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ERRATUM.

In March Number, on Page 381, Line 2, for "Lieutenant-Governor" read "Attorney-General."

LIABILITY OF A MUNICIPAL CORPORATION FOR INJURIES CAUSED BY THE EXPLOSION OF A PEANUT ROASTER.

In *Frank v. Village of Warsaw,* 198 N. Y., 463, the plaintiff's eyes were blown out by the explosion of a peanut roaster which was stationed near the curbstone in the streets of the village. Suit was instituted by the injured party on the ground that the negligence of the village in failing to remove a dangerous obstruction from its streets had caused the injury complained of. It appears that although the roaster was not expressly licensed, it had been maintained at this particular place for several weeks; in fact long enough to be brought to the notice of the village trustees, whose failure to object to its continued use of the place amounted to an implied approval on their part. The peanut roaster was mounted on wheels and was operated only during business hours, as the owner also conducted a confectionery store and fruit stand in the building across the sidewalk. In awarding damages to the plaintiff the Court held that the failure of the defendant to have the roaster removed amounted to a negligence which was the proximate cause of the injury.

The exact circumstances of this particular case have of course never arisen before but they involve a principle that has been con-

tinuously litigated throughout the country, leading to various decisions in different jurisdictions. The question in this case seems to be whether or not the trustees should have anticipated the possibility of the accident happening by the exercise of due care and prudence.

The decision in the principal case is based on the opinion rendered in a leading case of the State, and a case that is recognized as authority in a great many jurisdictions throughout the land. It is the case of *Cohen v. Mayor, etc., of New York,* 113 N. Y., 532, where the city had, by special permit, for which an annual license fee was exacted, allowed a grocery company to leave its wagon, when not in use, standing near the curbstone night and day. The shafts of the wagon were held perpendicular by strings attached to the body of the wagon. A passing ice wagon struck the grocery wagon and turned it partially around, the impact of the blow breaking the strings and thus causing the shafts to fall on the head of the plaintiff's intestate, who was passing at the time. It was held that the license was issued without authority, that the storing of the wagon on the highway was a public nuisance, and that the defendant was liable for damages just as if it had maintained the nuisance itself. In the same jurisdiction, *Wells v. the City of Brooklyn,* 9 App. Div., 61, a child was injured by the blowing down of a show case, which had been kept on the sidewalk for a number of months by a merchant, and it was held that the show case being permanent in character, continuously maintained and unauthorized, constituted a public nuisance, which it was the duty of the defendant to have removed as soon as the knowledge of its existence could fairly be attributed to it, and that the city was liable for the injuries suffered by reason of its negligence in failing to have it removed.

But in *Hunt v. Mayor, etc., of New York,* 109 N. Y., 134, in which the city authorized the laying of certain steam pipes by a corporation, where an explosion of gas in one of the man-holes injured plaintiff, it appearing that the laying of the steam conduits caused the escape of gas from the gas pipes into the man-hole where the explosion occurred, it was held that the city was not liable; for the laying of steam pipes was a new thing and that, as no such accident had ever happened before, it was not to be anti-

cipated by the city, even though exercising due care and diligence. However in *Beall v. Seattle,* 28 Wash., 593, where the circumstances were of a similar nature, an opposite view was taken by the Court. In this case the explosion of a steam boiler beneath the sidewalk caused the injuries complained of. The boiler was maintained in connection with the heating plant of the abutting building, where it had been installed for three months, and it was claimed that the ordinance of the city, requiring certain inspection by the proper authorities of any proposed heating plant located beneath a sidewalk, had not been duly followed, that the defendant had notification of the installment of the plant and was therefore put on notice as to the safety of its construction. It was held in this case that where a traveler upon a highway is injured as the result of the explosion of an unseen instrument, within the area of the street over which the city has control, a *prima facie* case of negligence is established against the city, in the words of the learned judge, "the explosion being a thing so unforeseen and unexpected in its nature."

