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THE RIGHT OF AN EMPLOYEE DISCHARGED FOR CAUSE

By HERBERT D. LAUBE*

Where an employee is hired for a definite term under an entire contract, he is not entitled to recover for services rendered if he is dismissed before the end of the term for good cause. This rule is said to be unanimously supported by the English decisions on the theory that a rightfully discharged employee, having broken the contract, has no rights under it. In principle, according to Woodward, it would seem that if the cause of discharge involves a breach of faith by the employee he should be regarded the same as one who wilfully abandons his contract. However, the ancient rule that an employee who is discharged for good cause forfeits his right to compensation for services rendered has been repudiated in the United States, and the employee is permitted to recover upon quantum meruit the value of the services rendered prior to his discharge, less such damages as the employer may have sustained by reason of the employee's misconduct.

LIMITATIONS ON RECOVERY

Ordinarily, jurisdictions which allow recovery by an employee who has wilfully abandoned his contract will also allow recovery where he has been discharged for cause, provided, says Williston, the cause does not involve dishonesty or intentional injury to the

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1(1907) 5 L. R. A. (N.S.) 524, 532. See also 2 Parsons, Contracts, 8th ed., 42.

2Woodward, Quasi Contracts, sec. 174 (1), p. 274. Cf. Williston, Contracts, sec. 1477. In Lane v. Phillips, (1859) 6 Jones (N.C.) 455, 456, the court said: "Had the plaintiff wilfully and without excuse left the defendant's service, he would, undoubtedly, both according to the principles of the common law, and by force of our statute, have forfeited his wages; White v. Brown, 2 Jones' Rep. 443; Revised Code, ch. 80. Is it reasonable that he should be in any better condition by acting so badly as to compel his employer to dismiss him?"


439 C. J. sec. 251 (b); Murphy v. Sampson, (1902) 2 Neb. (Unof.) 297, 298, 96 N. W. 494.

5Williston, Contracts, sec. 1477.
employer. According to Woodward,

"If the discharge is due to the employee's want of skill or strength or judgment he should be permitted to recover. This distinction has received little recognition in the decisions, however, and there are not a few cases in which an employee discharged for deliberate misconduct has been afforded relief.

"If an employee neither wilfully abandons his employment, nor is discharged by his employer, but nevertheless fails to satisfy the requirements of his contract, the same test of good faith should be applied. Thus, if he is discovered to have deliberately disobeyed the instructions of his employer or to have deliberately deceived or defrauded him, he should be denied compensation." It is a disturbing fact, however, that some states which deny recovery to an employee who wilfully abandons his employment allow him to recover where he has been discharged for misconduct.

In Missouri, an employee who deliberately fails to perform the conditions of his contract can recover nothing. Yet, in Parks v. Tolman, the plaintiff, a single woman, entered into the service of the defendant, being fully advised that the defendant would neither employ, nor retain in his employment, a married woman. Thereafter, the plaintiff secretly married and when the defendant learned of it, she was discharged. In an action to recover for her services prior to her discharge, the court said:

"And there is no evidence to show that her marriage interrupted her service to the defendant or lessened it in value to him, or that he was damaged or injured thereby. We are of the opinion that it was defendant's right to employ single women only. And that if a married woman contracted to serve him and did engage in his service by concealing the fact that she was married thereby deceiving him, he could on that account avoid and put an end to the contract at any time he discovered that she was married.

"... But it does not follow that in the absence of evidence of harm or injury in any way, he can avoid payment for the value of services performed and accepted before he does put an end to it, and we are of the opinion that he cannot."

Mississippi has denied recovery to an employee who deliberately abandoned his contract of service because the court did not feel that it was prepared to make so radical a change in the legal effect of entire contracts by allowing the employee to recover. Yet,

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6Woodward, Quasi Contracts, sec. 174 (1).
8(1905) 113 Mo. App. 14, 87 S. W. 576.
9Parks v. Tolman, (1905) 113 Mo. App. 14, 18, 87 S. W. 576.
10Timberlake v. Thayer, (1893) 71 Miss. 279, 281, 14 So. 446.
Mississippi has approved an instruction to the jury that an overseer's contract for wages is not an entire contract, and although he is turned off for misconduct, he may recover for the time he conducted himself well. In Illinois, an employee who abandons his contract forfeits his wages, yet in Hoffman v. World's Columbian Exposition, the right of a properly discharged employee to recover was declared to be so clear that "it needs no authority that he is entitled to be paid until discharged."

