BRITTON v. TURNER[1]

This famous case is generally regarded as incorrectly decided. Certainly it cannot be sustained logically on the grounds set forth in the opinion. There is, upon a careful analysis, no quasi-contractual obligation involved, and to discuss the case from that point of view merely leads to confusion.

The action was in assumpsit for work and labor, and the "declaration contained the common counts and among them a count in *quantum meruit* for the labor." At the trial the plaintiff proved the performance of the labor. The defendant claimed that the work was done pursuant to a special contract. By this contract, which was bilateral, the plaintiff promised to work for one year and the defendant promised to pay him $120. The plaintiff, having entered the defendant's service in March, voluntarily, without cause and without the consent of the defendant, left such service sometime in December. The court instructed the jury "that if they were satisfied from the evidence that the labor was performed, under a contract to labor a year, for the sum of $120, and if they were satisfied that the plaintiff labored only the time specified in the declaration, and then left the defendant's service, against his consent and without any good cause, yet the plaintiff was entitled to recover, under his *quantum meruit* count, as much as the labor he performed was reasonably worth; and under this direction the jury gave a verdict for the plaintiff for the sum of $95." To this charge the defendant excepted. The charge was sustained, the supreme court finding that, as no damage for the breach of the contract by plaintiff was proved or any deduction asked, none could be made in this case and that the defendant might still maintain an action for such breach.

It is submitted that the court was wrong in sustaining the above charge, and that substantial justice would be worked out by adhering to the well settled rules of contract. As the defendant contracted to pay $120, the breach by plaintiff of his promise should play no part; the case should not turn on the fact of non-performance of his contract by him. He is not now being sued. The sole point to consider is, whether the defendant has broken his promise. He has not paid the $120 and is liable

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[1] 6 N. H. 481.

therefore unless he has some defence. Whether he committed a breach, depends upon whether his promise is absolute or conditional. As far as the language is concerned there is no condition, and we must therefore look to the doctrine of conditions implied by law to see whether any rule covers the case. In so doing we find that the plaintiff's performance takes time, while that of the defendant is merely to pay money. Hence the implied condition that the work must be performed before the money is payable.[2] But, unless the situation calls for the application of this condition implied in law,—this rule of court,—the promise of defendant is absolute and he can be called upon to pay immediately without regard to what plaintiff has or has not done. The condition, however, being a creation of the court and introduced for the purpose of working justice, will not be applied unless the plaintiff's breach is of importance and goes to the root of the contract, that is, unless the breach goes to the essence and cannot be paid for by money damages—a question of fact for the court. By applying this doctrine, then, we find that perfect justice can be worked out in the above case. It is only necessary to understand these rules and apply them correctly. The question of whether the plaintiff is wilfully at fault or not plays no part. The civil action is not to punish[3] him but to make good the damage done to the other party. It is by no means uncommon for a lawyer to advise his irate client that although there is a clear breach of contract by the other party, yet, as the client can prove no damage, he cannot recover, a principle that frequently surprises the lay inquirer.

If the breach goes to the essence, is of such importance that the defendant does not obtain sufficient benefit to make it just to require him to keep his own promise, the condition will be implied in his favor and he will have a complete defense with an action for damages caused by the plaintiff's breach. On the other hand, if the damage is slight, does not go to the essence, then he must perform, and has his counter action for the damages he has suffered. As modern practice admits a counterclaim in such cases, the balance either way would be determined in

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[2] Ashley on Contract, 202.

[3] In *Byrd v. Boyd,* 4 McCord (S. C.) 246, the court seems to have overlooked the fact that they were engaged upon a civil case in which "punishment" is not involved. Judge Johnson in giving the opinion of the Court said: "I should feel no hesitation in enforcing the rule rigidly, not only as a punishment but, etc."

the one action and perfect justice be obtained under the express contract itself. *Britton v. Turner* does no more than this and yet it lays down a false rule for the measure of recovery and accomplishes the unfortunate result that it encourages the breach of a contract, does violence to well settled rules, and leads to general confusion. Thus the opinion says:

> "It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much he may have done toward the performance."