In regard to the liability of a municipality for injuries suffered by reason of the negligence of a contractor or builder, in failing to exercise due care and provide proper safeguards, where the city has expressly permitted the use of a portion of its streets for building material, etc., there also seems to be a conflict in the authorities. In *McCoull v. Manchester,* 85 Va., 579, the city, by virtue of a general ordinance to that effect, had allowed a builder to block the street from the sidewalk to the center of the street. The plaintiff, while riding his horse by at a moderate speed in the night, ran into a pile of sand on which there was no light. The horse fell and broke his neck and the plaintiff was also injured. It was held that the city was liable, because of its duty to see that lights were kept on such obstructions which, without lights, could be easily anticipated as productive of injuries to travelers. Whereas in *McArthur v. City of Saginaw,* 58 Mich., 357, it was held that the unauthorized use of a public highway by an abutting owner is a matter that falls within the cognizance of the police power, and it has nothing to do with the duty to make or repair highways. In this case the intestate of the administratrix, who was riding in his buggy at the time, ran into a pile of lumber extending into the street, was thrown from his buggy and killed. The Court refused to fasten any liability on the city. And the

same line of reasoning, under similar circumstances, is used by the Court in *Sinclair v. Baltimore,* 59 Md., 592, while in *Penrod v. City of Columbus,* 73 Ohio St., 209, it was held that the city was not liable unless the failure of the builder to keep the streets properly safeguarded has been expressly brought to the attention of the city.

In *King v. City of Oshkosh,* 75 Wis., 517, the plaintiff sustained injuries by falling over a hydrant maintained on the edge of the sidewalk by a private corporation, with the consent of the city. It was held that where the city suffers a dangerous structure, or object, to remain upon its streets, after notice of its existence and time for removal, it is liable for any injuries caused thereby. But in *Wolff v. Dist. of Columbia,* 21 App. D. C., 464, it was held that the municipal corporation was not liable for injuries caused the plaintiff by falling over a horseblock on the sidewalk, the street being poorly lighted at that point. And in Michigan it was held that the city was not liable for injuries to a pedestrian through the falling of a billboard, insecurely placed near the edge of the street, upon his own property, by an abutting owner. *Timby v. Ishpeming,* 140 Mich., 146.

It seems to be generally accepted that a municipal corporation is not liable for injuries inflicted on travelers by bob-sleds and other sleds used in coasting, regardless of whether the coasting is allowed or prohibited by the city ordinances. *Toomey v. City of Albany,* 38 N. Y. St. Rep., 91; *Pierce v. City of New Bedford,* 129 Mass., 534; *Dillon on Municipal Corporations,* 2nd Ed., Sec. 981, N. 2.

And even where the instrumentalities complained of are *per se* dangerous the authorities are at issue; thus, in *Speir v. City of Brooklyn,* 139 N. Y., 6, the city was held liable for damages where the plaintiff's house had been set on fire by a sky rocket, which entered the window from the street below where a celebration of fireworks, licensed by the city, was taking place; it being said by the Court that the discharge of the fireworks, at the place and under the circumstances, was a nuisance. While in *Hubbell v. City of Viroqua,* 67 Wis., 343, it was held that the city was not liable for injury to the plaintiff inflicted by a stray bullet from a shooting gallery, licensed by the city. And in Massachusetts

Lincoln v. City of Boston, 148 Mass., 588, the city was held not to be liable for injuries of the plaintiff, whose horse had run away, when frightened by the discharge of a cannon on the Commons, under permit from the city.

The subject is very well summed up by the words of Judge Peckham in *Hubbell v. City of Yonkers,* 104 N. Y., 434, where he says: "That which never happened before, and which in its character is such as not to naturally occur to prudent men to guard against in its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence, in not foreseeing its possible happening and guarding against the remote contingency." While the reasoning of the learned judge, as well as a very respectable line of authority, seems at first sight at variance with the decision reached in this case, still an analysis of the various authorities seem to show that the preponderance of the decisions in America support the conclusion reached in the principal case.

TECHNICALITIES IN CRIMINAL PROCEDURE—REVERSAL FOR INADEQUACY AND INEFFICIENCY OF COUNSEL.