The wavering attitude of the courts seems to have been excellently summarized by Page:

"In determining whether relief in quasi-contract will be given to a plaintiff who is in default, the courts are frequently controlled by two different considerations, which do not always lead to the same practical result. On the one hand, the courts frequently look to the benefit conferred upon the defendant by the partial performance on the part of the plaintiff, and measure the plaintiff's right to recover by the benefit which the defendant has received. On the other hand, many courts also consider the character of the breach on the part of the plaintiff; and show a strong tendency to grant relief to a plaintiff whose default is not due to his own wilful or deliberate choice, while they deny relief to a plaintiff who has performed a considerable part of the contract, but whose default is due to his wilful and deliberate choice."

The solution of the problem here involved would seem to be dependent upon the evaluation of these two considerations, and the extent to which either of them should be applied in any particular case. To make the wilfulness of the conduct, generally, the basis of denying recovery to the discharged employee, seems hard to justify.

**Measure of Damages**

When an employee deliberately leaves the service before the end of his term without cause, in many jurisdictions, he loses his right to the wages he has earned although the employer has suffered no loss. But if the employer is guilty of a breach of the same contract, he is liable only for the damages which result. Similarly, where an employee is discharged for wilful misconduct,
in many jurisdictions, he can recover no compensation, even though the employer sustains no loss. But if the employer wrongfully discharges him, the employee can recover only the actual damage which he has suffered, which is the wages for the remainder of the term reduced by the wages which the employee earned, or could have earned with reasonable diligence, during the unexpired term. Why should an employee forfeit his wages for wilful misconduct, causing no loss, if an employer can cancel at pleasure any contract of employment he has made, provided that he pay only such damages as the employee has actually suffered? An early New York case tells us that the just claims of the employee are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part unexecuted, and to persist in accumulating a larger demand is not consistent with good faith toward the employer. In Illinois, when the interest of the employer is at stake, the court proclaims that "just compensation should, after all, be the end aimed at in suits for the breach of contract."

Although the employee who is guilty of a wilful misconduct is denied any right to recover compensation for the services he has rendered, yet reparation seems to be the measure of liability of the defaulting employer. In Schroeder v. California Yukon Trading Co., the plaintiff was discharged without cause. By an express stipulation of the contract he was entitled to his wages for the entire year. The court said:

"The libelant, while not disputing the general principle of law that the measure of damages for breach of a contract is such sum only as will compensate the innocent party for the loss sustained by him, nevertheless contends that by express terms of his contract he is entitled to a sum equal to the wages he would have earned during the remainder of the year for which he was employed. This contention cannot be sustained. That stipulation, if enforced according to its letter, would result in giving to the libelant more than the compensation for the actual loss which he has sustained on account of defendant's breach of contract; that is he would recover in this action, by way of damages, a sum equal to what he would have earned if he had fully performed his contract, and at the same time he would be permitted to retain all he has earned...

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18Clark v. Marsiglia, (1845) 1 Denio (N.Y.) 317, 319.
since he was wrongfully discharged and all that he may earn sub-
sequent to the trial and during the remainder of the year for which
he was employed by the defendant."21
In other words, the employee can not enrich himself by the wrong-
ful breach of contract by his employer, even by express stipula-
tion in the contract itself.

WILFULNESS AS A TEST

Where an employee has wilfully failed to perform his contract
in full, the jurisdictions in which the character of his breach and
his intention are regarded as material, hold that he can not re-
cover in quasi-contract on the basis of the enrichment of the em-
ployer by his partial performance.22 But those jurisdictions which
regard the character of his breach and his intention as immaterial
have allowed the discharged employee to recover in quasi-contract
the reasonable value of the benefits, less damages for the breach,
even though his conduct was wilful.23 The question thus is:
Should the wilful character of the employee's conduct be regarded
as immaterial? On the part of the employer in wrongfully dis-
charging employees, wilfulness has generally been so regarded.
But as to the employee, the Massachusetts court has said:
"But we are of opinion that a wilful default in the performance
of a stipulation not going to the essence of the contract bars a re-
covery. . . . Where the plaintiff has honestly tried to perform his
contract, it is one thing to hold that it must have been the intention
to make the commission of such breach a condition precedent.
But where the default is wilful the question in our opinion is a
different one."24
The court felt that one who had committed a wilful default and
still sought to recover, in effect, claimed a right to break his con-
tract, when he had no such right. An analysis of some of the
cases may be illuminating in revealing the unsoundness of any
such approach.

1. Use of Improper Language. In the early case of Byrd v.
Boyd,25 the plaintiff was employed for one year as overseer for
$180. He managed his crop well, but in July he used some abusive
language to the defendant's daughter, and was discharged. The

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21 Schroeder v. California Yukon Trading Co., (D.C. Cal. 1899) 95
110.

