification may be the most inveterate of our reasoning processes.²³⁵ But to be a valid constitutional classification, it must be reasonable.²³⁶ There must be some justification for any discrimination. If the guaranty of equal protection does not warrant less favorable treatment of defaulting employers, why should the law be more severe in its treatment of the class less favored by fortune and circumstance? Clearly, the uniform application of the condition precedent to defaulting employer and employee alike is unjust discrimination ²³⁷ because it is not "equality of application."

Indeed, the application of that common law rule to contracts involving the employer-employee relation was clearly unsuited to the democratic con-

227. 6 N. H. at 493.

228. *Parcell v. McComber*, 11 Neb. 209, 211, 7 N. W. 529, 530 (1881); cf. *Loyd*, *supra* note 79, at 128.

229. Pound, *supra* note 50, at 481.

230. Pound, *supra* note 164, at 605.

231. 257 U. S. 312, 332 (1921).

232. *Badgley v. Heald*, 9 Ill. 64, 65 (1847).

233. *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1885).

234. *Barber v. Connolly*, 113 U. S. 27, 31 (1885).

235. *Truax v. Corrigan*, 257 U. S. 312, 337 (1921).

236. BURDICK, *LAW OF AMERICAN CONSTITUTION* (1922) § 279. See also (1929) 2 DAK. L. REV. 399, 400.

237. *Black v. State*, 113 Wis. 205, 217, 89 N. W. 522, 527 (1902).

ditions which our constitutions and laws have sought to preserve. Generally, the common law of England was not recognized in the American states so far as it was repugnant to the policy of our laws or inconsistent with the spirit of free institutions.²³⁸ Not only the difference of political conditions justified its modification, but public sentiment often demanded its repudiation.²³⁹ Kansas repudiated the application of the condition precedent to contracts of labor because it violated both the spirit and the purpose of the bill of rights.²⁴⁰ The rule applied to labor under the social conditions of pre-Victorian England can not be deemed to be in keeping either with the habits of thought in this republic or in harmony with the objects of our legal institutions.

Conclusion

If, as Lord Scrutton has said, the whole history of the action for money had and received may properly be called "a history of well-meaning sloppiness of thought,"²⁴¹ the defender of quasi-contractual relief can justly reply that such judicial sloppiness may not be in any degree comparable to the judicial obtuseness employed in mechanically applying the doctrine of the condition precedent to defaulting employees. Social justice is not an emotional manifestation. The vice in applying one rule of damages to the employee and another to the employer, when both are wilful defaulters, can not be concealed by the veneer of rationalization nor can its weakness be camouflaged by conventional morality. The ideal of the law ought not to depend upon whether it is the employer or the employee who is seeking justice.²⁴²

If the defaulting seller can recover the reasonable price of such part of his goods as he has delivered, should not labor as a commodity be valued as highly as are goods in the scale of judicial values? The protective majesty of the law can not so pervert common sense as to exalt permanently commercial values above personal service values. It is not at all likely that those states which have followed *Britton v. Turner* will revert to the common law rule adopted by the *Restatement of Contracts*. The struggle between the employer and employee for equality before the law is becoming too tense to admit of a reversion to the formalism of the condition precedent so far as it is applied to contracts of personal service. Labor is now on the offensive. The constant appeal to uniformity was but a dialectic device to give prestige to the dogma of the condition precedent. That dogma ought never to have

238. *Conant v. Jordan*, 107 Me. 227, 234, 77 Atl. 938, 941 (1910); *Fidelity & Deposit Co. v. Brucker*, 205 Ind. 273, 277, 183 N. E. 668, 670 (1933).

239. *Trustees of Brookhaven v. Smith*, 188 N. Y. 74, 78, 80 N. E. 665, 667 (1907).

240. *Cooper v. Seaverns*, 81 Kan. 267, 281, 284, 105 Pac. 509, 512 (1909). See also *Cunningham v. Dorsey*, 3 W. Va. 293, 305 (1869).

241. *Holt v. Markham*, [1923] 1 K. B. 504, 513.

242. Pound, *Hierarchy of Sources and Forms in Different Systems of Law* (1933) 7 TULANE L. REV. 475, 486.

been applied to contracts of labor to the enrichment of the employer in a nation where the dignity of labor is glorified, and where equality before the law is deemed a constitutional virtue. By legislation, the evil of its application has been modified, but not nullified. After a hundred years of controversy, *Britton v. Turner* stands approved by considerations of morality, equality and social solidarity. Only the classic doctrine of contracts condemns it.