The mere incompetency of an attorney does not ordinarily constitute a ground for a new trial nor justify a reversal. There must be a strong showing both of incompetency and prejudice. *The State of Iowa v. Benge,* 61 Ia., 658. This strong showing was proved to the satisfaction of the Missouri Supreme Court in the case of *The State of Missouri v. Lewis,* (1880) 9 Mo. App., 321. Here, after vainly attempting to have the case continued, the attorney withdrew. The witnesses were not subpoenaed and the investigation and all other preparation had been entirely omitted. The appointed counsel were unable to prepare the defense in time and the Supreme Court reversed the case, saying that the refusal of a motion for continuance was an abuse of the discretion of the Court. "The gross ignorance, incompetence and imbecility of the attorney of one accused of murder, by which the prisoner is deprived of essential rights and advantages guaranteed to him by law is sufficient ground for setting aside a conviction and granting a new trial," says the Court in this case.

But the incompetency, inefficiency or even ignorance of the attorney for the accused prisoner is not a ground for a new trial unless it clearly appears that the accused was prejudiced thereby. *Darby v. The State of Georgia,* (1887) 79 Ga., 63. Here it was held that although the chief counsel for the accused was so unwell that he died a few days after the trial it was not a ground for reversal based on the allegation that his ill-health prevented him from properly handling the case since it was not shown that different conduct would have changed the result.

This case is in accord with a previous decision where the counsel for the accused in consequence of too free use of intoxicants neglected to inform the defendant of his right to make a statement to the court. It was held that there was no ground to justify a reversal as it was not shown that he had suffered material detriment therefrom. *Hudson v. The State of Georgia,* (1876) 76 Ga., 727. But the court indicated that a reversal was not impossible.

The case of *People v. Blevins,* (1911) 96 N. E., 214, raises a novel question under this rule. The plaintiff was indicted for murder and the indictment returned August 15, 1911, when he was arraigned and counsel appointed and trial set and had two days later. Neither of his attorneys felt equal to the handling of this case; one was in practice less than two years, and the other was engaged in civil practice. The State was ably assisted by three experienced counsel hired by outside parties, and it was held that, on objection, the defendant was entitled either to have his defense strengthened or the State's representation weakened so the contest would not be quite so disproportionate.

In *The State v. Dreher,* (1897) 137 Mo., 11, the counsel failed to handle his case in a manner satisfactory to the counsel on appeal who claimed that "he did not see his witnesses before they came into court; that he had not summoned proper witnesses; nor properly handled a preliminary hearing on the question of the insanity of the criminal; and also that he had placed experts on the stand before his defense was properly or sufficiently developed; etc." The Court, basing their decision upon *Fields v. Matson,* 8 Mo., 686, and *Gehrke v. Jod,* 59 Mo., 522, held this was not a sufficient ground for reversal. "After a most laborious

search we have found but one case in which an appellate court has reversed sentence or judgment on the ground of the negligence or incompetency of an attorney," says the Court in this case, referring to *The State of Missouri v. Jones,* (1882) 12 Mo. App., 93.

But it may be reversed on that ground. *Kuehn v. The State,* (1905) 47 Tex. Crim. Rep., 636. But not unless it is well proven. *Vowles v. The Commonwealth,* (1894) 15 Ky. Law Rep., 524. Here, in the opinion of certain spectators, the attorney was not well enough to try the case. But the reversal was refused. Inefficiency caused by sickness is not generally considered a ground for reversal. *Darby v. The State of Georgia,* (1887) 79 Ga., 63. And the same rule applies to intoxication. *Hudson v. The State of Georgia,* (1876) 76 Ga. App., 727.; *O'Brien v. The Commonwealth* (1903) 115 Ky., 608, 24 Ky. Law Rep., 2511. The mere failure or even refusal of the defendant's counsel to summon certain witnesses is not sufficient proof of incapability. *Fambles v. The State of Georgia,* (1895) 97 Ga., 625. And where the only neglect is a failure to except to the ruling of the Court or to the instructions to the jury, which did not appear to have prejudiced the defendant, it is no ground for reversal. *State of Kentucky v. Currens,* (1891) 46 Kan., 750.