22 Page, Contracts, sec. 3265, p. 5751.

23 Page, Contracts, sec. 3266, p. 5755.


25 (1827) 4 McCord (S.C.) 246.
trial court in charging the jury advised them that they were not at liberty, under any circumstances, to apportion the compensation of the plaintiff for the services rendered. On appeal, this was held a misdirection. The court said:

"It happens frequently too that it becomes a question of great difficulty to ascertain with whom the first wrong commenced. I cannot reconcile it to my notions of natural justice, that the overseer should not recover a compensation for the services, so far as they were directed, and which have been beneficial to the employer. And I am unable to discover any evil which is likely to result from submitting such a matter to the sound discretion of a jury of the country. And as a matter of expediency I should be disposed to establish it as a rule. . . . Cases of this description are of very frequent occurrence, and although this question has never been judicially determined, it may be clearly collected from them, that the prevailing opinion is favourable to an apportionment." 26

Although one may feel that the overseer's misconduct justified his discharge, one may also endorse the attitude of the court that "notions of natural justice" precluded penalizing the overseer more than six months' salary for such deliberate misconduct.

The use of improper language in the service does not of itself constitute a good ground for discharge; it must have been used in the presence or hearing of the employer or his family. It is said that no definite rule applicable to all cases can be given. The right of discharge must necessarily depend upon the peculiar circumstances of each case. But, says Wood,

"What might be regarded as improper or insolent in a servant toward one master, might not be so regarded toward another. Obscene and blasphemous language, used by a servant in the service of a master who himself indulges in the same class of language, could hardly be said to be so shocking to his moral sensibilities as to warrant him in discharging the servant for that cause; but such language used in the service of a master of refined tastes and keen moral sensibilities, would furnish the very best of reasons for the servant's discharge." 27

From this excerpt it would appear that the law is not interested in the moral aspect of the employee's profanity, but rather in the propriety and discretion with which he gives expression to his vulgarity in the light of the time, place and circumstances. His right seems to be dependent upon his adaptability in a large

26Byrd v. Boyd, (1827) 4 McCord (S.C.) 246, 248. In Timberlake v. Thayer, (1893) 71 Miss. 279, 282, 14 So. 446, the court said, "The South Carolina court put its decision expressly upon the ground of expediency . . . ." In Cross v. Baseball Club, (1900) 84 Mo. App. 526, the improper language was regarded as irrelevant.

measure. When the employee is denied a right to recover after having been discharged for such misconduct, the penalty for his willful act seems to be imposed for the willfulness involved in the indiscretion of which he has been guilty in shocking an employer of delicate sensibilities. It is not based on any social interest in general morals, except so far as bad faith is manifested in the breach of the contract when the employer is of fine moral quality. It is the social interest in the integrity of such contracts which the employee must preserve under penalty of forfeiture.

2. Drunkenness. Generally, intoxication is a good ground for discharging an employee, particularly where it interferes with the performance of his duties. Of course, a minister who should become intoxicated on any occasion would be subject to instant dismissal, because it is inconsistent with his position. Dismissal of an employee probably would not be justified if the intoxication were an isolated act committed at some festival frolic, not affecting the employer's business. But, where intoxication unfits an employee to perform his duties, his discharge is justified. In an Alabama case, the court said:

"We do not doubt that public drunkenness of any employee, while in the service of the employer, and manifesting itself in boisterous and disorderly conduct, either toward the employer or third persons, is such misconduct as to constitute a violation of the stipulation, implied in every contract of service, that the employee will conduct himself with such decency and politeness of deportment as not to work injury to the business of the employer. This he can do by a single act of drunkenness, which may tend to offend the reasonable prejudices or tastes of the public, or impair

28In Development Co. of America v. King, (C.C.A. 2nd Cir. 1908) 161 Fed. 91, 93, the court said, "A master has the right to give reasonable orders to a servant, even though he knows the work required is distasteful. He may give them with the expectation that the servant will leave his employment rather than obey. He may even give them for the express purpose, as stated in the charge, of 'getting rid' of the servant. The motive of the master in giving an order is not important. Whether the order is reasonable is all-important. A servant is bound to obey reasonable orders given in bad faith."

