"THE DEFAULTING EMPLOYEE"

A CORRECTION—SAMUEL WILLISTON †

The *Restatements* of the American Law Institute inevitably contain many statements of rules of law where the authorities are divided, and where the propriety of the rule stated may be open to dispute. The justification for such a rule must, in the long run, depend upon its intrinsic merit, and the fact that a critic expresses disagreement with it does not necessarily call for a reply from those responsible for the *Restatement.* But when a writer whose position might justify a belief in his accuracy misrepresents, however innocently, the effect of a section of the *Restatement,* the case is different. Others may be deceived.

Such a misrepresentation occurs in Professor Laube's article on the right of a defaulting employee to recover for benefits conferred, which appeared in the May number of this REVIEW.[1] In that article, the author refers to Section 270 of the *Restatement of Contracts,* which provides, in effect, that where the promise of one party to an ordinary bilateral contract requires performance "extending over a period of time and fulfilment of the promise of the other party does not, the duty to fulfil the latter promise is except as stated in § 268 (2) [2] conditional on the completion of the former, if the contract does not indicate the contrary by fixing dates or otherwise." Professor Laube assumes that this section involves the conclusion that, unless the condition is performed, an employee can recover nothing. He says:

> "To illustrate the application of the condition precedent, the *Restatement* invokes the employee as its victim. Its comment tells us that
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> > '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. . . .'
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> '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." [3]

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1. Laube, *The Defaulting Employee—Britton v. Turner Re-viewed* (1935) 83 U. OF PA. L. REV. 825.

2. This exception covers the case where there has been substantial performance.

3. Laube, *supra* note 1, at 843.

The writer's error of supposing that, because a condition in a contract is not fulfilled, there necessarily can be no recovery quasi-contractually [4] is surprising because, I presume, Professor Laube would allow recovery by the employee even though the contract expressly said that the employer would pay wages only if the employee worked the full time. The development of modern law has been in allowing quasi-contractual recovery, where it is just to do so, in spite of conditions in a contract, not in denying the existence of conditions plainly expressed or implied.

In fact, the section of the *Restatement* states a rule that is everywhere law—that under such a contract as is there referred to, payment is due after performance, not before it. What are the rights of an employee if the condition is not fulfilled is set forth in Section 357, which states that recovery of any benefit conferred may be had

> "if (a) the plaintiff's breach or non-performance is not wilful and deliberate; or
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> (b) the defendant, with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in specie is still not unreasonably difficult or injurious."

This rule is not as liberal as that for which Professor Laube contends, but it is far different from that which he represents the *Restatement* as laying down.

Professor Laube's error in regard to the meaning of Section 270, and his oversight of Section 357, though unjustifiable, were evidently inadvertent, and I should have supposed that he would have wished himself to make the needed correction. But on my suggesting to him the propriety of so doing, he declined to correct the error, though he did not deny its existence, on the ground that the general tenor of the argument in his article was not affected and that he disagreed with the rule stated in Section 357.

No Retraction—Herbert D. Laube †

When my article on *The Defaulting Employee* appeared last May in this Review, Professor Williston protested that I was laboring under a misapprehension as to the meaning of Section 270 of the *Restatement of Contracts* and after attempting to point out the error that he thought I had made, suggested the propriety of my "retracting or qualifying" my criticism of the *Restatement*. He was immediately advised that the only error that I had

† Author of *The Defaulting Employee—Britton v. Turner Re-viewed* (1935) 83 U. of Pa. L. Rev. 825; Professor of Law, Cornell University.

4. The same error is made on page 826.

made was one of inadvertent omission in failing to cite Section 357. Since that section denies recovery to the employee who wilfully defaults, it merely sustains, by specific reference, the validity of my criticism.

My critic says that Section 270 of the *Restatement of Contracts* simply means that when an employer engages an employee to do a piece of work for him, he does not pay him in advance. The performance of the work must precede the payment. Clearly that is a "condition precedent." The commentator of this section tells us that, apart from any intention of the parties, due to centuries of practice, the law imposes this "constructive condition" in deference to this custom. However my critic may rationalize this section historically, it was this "old and deep-rooted principle" that performance must precede payment upon which the courts relied when they denied to the wilful defaulter any recovery for part performance. Yet, my critic says that it is Section 357, and not Section 270, that controls the matter with which my article deals because it prescribes what happens when the contract is broken.

Under Section 357 of the *Restatement,* the employee who wilfully defaults is denied recovery. His wilful non-performance bars his remedy. Under Section 270, the employee has no right to payment until he has performed, because centuries of practice have generated a constructive condidition that performance must precede payment. Since my article dealt chiefly with the historical doctrine of the condition precedent, which barred the remedy of the wilfully defaulting employee by denying him any right because his performance was a condition precedent to payment by his employer, my critic says that Section 357, and not Section 270, of the *Restatement* applies.

Most professors of Contracts would probably admit, as some of the annotators of Section 270 do, that Section 270 makes the contract entire. How strange to have my critic condemn me for assailing the "no right" section of the *Restatement* on the ground that I should have confined myself to the "no remedy" section! Such compartmental isolation of thought is a distinguished analytical achievement. A realist would have said that if non-performance under Section 357 bars the remedy of an employee who deliberately defaults, and performance under Section 270 is a condition precedent to his right of payment, then the two sections must have been dealing functionally with different aspects of the same thing. A wilfully defaulting employee would be justified, in view of the injustice which the *Restatement* inflicts upon him, in being just as profane when his attorney advises him that he has "no right" under Section 270 as when he is advised that he has "no remedy" under Section 357.

I am no dialectician but it seems to me that the real is the rational. If a wilful employee can not recover because of non-performance of a condi-

tion (Section 357), it seems to me that it is the condition (Section 270) which is the obstacle to his recovery. If that position is sound, my refusal to retract seems justified. My critic requested me to reflect upon my misapprehension, with the prophecy that through that magic process I would soon agree with him. The analytical devotion necessary to that consummation repels me. Even now, my heart is murmuring, "God forbid. I want to be a realist." May my prayer not be regarded as contemptuous, as my critic regarded my article, even though it may reflect upon certain sections of the *Restatement* or the interpretation of them.

To express my well-founded convictions, although adverse to the *Restatement,* in the columns of this REVIEW seems to me not only a privilege but a duty. If the honor of that opportunity is extended to me in the future, I shall strive to merit it. But, if any critic should ask me to retract because he refuses to note the plural effects of any principle of law, my refusal will be adamantine, however eminent my critic may be.