Inefficiency due to lack of skill and inexperience is raised only when the counsel is appointed by the Court. In such a case the prisoner's counsel acts as a substitute for the judge under a survival of the maxim, "The judge is counsel for the prisoner." And therefore his acts or omissions are to be more favorably construed than if he had been employed by the defendant himself for his defense. *State v. Williams,* (1890) 9 Houst. (Del.), 508. But nevertheless where it is claimed that appointed counsel is inefficient it must be proven. *Innocents v. The State,* (1908) 53 Tex. Crim. Rep., 390.

Where the accused person employs his own counsel he must take proper precautions to protect himself before he can obtain a reversal upon such grounds. Where the defendant's counsel was so drunk that the court stopped the trial and gave warning to the defendant that the attorney could not try the case in that condition it was held that as the defendant continued to retain the same

counsel there was no abuse of discretion in the Court to refuse to grant a new trial. *Territory of New Mexico v. Clark,* (1905) 79 Pac., 708. And where the defendant was tried for keeping a disorderly house and he had disclosed only part of the facts to his lawyer so that the attorney was not prepared to meet proof that a tenant in the basement had so kept that part of the premises. It was held that the defendant had no ground for reversal for surprise and consequent inadequacy of defense. *People v. O'Brien,* (1854) 4 Parker Crim. Rep. (N. Y.), 203. In a Texas case where the attorney's condition due to sickness and ill-health was such that he could not try the case and the defendant then made extraordinary efforts to secure other competent counsel and failed, it was held an error in the Court to refuse to grant a continuance. *Kuehn v. The State,* (1905) 47 Tex. Crim. Rep., 636. And also that where the attorney employed did not take up the case and the defendant in ignorance of his rights pleaded guilty it was an error in the Court to refuse to grant a new trial when he had a good defense. *Jackson v. The State,* (1906) 48 Tex. Crim. Rep., 373. And where the prisoner's counsel was hired by his mother and then appeared during the trial so intoxicated that he was unable to fill his duties it was held that, while the defendant might not be held with the same strictness yet the Court would refuse to reverse the case under the facts disclosed. *O'Brien v. The Commonwealth,* (1903) 115 Ky., 608.

It is nevertheless a condition precedent that the defendant avail himself of all proper means for his protection. Where continuance or postponement or other opportunity for preparation is not sought at the proper time there is no ground for an appeal for refusal to grant a new trial on the ground of inadequate preparation. *State of Louisiana v. Walker,* (1887) 39 La. Ann., 19. But where the defendant's counsel refrained from asking a change of venue for local prejudice for fear of mob violence it was held that under the circumstances it violated the prisoner's constitutional right "to a speedy public trial by an impartial jury—and to have the assistance of counsel for his defense." *Roper v. The Territory of New Mexico,* 7 N. M., 255. Where the question of sufficiency of preparation was not raised until after the verdict, the Supreme Court of Louisiana could find no reversible error. *State v. Bradley,* (1851) 6 La. Ann., 554.

It therefore seems that while the weight of American authority is not in favor of granting a new trial on the assumption that the defense was not sufficiently strong yet there is a sharply defined line beyond which we cannot go. The case of *People v. Blevins, supra,* is one very close to the dividing line and might be justly decided in either way but the including of the weakness of the defense in the assignments of error is fully justified both on principle and authority.

THE EFFECT OF A PAROL AGREEMENT LOCATING A BOUNDARY BETWEEN ADJOINING ESTATES.

Throughout the history of this country uncertain and disputed boundary lines have constantly given the courts of the various States many cases for decision. As was to be expected, different judges took different views of questions of law arising from similar facts, and at first there was a wide variance between the laws of a number of the States. Most of this diversity of opinion was concerning the effect of a parol agreement between adjoining owners establishing the location of a disputed or uncertain boundary between their lands. Many of the earlier decisions were in direct conflict, entirely irreconcilable, but gradually one view came into favor and was adopted by the courts of a large majority of the States.