29"Wherever there are strong conflicting interests or divergent ideals of justice and whenever groups or classes are asserting claims which do not admit of easy reconciliation, there is likely to be vigorous complaint of the want of accord of law with the individual moral sense." Pound, Criminal Justice in America 42.


their confidence, or render him disagreeable in social or business intercourse. . . . It may prove, also, equally offensive to the master or employer, who may justly regard sobriety as an indispensable element of efficient service.\(^3\)

It has been held that although intoxication unfits an employee to perform service, he is still entitled to just compensation for the services he actually rendered.\(^3\) But for a master of a vessel to become incapacitated through drunkenness on a voyage is the gravest kind of a fault, and he clearly forfeits his claim to wages.\(^3\) Where the Railway Act makes intoxication of the conductor and other employees while in service a crime,\(^3\) it would be difficult to justify recovery of wages by the employee for services rendered when discharged for such a cause.

Generally, workmen's compensation acts deny compensation for any injury or death which is caused by the wilful misconduct of the employee or which is due to his own intoxication.\(^3\) The workmen's compensation acts were passed for the benefit of the employees who came within its provisions. The social interest in the employee motivated their enactment. To allow an employee to recover under them for injuries suffered as a result of intoxication or his own wilful conduct is to allow him to enrich himself at the expense of his employer.

3. Incompetence. Because of the implied condition in every contract of service that the employee is competent to discharge the duties for which he is employed, the employer may refuse to continue him in his employ if he is incompetent and inefficient.\(^3\) Woodward would allow a recovery by the employee who is discharged for want of skill; but Eversley says that he who can not, is much the same as he who will not perform.\(^3\) Want of skill is reckoned as culpa.\(^4\) Although an employee has fully served his term, some authorities favor denying him all compensation if the want of skill goes to the essence of the contract.\(^4\) Pennsylvania refuses to subscribe to "the doctrine that a man who holds himself

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\(^4\)Foster v. Watson, (1855) 16 B. Mon. (Ky.) 377.


\(^8\)Note 49 A. L. R. 472, 473.


\(^10\)Dig. 50, 17, 132.

out to the world as skilled in a particular branch of industry, and who undertakes to perform a piece of work in his appropriate art, is entitled to compensation, on a quantum meruit, whatever the consequences resulting from his imperfect performance, unless there has been gross negligence or wilful misconduct." If the employee is fully advised of the character of the duties of his employment and deliberately undertakes them and fails, quite clearly if the implied condition of the contract is to be treated realistically, his non-performance is wilful if the situation is looked at objectively as the Pennsylvania court viewed it. One who is clumsy, inexperienced and wanting in skill, and still professes to be able to perform with reasonable skill, is quite as culpable as one who is skilled and fails to perform. The difference is largely one of time. The culpability of one is in entering the contract; the culpability of the other is in not performing. However, Maine has made the distinction which Woodward contended was a sound one. Recovery is often allowed where the employee is discharged for want of skill or diligence.

4. Disobedience. How the class atmosphere in which men live determines the premises of their thought is excellently illustrated in some of the early English cases. In *Spain v. Arnott*, a farm hand, who was hired for a year, was discharged for disobeying his employer's orders. The plaintiff usually breakfasted at about five o'clock in the morning and dined at two in the afternoon. Although dinner was ready on this particular day, the master ordered the servant to go with the horses down to the marsh, which was a mile off. The plaintiff insisted that he had done his due and would not go until he had dinner. Thereupon, he was told to go about his business, and he went. He is now suing for wages for his services from Michaelmas to July. Lord Ellenborough said:

"If the contract be for a year's service, the year must be completed, before the servant is entitled to be paid.

"If the plaintiff persisted in refusing to obey his master's orders, I think he was warranted in turning him away. He might have obtained relief by applying to a magistrate; but he was not bound to pursue that course, the relation between master and servant, and the laws by which that relation is regulated, existed

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42Waugh v. Shunk (1852) 20 Pa. St. 130, 133.
43Lawrence v. Gullifer, (1854) 38 Me. 532.
46(1817) 2 Starkie 256.
long before the statute. There is no contract between the parties, except that which the law makes for them, and it may be hard upon the servant, but it would be exceedingly inconvenient if the servant were to be permitted to set himself up to control his master in his domestic regulations, such as the time of dinner."  

If one concedes that the dismissal was justified, still one sympathizes with Lord Ellenborough's attitude that to compel a farm laborer to fast for more than nine hours between breakfast and dinner under penalty of losing several months' wages is rather hard.

The controlling influence which the governing class has in shaping legal rules manifests itself in Turner v. Mason, decided in 1845. The plaintiff was engaged to serve as housemaid for £7 a year. She was under a duty to continue in service one month after notice or warning. An action of assumpsit was brought by her for wrongful discharge. The plea was that she absented herself from the defendant's service for a day and a night against his wishes. The replication disclosed that the mother of the maid was suddenly seized with a violent illness and was in imminent peril of death. She requested the defendant to give her leave to absent herself, which was refused. The defendant demurred to the replication. The following excerpts, cast as colloquy, represent what followed:

**COUNSEL:** "Again, is she to forego in his service all moral claims and obligations? He does not allege that her excuse was false, or that her absence was inconvenient."