This result is sound and just, if the plaintiff's breach goes to the essence. If it does not, he is entitled to recover on the contract, and the defendant may counterclaim such damage as he has suffered by plaintiff's non-performance. The court further says:

> "A party who contracts to perform certain specified labor, and who breaks his contract in the first instance without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such nonperformance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract and nearly completed it, and then abandoned the further performance—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage—is in fact subjected to a loss of all that has been performed, in the nature of damages for the non-fulfillment of the remainder, upon the technical rule that the contract must be fully performed in order to a recovery of any part of the compensation.
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> By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other may receive much more by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action."

The results enumerated above do not at all follow. In the first place the court says that by the "technical rule" the contract must be fully performed in order to recover. But there is no such rule. Such a result follows only a breach going to

the essence, i. e., a breach so important that the other party will not get the reasonable and fair benefit from the contract which he was entitled to expect, and money damages will not compensate him for the breach. The trial court should decide this fact, and if it determines that the breach does go to the essence, justice requires that there should be no recovery. But if not, then a full recovery may be had and the defendant is left to his suit for damages. Secondly, the court suggests that the person who begins the work may be in a much worse situation than if he wholly disregarded his contract and did not begin at all. But this again does not follow. The party suing for the breach must prove the actual loss which he has suffered, and can recover no more. If the defendant has already performed some part, and the plaintiff has benefit therefrom, then his damage is reduced *pro tanto*. Take the present case as an illustration. The defendant could recover only the damage he has actually suffered. If $95 worth of work has been received by him to his benefit, then his damage must be that much less. Hence the defendant does gain by what he has done, as the recovery against him will be proportionately diminished. He is entitled to $120, if his breach does not go to the essence. Against this the defendant can counterclaim his damages which may or may not be estimated by the jury at $25.

Writers commenting on this case[4] criticise it solely on the ground that the plaintiff has voluntarily committed the breach. This seems to the writer a lame ground upon which to proceed. It should make no difference in plaintiff's case whether he has voluntarily or unavoidably committed the breach. He is suing upon the defendant's promise, and the only defence is to show that the courts will imply a condition precedent to the promise sued upon, and hence there is no breach. But as this is entirely a creature of the courts, not found in the contract, and invented by them simply to work justice, they are entirely masters of the situation and, having borrowed the idea from courts of equity, can mete out exact justice and prevent unjust enrichment. Where there is an express condition there can be no recovery, be the unjust enrichment great or small. In other words, the courts, in that event, refuse to go beyond the expressed intent of the parties. In the case under examination the court recognizes this and says:

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[4] Woodward, Law of Quasi-Contract, p. 270, § 170.

> "It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretense for a recovery if he voluntarily deserts the service before the expiration of the time."

Of course this is sound, because the parties having the matter fully in mind, expressly agree to a certain result. If the contract voluntarily entered into by the parties provides for a situation which may work injustice, it should be enforced nevertheless.[5]

The application of the well developed rules of condition implied in law would work out exact justice in any given case, without resort to such expedients as are adopted in this celebrated decision. This is so whether one believes that conditions implied in law are true conditions, based on the intent of the parties, or merely rules of court gradually developed. At any rate, whatever view one may take on that point, the rules and their applications are well settled, and work out to a nicety the equities of each case. The recovery should rest solely upon the strength or weakness of the defendant's case.

In the case under discussion the plaintiff is allowed to recover for the market value of his services and the principle is recognized that the defendant might offset his damages.[6] The defendant's promise was to pay $120. Suppose, now, the market value of labor had suddenly risen and the services actually rendered worth $150, with damages perhaps of $20. Then, according to this decision, the defendant would be obliged to pay $130 or $10 more than he promised, although he was not at fault in any way and the plaintiff was the one who broke the contract.

The rules regarding quasi-contract are often invoked when perhaps a true contract may be found. Thus, take the case *Champlin v. Rowley*.[7] About fifty tons of hay were delivered under a contract before navigation closed, when the further

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[5] But see *Nolan v. Whitney*, 88 N. Y. 648, and *Chism v. Shipper*, 51 N. J. L. 1, where the courts deliberately disregarded the express provisions in the contract.