In *Taylor v. Rudy,* 137 S. W. (Ark.), 574, a recent case before the Supreme Court of Arkansas involving the boundary question, the plaintiff brought an action to restrain the defendant from obstructing a stream of water which ran through the land of each, alleging that such obstruction caused the water of the creek to back up and overflow his lands, thereby causing much damage to certain buildings and their contents. The defendant contended that these buildings were upon his land and not upon the land of the plaintiff. The evidence showed that there had been uncertainty as to just where the boundary line was located, and that by parol agreement the prior owners had fixed a boundary between their respective possessions, and had continued to occupy the lots with reference to this agreement until the conveyance to the plaintiff and defendant in this action. According to this division the buildings stood upon the land owned by the plaintiff, and the only

question was whether the parol agreement was valid and binding. The Court held that it was and gave judgment for the plaintiff.

In the opinion the Court said that where there is uncertainty as to the boundary or where the owners of adjoining lands are in dispute as to the dividing line, the parol agreement of such owners as to the boundary establishes the line, and when followed by possession with reference thereto is conclusive on them. *Payne v. McBride,* 131 S. W. (Ark.), 463, was there cited and the doctrine as stated in that case is substantially the same, with the addition that the possession with reference to the agreed boundary need not be for the full period of the statute of limitations. In many other jurisdictions this opinion is reiterated and regarded as settled law therein, notably, *Kitchen v. Chantland,* 105 N. W. (Iowa), 367, and *Vosburg v. Teator,* 32 N. Y., 561; but in some the rule is less strict, the agreement alone being deemed sufficient without acquiescence or possession. *Patterson et al. v. Meyer,* 114 Pac. (Okl.), 256; *Hastings v. Stark,* 36 Cal., 122.

In all cases it is essential to the validity of the agreement that there should be a dispute or uncertainty as to the line, and in some, as already noted, there is the additional necessity of acquiescence or occupation following the agreement. Concerning the former it is said in 4 *American and English Encyclopaedia,* 859: "A practical location of the boundaries of two coterminous estates by the act of the parties has been held to determine the boundaries and fix the rights of the parties. A limitation to the efficiency of this method of determining boundaries is found in the provision of the statute of frauds prohibiting a parol transfer of title to land. The judicial expressions upon this subject are not easily reconciled, but by the weight of authority, in order to avoid the statute, the location must determine a boundary previously unascertained and uncertain; or there must be an acquiescence in the actual location for a period greater than the statute of limitations; or there must be an element of actual estoppel in the case which will prevent one of the parties from asserting his title." Thus it is said in *Olin et al. v. Henderson,* 79 N. W. (Mich.), 178, that there must have been a doubt or controversy as to the true line; otherwise the case comes within the prohibition of the statute. Where the boundary is known and not in doubt the agreement is void. *Gilchrist*

v. McKee, 9 Yerg. (Tenn.), 456; *Northern Pine Land Co. v. Bigelow and Another,* 84 Wis., 157.

But what is the effect of the agreement where the boundary is in doubt at the time it is made, but the true location is afterward discovered? Here there is a conflict of opinion. In some States it has been decided that the agreement binds the parties though it is not the true line, and though the true line is afterward determined. *Provident National Bank v. Webb,* 128 S. W. (Tex.), 426; *Loustalot v. McKeel,* 108 Pac. (Cal.), 707. Perhaps a greater number, however, have decided that where the parties agree as to the location of the line thinking it the true one, or where the true line is discovered after the agreement, the agreement is not binding and either party may claim up to the true line. *Gove v. Richardson,* 4 Greenl. (Me.), 327; *Jackson v. Perrine and Wife,* 35 N. J. Law, 137; *Bailey v. Jones,* 14 Ga., 384.