**PARKE, B.:** "This is wilful disobedience of orders."

**COUNSEL:** "There may be good reason for that."

**ALDERSON, B.:** "Surely it is a lawful order not to stay out all night."

**PARKE, B.:** "Now here the replication alleges the extreme illness of the plaintiff's mother, but does not say the plaintiff gave the defendant notice of that fact; it only says that was the ground on which she applied for his permission, but not that she communicated it."

**ALDERSON, B.:** "If the mother be very poor, is the daughter to absent herself from her service to work for her, to prevent her starving?"

**POLLOCK, C. B.:** "Or, if she has the right to go to the deathbed of her mother or her father, why not of any other near friend?"

**COUNSEL:** "The replication alleges expressly that the defendant had no need of her services."

**PARKE, B.:** "The master is to be the judge of the circumstances under which the servant's services are required, subject to this,
that he is to give only lawful commands. . . . Even if the replication shewed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her.

Alderston, B.: "We are to decide according to the legal obligations of parties. Where is a decision founded upon mere moral obligation to stop? What degree of sickness, what nearness of relationship, is to be sufficient? It is the safest way, therefore, to adhere to the legal obligations arising out of the contract between the parties."

Four learned judges were of one opinion, judgment must be for the master. Only considerations of self-preservation could justify a servant in departing from the duties imposed by contract. This case was decided eleven years after Britton v. Turner. Let us concede that in an action for damages for wrongful discharge, the decision on the demurrer was correct. In an action for wages earned, it would not have been. The climates of opinion toward labor in England and the United States as represented by these two cases are as diverse as the hemispheres in which the two courts sat. For that reason it is difficult to understand how courts in the United States can be so shocked at the violation of an employee's contract that he is penalized by forfeiture of wages when he so defaults, and yet resent the suggestion that punitive damages should be imposed upon the employer when he is likewise in default, because punitive damages never are awarded for a mere breach of contract.

Wood, Master and Servant, 2nd ed., p. 228n., says: "It is true, there is no imperative legal duty upon a daughter to visit a dying mother, but a daughter who knew that her mother was dying, and she was within easy distance of her and did not visit her, would be regarded as destitute of the ordinary instincts of humanity, and most people who are fit to have servants at all would hardly care to keep a person in their employ who exhibited such heartlessness."

In commenting on Turner v. Mason, the Michigan court has said: "No other case seems to go quite so far, but 'wilful disobedience' of orders is the general phrase used as justifying a discharge; and in some few cases the courts have gone quite far in requiring an extreme rule of duty. But this doctrine, which is certainly a harsh, if not inhuman one, has not received entire favor, and has been confined to menial domestic service. In employments not menial and domestic, the case has been left to the jury with more or less latitude for the exercise of good sense." Shaver v. Ingham, (1886) 58 Mich. 649, 653, 26 N. W. 162. Cf. Riggs v. Horde, (1860) 25 Tex. Supp. 456. 78 Am. Dec. 584. See also Wilson v. Simson, (1844) 6 Ct. Sess. (Scot.) 1256; Hamilton v. McLean, (1824) 3 Ct. Sess. (Scot.) 379.

Russell, Principles of Social Reconstruction 42.

The rule is thoroughly established that the disobedience of a reasonable order is ground for the discharge of an employee. An employer has the right to the control and management of his business. When he gives directions as to the methods of conducting his business and the manner in which his employees shall do their work, it is then the duty of the employee to perform that work in accordance with the employer's directions. Where an employee intentionally violates a rule of the shop against smoking, the employer has the right to discharge him. But should the employee be compelled to forfeit his wages because of his willful violation of the rule against smoking? When an employee willfully refuses to return to his employer certain samples which he has in his possession, it is a sufficient ground for discharge. Should he be compelled to forfeit his wages on account of such misconduct? Failure to follow a route prescribed by the employer is ground for dismissal of an employee. But, where the employer requires that his employee shall keep his credit good, is deliberate failure to do so basis for forfeiting his excess wages to his employer, where his wages have been garnished? According to Tiffany, by the better opinion, especially in the case of mechanics, clerks in stores and other servants not menial, the act of disobedience, to justify dismissal, must involve injury to the master. If that is true, the act of disobedience justifying dismissal ought not per se to entail a forfeiture.