[6] The Court says the recovery should not exceed the amount promised. That is recognizing the contract in order to escape this very difficulty. Either the contract should be enforced or set aside. Here they propose to recognize its existence in so far as it suits their purpose, and then to ignore it.

[7] 13 Wend. 258.

delivery was interrupted. The defendant sold or used the quantity which he received under the contract. No recovery was allowed by the plaintiff who had sued for the price of the hay delivered. The case does not disclose whether the defendant voluntarily used the hay after he knew that the plaintiff would break his contract. If he did, such conduct might have amounted to a waiver. But if no waiver can be found, then there would seem to be a true promise to pay the market value of the hay thus used. His action in using the hay after he knew that the contract would not be carried out, would seem to indicate a promise on the part of a reasonable man to pay the market value. Of course this theory would justify the one who supplied the hay, pursuant to the original contract, in refusing to enter into the new contract implied in fact. He could demand the hay back again because the assent of both parties is necessary.

Suppose a somewhat similar state of facts. A agrees to deliver a certain number of brick at a private wharf at Poughkeepsie. He fails to deliver all called for by the contract and the breach goes to the essence. There could be no recovery for the bricks delivered unless there is a waiver by defendant of the implied condition precedent to his promise. If he has worked the brick into his building as the delivery proceeded, there is no conduct on his part from which a true promise can be inferred and there should be no recovery in quasi-contract for unjust enrichment, because the breach goes to the essence. If it does not, then the full contract price should be recovered as promised by the defendant, the implied conditions precedent to his promise not being applicable as the breach is not material, and he is put to his cross action for his damages. But suppose the brick are left on the pier as delivered and, while they are there the delivery ceases, so that B knows that A has broken his contract and suppose further that such breach goes to the essence. B is then not liable on his original promise. But if, after such recognized breach, he voluntarily takes the bricks, he would seem to promise to pay the reasonable price therefor, and there is a true contract implied in fact. Here also A must directly, or by reasonable intendment, acquiesce in the new contract.

Another class of cases raises a different situation. Suppose a plaintiff in a given case has himself a defense, as for instance sickness. Such defense should play no part in his affirmative action. If his breach goes to the essence he can recover nothing, and justice requires this. If not, then the defendant should

keep his promise and pay the amount he agreed. Of course, in that event, the result may be a slight enrichment by the plaintiff, because he has a defense to any action which the defendant may bring for damages. But as the law considers that the parties must necessarily have taken the possibility of sickness into their calculations, it would perhaps seem just that the defendant should suffer this slight loss, particularly as he is protected in case the breach is material.

It may be, however, that exact justice would be worked out by permitting the defendant to offset his damages, and limit the defense of sickness to a case where he is directly attacked.[8]

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[8] Professor Woodward, Quasi-Contract, § 165, says: "If the premise be true that conditions implied in law do not rest upon the actual intent of the parties as inferred from the express terms of the contract, there is no basis whatever for the claim that a contractor assumes the risk of a failure to perform such conditions. And it is believed that the premise *ought* to be true. That is to say, the courts ought to recognize the futility of attempting to ascertain the unexpressed intention of the parties—to say nothing of the probability that they had no intention whatever in the matter—and treat the condition as a fiction invented in the interest of fair dealing. But the prevailing judicial dogma, it is feared, is that conditions implied in law are genuine conditions, resting upon the actual intent of the parties, as ascertained by an examination of the entire contract, and unless this view is abandoned, any distinction between express and implied conditions, as to their effect upon quasi-contractual rights, is impossible."

Professor Woodward evidently believes that these conditions are not based on the intent of the parties, as indeed such a clear thinking man as he shows himself to be, must conclude. But he gives way to the language of the courts as found in various opinions, and feels that the matter is thus settled. It is as though the courts should describe a cow in great detail, and say, "This is a horse." Doubtless they may believe it to be a horse, but because their ignorance leads them into this error does not make it any the less a mistake. The cow remains such and is not turned into a horse, although the court may call it a horse for years. Thus, in conditions implied in law, the judges talk about the intention of the parties and then proceed to decide the case upon principles of their own. Probably they do this in good faith but, for all that, the fact remains the same; no intention is to be found. If the intention were shown in the contract then the condition would be express, and it would necessarily be enforced whether the breach went to the essence or not. If the parties have once expressed an intention, it is absolutely immaterial whether it is of any importance or not.