This latter rule, as well as the one requiring acquiescence or possession, probably arose from the belief that the allowance of these parol agreements was a judicially created exception to the statute of frauds. This is now considered erroneous, and the section of that statute forbidding a transfer of title to land by parol is held to be not applicable. In *Hagey v. Detwiler,* 35 Pa. St., 409, this is explained in accordance with the weight of authority as follows: "It is supposed (by counsel) that boundaries fixed by parol are within the operation of the statute. This is a mistake. The statute is a rule of conveyance; it requires a writing to *create* an estate or interest in lands, that shall have more force or effect than a lease or estate at will only. But adjoining owners who adjust their division by parol do not create or convey any estate whatever between themselves; no such thought or intention influences their conduct; after their boundary is fixed by consent, they hold up to it by virtue of the title deeds, and not by virtue of a parol transfer. Generally, indeed, they feel that their rights as defined in the title papers, have been abridged rather than enlarged by the agreed line; and this, because their treaty proceeds on the basis that the exact right between them is doubtful. Out of the doubtfulness of the right springs the consideration which binds the parties to such agreements." Again, in *Vosburgh v. Teator, supra,* "It may be regarded as settled law at this day, that the settlement of a disputed boundary line between the parties

by arbitrament or parol, and especially where equivalents of benefit or advantage are mutually received and acted on, will bind the parties to it, not by way of transferrnig title from one to the other, which the statute of frauds prohibits, but operates by way of estoppel."

The courts almost universally have now adopted the view expressed in the above cases. But formerly not a few judges refused to give effect to a parol boundary agreement because they looked upon it as a transfer of title within the statute. *Phillips v. Eades,* 1 Ky. Law Reporter, 425, is a case in point. There it is said that while a parol agreement as to the location of a boundary would be within the statute of frauds, yet such agreement would conduce to show that such was the true line. *Small v. Hamlet,* 24 Ky. Law Reporter, 238, and *Campbell v. Combs,* 25 Ky. Law Reporter, 1643, are to the same effect, but they now stand almost totally unsupported by authorities elsewhere.

In brief then, the law, as supported by the better opinion and the weight of authority, may be stated thus: Where between adjoining landholders there is a dispute or uncertainty as to the location of a boundary line, they may make an oral agreement establishing the line and it will be binding upon them, at least when followed by acquiescence or possession, though such possession need not be for the period of the statute of limitation of actions. Furthermore, it should be added, that "the agreement may be express or implied," *Clayton v. Feig,* 179 Ill., 554; 54 N. E., 149, and is binding not only upon the parties, but also upon those holding under them. *Hastings v. Stark, supra, Taber v. Hall,* 23 R. I., 613. Though it has been held that if unrecorded it is void as to innocent third persons without notice. *Kittridge v. Landry,* 2 Rob. (La.), 72.

So it must be concluded that *Taylor v. Rudy, supra,* was decided in accordance with the great weight of authority; that the agreement made by the contestants' devisors was valid and binding, and, therefore, that the decision for the plaintiff was correct.

MEASURES OF DAMAGES FOR THE WILFUL BREACH OF A CONTRACT FOR WORK AND LAROR.

Considerable dispute has arisen as to the right of a servant or employee to recover for his services when he has quit his employment before his term has expired, and without any justification.

In the recent case of *Hedges v. Slaughter,* 130 S. W. (Tex. Civ. App.), 592, the Court of Appeals of Texas reaffirmed its previous doctrine regarding this question. The plaintiff in this case had contracted with the defendant to perform certain services. The plaintiff left the defendant's service without any justification and before his term had expired. The court held that where an employee abandons his contract he may recover the reasonable value of the work performed, not exceeding the contract price, less any damage sustained by the employer, regardless of whether the services were of actual value to the latter.

The foregoing doctrine has been repudiated by a long line of decisions, both in this country and in England, but "the reason of the thing and the trend of legal development are clearly in favor of it." *Scott, Cases on Quasi Contracts,* 761.

The leading case in support of the doctrine that a wilful and inexcusable default of the servant is no bar to his recovery is *Britton v. Turner,* 6 N. H., 481. The measure of recovery allowed the plaintiff is the value of his services as against the damages sustained by the defendant for his non-performance. The Court states in the opinion, "We think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that the contract being entire there can be no apportionment; and that there being an express contract no other can be implied, even upon the subsequent performance of service, is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that 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, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary."