5. Insolence. Unprovoked insolence or disrespect on the part of an employee toward his employer, while actually in service, is ground for discharge. But, in an early Scottish case, when the gardener, who was hired for a year, was requested by his employer

54Notes 37 L. R. A. (N.S.) 950; Ann. Cas. 1916A 1027.
58Ball v. Livonia Salt & Mining Co., (1894) 8 Misc. Rep. 333, 28 N. Y. S. 537. Cf. McCain v. Desnoyers, (1895) 64 Mo. App. 66 where the employee failed to write daily as to his whereabouts, so that he could be instructed.
60Tiffany, Domestic Relations, 3rd ed., 591.
to help in the turnip field, he refused to do so in an uncivil fashion because he had enough to do in the garden. He was dismissed from the service. Although the Lords did not by any means approve of the gardener's conduct, they did not think it so highly blamable as to require a forfeiture of his place and his wages.

"The relation of master and servant imposes upon each, touching the work to be performed, the duty to be reasonably respectful to the other both in words and behavior, and to refrain from insolent or imperious conduct. Among the obligations resting upon the servant as an implied term of the contract is that he shall not be insubordinate but shall show just regard for the rights and person of the employer. The reciprocal obligation of the master is that he shall not be arrogant or excite resentment, or wantonly wound the feelings of his employee. But petty annoyances and trifling irritations are likely in many kinds of employment. Not every act of discourtesy or every slight disrespect justifies a termination of the relation. Insubordination imports a wilful disregard of express or implied directions and a refusal to obey reasonable orders. When this is established, it is such a breach of duty on the part of the servant as to warrant his discharge."

Cases have been frequent where the issue was as to whether the insolence of the employee was justified by the master's provocation. The employee may be over-sensitive or the employer may be over-dignified. Or when each has an interest to protect, they may be equally sensitive when that issue is involved, as when the compensation of the employee is dependent on the profits of the employer.

When an employee is discharged for cause before extra compensation or a bonus becomes payable, he can not recover the extra compensation even proportionally according to the time served, because he has not performed the condition. The difficulty of enforcing any such rule is well illustrated in a recent Illinois case. The plaintiff was employed by the year as manager of one of the departments of the defendant's store. After seven years, contrary to his practice, the employer asserted, what seems

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clearly to have been his right, the right to fix prices at an inventory sale. The manager, thinking that his employer's conduct would affect his right to additional compensation, told his employer that it was "a dirty, crooked trick," which he "couldn't get away with." The plaintiff was discharged instantly, just ten days before the end of his period of service. The court felt that the use of such language to a superior justified his discharge. But the forfeiture of $12,000 as additional compensation for services, ten days before the end of his term of service, was so disproportionate to any loss that the employer could have sustained that it seemed an oppressive exaction. The forfeiture of such a sum was held too unconscionable to enforce. It would seem that the enrichment of the employer can never be justified by the fact that he had to discharge an employee who was insolent, if he suffered no damage as a result of it.

6. Disloyalty. An agent owes to his principal a fidelity which places him under a duty not to entice other employees to leave their employment pending their contract. It is disloyal conduct which entails a forfeiture of his wages for the term. An employee who makes derogatory statements concerning his company's financial condition, may not only injure it, but threaten it with bankruptcy. For an employee to engage secretly in business as a rival of his employer is monstrous. It not merely violates his contract, but goes to the essence of it and places him in an attitude of hostility to his employer. For an employee to solicit and receive a secret profit not only violates good faith but furthers his self-interest at the expense of his employer. It is contrary to good morals because it is fraud upon his employer. To forbid the

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employee to act in opposition to the interests of his employer is a
rule of common sense and common honesty. Where self-interest
impels an agent to over-reach his principal, the law will strip him
of the benefits which he has acquired at the expense of his prin-
cipal. The interests of justice and security prescribe the salutary
rule that selfishness and greed shall not be encouraged. An
employee may not profit by the advantage which he obtains by vir-
tue of his employment.

Reparation for the fraud is not regarded an adequate remedy
when an agent betrays his principal by obtaining an unjust advan-
tage. Owing to the imperfection of human institutions, the injured
party may be unable either to discover or to prove the extent of
such fraud to entitle him to redress. As a result, an agent who
defrauds his principal forfeits his right to compensation for his
services as a penalty for his fraudulent conduct. Indeed such
conduct has been made a crime.