This is recognized in *Britton v. Turner* when it is said that "it is easy to provide by an express agreement that nothing shall be earned if the laborer leaves his employer without having performed the whole service contemplated." One of the just criticisms of *Nolan v. Whitney*, 88 N. Y. 646, is that the court disregards an express condition and applies the rules of conditions implied in law. It is not disputed that this doctrine of implied conditions first arose in *Kingston v. Preston* (cited in *Jones v. Barkley*, Doug. 684, 689). In delivering the opinion Lord Mansfield said that "in the case before the court it would be the greatest injustice if the plaintiff should prevail." But if we are to rely on the intent of the parties gathered from the contract, it can make no difference whether justice results or not. The parties have so agreed and that ends it. Sergeant Williams in his celebrated notes to *Pordage v. Cole*, Williams' Saunders 319, in his rule 3 says: "Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained without averring performance in the declaration." In other words, where the breach does not go to the essence, recovery may be had. If, however, the intention of the parties is found, it can make no difference whether the breach goes to the essence or not.

The first writer who scientifically handled the subject of conditions implied in law was Langdell (Contract, § 105). He says: "Every condition in a covenant or promise must be founded upon the intention of the convenantor or promisor and generally this intention must be an actual one, i. e., it must be proved to exist in each case. Conditions of the class just referred to, however, are frequently founded upon an intention which the law imputes to the covenantor or promisor without any evidence of its actual existence in the particular case." But if the law imputes the intention, of which there is no evidence, is not the law laying down the rule of its own motion? How can we say that there is intention when there is no evidence of it? Langdell then goes on (Contract § 106) to explain how he thinks this can be done. Although the animal has all the attributes of a cow, nevertheless it is a horse. The explanation is very Langdellesque. Holmes (The Common Law, 334 et seq.) also speaks of the intention of the parties in these cases, but proceeds to demonstrate the absurdity of the position. The present writer said on this subject (Ashley on Contracts, 191, N.): "As shown above (p. 189) Lord Mansfield founded these conditions upon equitable considerations. Langdell (Contract, § 105) bases them upon the intent of the parties, as does Holmes (Common Law, 334-335). Keener in 1893 (Quasi-Contract, 225) seems to have been the first to publish the evidently sound view that these rules do not depend upon any supposed intent of the parties, but upon the demands of justice. Professor Costigan (7 Columbia L. Rev. 152, n.) states that he borrowed this doctrine from Professor Williston's lectures. The author took it from Keener." In correspondence Williston says: "The credit, such as it is, for the suggestion referred to here doubtless belongs to Mr. Ames, though he never worked out the subject very elaborately. I imagine that he got his suggestions from the civil law. At the time I was a student, Pro-

fessor Keener had not worked very far away from Professor Langdell's theory, and when I began to teach I started on the foundation I got from Keener. Both of us, I suspect, worked farther and farther away from Langdell in our views of the matter as we continued to teach." Harriman (Contract, § 315) criticises Keener's views on this point. But he begins by referring to Langdell's classification and adds: "Whatever may have been the former importance of this distinction, it seems to be of no practical consequence at the present day." He then proceeds to complicate a sufficiently difficult subject by the employment of unusual terms. His argument seems unconvincing. In *Hertzog v. Hertzog*, 29 Pa. St. 465, the court in speaking of the distinction between true contracts and those implied in law says: "All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied or presumed from circumstances, as really existing, and then the contract, thus ascertained, is called an implied one. . . . It is quite apparent therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely *constructive* contracts, while the former are truly implied ones. . . . We have therefore, in law, three classes of relations called contracts. 1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract where no proper contract exists, express or implied." . . .

Although the historical development of "contracts implied in law" and "conditions implied in law" is very different, yet if one uses the above language with reference to conditions it is equally pertinent. True conditions may well be called express, as they always have been, while these rules or creatures of the courts, these "conditions implied in law" might equally well be called "constructive conditions" or perhaps, if this does not sufficiently bring out the difference, they may be described as "rules of court" to indicate that they are not based on the intent of the parties.