That the present doctrine is based on justice and right upon principle, however technical the common law may have been, seems to be the opinion of *Chitty on Contracts,* 846. "It is difficult to discover a reason emanating from any principle of equality or justice for holding that a servant who has been wrongfully dismissed by his master before his term has expired shall be held to allow for other eligible employment he might obtain during the residue of his term, which would not on the other hand require that the master, when the servant has wrongfully deserted his service, should procure the services of another servant to fulfill the same employment, and then allow to the former the amount agreed to be paid, after deducting therefrom the wages paid to the latter and any damages and trouble suffered in consequence of the change of servants and procurement of a substitute."

In all of the cases in support of the above doctrine the courts have not been unmindful of the fact that when a person makes a fair contract he is entitled to have it fully performed, and if the plaintiff has wilfully refused to perform, the defendant should be entitled to damages. In *Britton v. Turner, supra,* Judge Parker, in referring to the benefit and advantage which the employer takes by the services, states that it is to be determined as follows: "The amount of value he receives, if any, after deducting the amount of damages; and if he elects to put this in defense he is entitled so to do, and the implied promise which the law will raise in such cases, 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-fulfillment of the contract."

Some courts have held that to allow no recovery on a *quantum meruit* would in effect operate as a forfeiture and in the nature of a penalty. In *Fenton v. Clark,* 11 Vt., 157, the Court said: "The theory on which it is based is not that it is the object of the law to punish the party for a violation of his contract, but to make the other party good for all damages he may sustain by such violation. Common justice should require that plaintiff should recover what defendant has been benefited, after deducting all damages he might have sustained by reason of such contract."

The opposite view, to the effect that the employee cannot recover, is apparently based upon the theory that the contracts are entire and the performance of them is a condition precedent to the right of the servant to recover. Some of the courts base their decisions on the doctrine, *expressum facit cessare tacitum. Davis v. Maxwell,* 12 Metcalf, 286, held that the plaintiff cannot abandon his express contract and resort to an action for a *quantum meruit* on an implied *assumpsit.*

The rule that implied promises do not exist where there are express stipulations is not without exceptions, but where the failure to perform the express contract is intentional, it is such bad faith that he can recover nothing. *Metcalf on Contracts,* 8.

Performance by the servant is a condition precedent to the master's liability, and he cannot recover on a *quantum meruit,* because an express contract always excludes an implied one in relation to the same matter. *Olmstead v. Beale,* 19 Pick., 528.

In order to recover under contracts for wages in which there is a specified length of time the courts sustaining this doctrine have held that the plaintiff must show full performance on his part or a release by his employer or some justifiable cause for leaving. Such contracts are entire. He cannot sue on the express contract, because performance is a condition precedent to the master's liability. *Thrift v. Payne,* 71 Ill., 408; *Lantry v. Parks,* 8 Cowen, 63.

"Mutual promises may be the whole consideration for each other, but it may nevertheless appear either expressly or impliedly from the nature of the contract that one is to be performed before the other. The promise which is to be first performed is independent, and the promises may enforce it or sue for its breach without having performed or offered to perform. The performance of the latter is conditional, that is, performance by the other is a condition precedent to any liability to perform it." *Clark on Contracts,* 669.

The granting of a quasi contractual remedy in these instances has been criticised, in that to allow such would be to encourage the breach of contract. "It would seem that a sound policy would require the courts to establish in the case if a wilful breach of

conditions implied in law the same rule as exists in the case of express conditions. To do otherwise would be to put a premium on breach of contract." *Keener on Quasi Contracts,* 232.

It has also been held that a court of equity has no more power than a court of law in such cases, and therefore cannot relieve a party from the consequences of his wilful non-performance. *Mallory v. Mackaye,* 92 Fed., 749.

From the cases it would appear that the weight of authority is decidedly in favor of the strict doctrine, that there can be no recovery where the servant has unjustifiably quit his employment before his term has expired. There are a number of jurisdictions, however, which sustain the opposite view, that there may be a recovery on *quantum meruit,* notwithstanding the fact that there is a legal contract in existence. Undoubtedly a tendency is manifest on the part of the courts to disregard the more strict rules of the common law and adopt those which justice and equity demand, and upon which the Texas court placed its decision in the principal case.