7. Theft. If a servant robs his master, he may dismiss him
without notice and need not pay him month's wages. Where
a shipman steals his employer's silverware, he may not recover
anything for his services, regardless of the value of the article
stolen. Where an employee embezzles money from his employer,
to allow him to recover the value of his services less what he has
stolen would neither subserve the ends of justice nor tend to


707. R. C. L. sec. 10, p. 825. No man should be allowed to have an
interest against his duty. Dieringer v. Meyer, (1877) 42 Wis. 311, 313.
Harrison v. Craven, (1908) 188 Mo. 590, 608, 87 S. W. 962.
Jansen v. Williams, (1893) 36 Neb. 869, 876, 55 N. W. 279. See
also Elco Shoe Mfrs., Inc. v. Sisk, (1932) 260 N. Y. 100, 183 N. E.
191; Brown v. Dupuy, (C.C.A. 7th Cir. 1924) 4 F. (2d) 367. Cf. Pungs
Doss v. Long Prairie Levee Dist., (1910) 96 Ark. 451, 132 S. W. 443;
Porter v. Silvers, (1871) 35 Ind. 295; Vennum v. Gregory, (1866) 21
Iowa 326; Ranney v. Henry, (1910) 160 Mich. 597, 125 N. W. 693;
Whaples v. Fahys, (1903) 87 App. Div. 518, 84 N. Y. S. 793; Lichtenstein
196 Pa. St. 205, 46 Atl. 357; Cotton v. Rand, (1899) 93 Tex. 7, 51 S. W.
838; Jackson v. Pleasanton, (1903) 101 Va. 282, 43 S. E. 573; Blum v.
Palace Garage Co., (1934) 214 Wis. 319, 252 N. W. 177; Quirk v.
Cunningham v. Fonblanque, (1833) 6 Car. & P. 44.
promote common honesty. What can say that the services of a dishonest employee are worth anything? It is a narrow view to regard the interest of the employer alone in the matter. But flagrant acts of dishonesty or crime, which seriously affect the interest of the employer may well bar recovery of wages, although the amount appropriated is less than the wages due. However, it has been said that the principal ought not to extend so far as to bar recovery where the contract is at an end. And, in a Tennessee case, although the court thought the services of an embezzler would ordinarily be regarded as worthless, yet it favored submitting the matter to the jury.

**Wilfulness: A Defective Test**

The distinguishing characteristic of sound thinking is facing the facts. Sonorous generalities often make a problem incapable of solution. To deny the right of an employee who has been discharged to recover because his conduct has been wilful seems a pure verbalization. Wilfulness has such a variability of content that to make it a test of non-recovery by the discharged employee is empty formalism, although it is the test which the Restatement of Agency, as well as the Restatement of Contracts, has adopted.

The meaning of wilfulness when translated into concrete situations is as diverse as the misconduct to be observed. The problem is not to be solved on the basis of will, but upon the basis of interests. It involves the criteria of value. The purpose of dealing with the variety of situations which have been set forth was to discover the interests which should be given recognition by the law, whether individual or social, of substance or of morals.

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83Peterson v. Mayer, (1891) 46 Minn. 468, 49 N. W. 245.
85Note 13 L. R. A. 72.
88Dewey, Reconstruction in Philosophy 140.
89Dewey, Reconstruction in Philosophy 199.
91Pound, Introduction to the Philosophy of Law 89.
92Pound, Outlines of Lectures on Jurisprudence 60.
Although wilfulness has been made a test of right by eminent authority, to classify conduct on the basis of it alone seems too crude to be helpful. To be wilful conduct it is not necessary that the conduct should be fraudulent, that it should involve any moral obliquity, pecuniary or otherwise. Often, in a contract of employment, discontent, distrust and aversion arise on the part of the parties to it. Deliberate insubordination should be ground for discharge, but if no moral turpitude is involved except the deliberate conduct which justifies the termination of the contract by the employer, forfeiture of wages, in the absence of loss to the employer, seems without warrant. For the wilful misconduct of the employer

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97“A breach of contract is wilful and deliberate . . . only when the agent in complete disregard of his contractual obligations fails to perform or misperforms the promised services and has no substantial moral excuse for so doing or is guilty of disloyal or grossly insubordinate conduct.” Restatement, Agency, sec. 456(c). See also sec. 455, sec. 380 and sec. 409. Cf. Restatement, Contracts, sec. 270 and sec. 357.
who compels the employee to abandon his employment, the employee can recover the reasonable value of his services or damages for breach of contract.\textsuperscript{98} Ought the employer to have any greater immunity when sued by a defaulting employee?

To fail deliberately to remit money to an employer in accordance with the terms of his contract warrants discharging the employee.\textsuperscript{99} Should the employee be required to forfeit his wages on that account? Some courts can not perceive a difference between one who refuses to comply with his contract and one who compels his employer to discharge him on account of fraud.\textsuperscript{100} Should a confidential clerk, who gambles on the stock exchange,\textsuperscript{101} forfeit his wages for his misconduct? The answer depends upon the interests which are involved.

When misconduct is a source of damage, motive is of no consequence. When misconduct is not a source of damage, motive acquires significance. What significance? Although a single woman is guilty of deceiving her employer when she secretly marries and wilfully breaks her contract, should the law enrich the employer by relieving him of the necessity of paying her for her services when he discharges her? Why should the employee be regarded any differently by the law when he wilfully swears at his employer, than his employer is regarded when he wilfully swears at the employee? The conduct is equally reprehensible. Should the employee forfeit his wages when he wilfully violates a rule of the shop against smoking? If it is merely a question of discipline, his discharge would seem a sufficient penalty. But, if the reason of the rule was the high inflammability of chemicals used in the shop, his wanton, reckless conduct may merit a forfeiture. There is a vast difference between drunkenness when indulged in by an unskilled manual laborer, and drunkenness indulged in by employees in charge of a train where unfitness may have the greatest consequences to both life and property. The culpability due to incompetence normally may be of no consequence except to diminish the value of the service of the employee to his employer. As Woodward suggests, the employer should normally be compelled to pay him the value of his services, just as he should be

\textsuperscript{98}Jensen v. Lee, (1903) 67 Kan. 539, 73 Pac. 72; Keyser v. Rehberg, (1895) 16 Mont. 331, 41 Pac. 74.
\textsuperscript{100}Fuqua & Smith v. Massie & Sons, (1894) 95 Ky. 387, 393, 25 S. W. 875.
required to pay for the services of an employee whose conduct was sufficiently uncivil to be insolent.

The insolence of the employee who suspects his employer's conduct without just cause, and tells him so, can not be classed with the employee who steals either his goods or his money, yet his conduct may be as wilful. The deceiving single woman who secretly marries, yet renders full service to her employer despite her marriage, is not to be placed in the same category as the employee who enriches himself at his employer's expense by making a secret profit or who by his disloyalty enriches himself or his employer's competitor. When wilful conduct is fraudulent, when it is wanton, when it is corrupt, when it is pernicious, society may have such a vital interest in general morals that the law ought to protect it by the forfeiture of wages. But where merely the integrity of contracts is at stake, wilful conduct on the part of the employee is no worse than wilful conduct on the part of the employer and the law should recognize that fact by an equality of treatment.

CONCLUSION

Morals is an evaluation of interests. The wilfulness of the conduct does not reveal the interest which may be involved in any violation of a contract. Even if it did, the employee would still be entitled to as favorable a treatment by the law as is accorded to the wilful employer. The traditional precepts of morality which crystallized in pre-Victorian England can no longer dominate modern America. Perhaps the most illuminating criticism of this primitive approach of the problem is embodied in the words of Dean Pound:

"Regularly the law begins by using penalties. Later, it learns more effective and discriminating means of enforcing its precepts. . . . Again, in the beginning the law dealt with wrongs of all kinds by imposing a penalty on the wrongdoer. Later an idea of what might be called a penalty of reparation developed. Ultimately, the law attained the idea of reparation as appropriate to civil injuries, leaving punishment to the engine of the criminal law." In solving the problem of misconduct in the defaulting employee,

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102Pound, Law and Morals 112.
103"No one would question the value of historical knowledge in the solution of social problems, but the doctrine of precedent in law is something more than a responsibility to history. It is a custom, not only of knowing what others have thought, but also of thinking that way oneself. It is a habit of mind in which a stupidity may be perpetuated on the grounds that it is well established.” Robinson, Law and the Lawyers 30.
104Pound, Criminal Justice in America 27.
the fixative quality of doctrine has made wilfulness a preordained category of vice, which facts contradict. Indoctrination has distorted the law if it is to be judged by life. Society is less interested in the preservation of the integrity of contracts and the nature of the obligation which contracts impose, than it is in the social consequences of wilful conduct. Wilful conduct should merit a uniformity of treatment by the law except so far as a diversity of situation between employer and employee dictates penalizing by forfeiture the wanton, reckless and corrupt conduct of the employee in the interest of general morals and social security.

Quite clearly justice demands that the legislature should recognize the fallacy of the doctrine of wilfulness as it is applied by the courts to personal service contracts. Legislation should supplant it by the doctrine of reparation, with specified exceptions. The position of the employer and the employee before the law should be a symbol of equality rather than an historic perversion paraded under the banner of conventional principles of contract.