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# Wages During Temporary Disability

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## *Partial Impossibility in Employment Contracts*

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In *O'Grady v. Saper*,[1] the English court of appeal held that an employee was not entitled to recover wages for periods during which he was absent due to temporary disability, unless the terms of the contract said so. Plaintiff had been employed by defendant as a commissionaire[2] at £3 per week for two and a half years. He had been absent several times due to illness, once for four weeks, once for nine weeks, and finally for two. There was no agreement to pay him while absent, and he received no pay. After he had returned to work following his last absence, he read a newspaper account of the case of *Marrison v. Bell*[3] in which an employee had recovered pay for a period of temporary disability. He brought suit and won in the county court. Reversing the decision on appeal, MacKinnon, L.J., said that there was no common-law rule under which a temporarily disabled employee is entitled to pay. "The whole question in such a case as this is: What were the terms of the contract between the employer and the servant and what did those terms provide in regard to payment of wages to him during his absence from the service by reason of illness? . . . It must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work, or whether the mere readiness and willingness, if of ability to do so, is the consideration."[4]

The problem of whether wages ought to be paid during sickness is raised more sharply in this case than in any other of the decided cases in England or the United States. The court recognized that at the bottom lies the question of how courts are to deal with unforeseen events, not provided for in the contract. The particular unforeseen event with which we are here concerned falls

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1. [1940] 2 K.B. 469.

2. A person entrusted with small commissions, a messenger or light porter. 2 NEW ENGLISH DICTIONARY 682 (1893).

3. [1939] 2 K.B. 187 (leave to appeal to House of Lords refused).

4. [1940] 2 K.B. at 473.

between the two extremes of serious disability of an employee on one hand, and very insignificant disability having no effect on a continued right to wages on the other. The unforeseen temporary disability which will be discussed makes a part (better described as a period, perhaps) of the employee's performance impossible and thus excuses it.[5] Since it is not serious enough, however, to constitute a material failure of consideration, the question remains: what is the effect of such partial impossibility of performance on the duty of the employer to pay wages?

The facts of industrial life must play a large part in determining what the employer's duty is or should be. Workmen's compensation disposes of the cases where disability arises out of the course of employment. Disability not connected with work, however, is covered by statutory insurance schemes in only four states and under the federal railroad unemployment insurance system.[6] Many collective bargaining contracts make health insurance benefits available but, apart from this type of protection, custom is probably overwhelmingly against paying hourly employees wages when they have not punched the time clock.[7] Clerical, administrative, supervisory, and other employees paid on weekly or monthly bases are in a different position. Surveys indicate that well under one-half of the office workers in the largest American cities are entitled to stated periods of sick leave under their contracts.[8] The many other employees belonging to this general class, whose compensation is not computed hourly and who are often hired under

5. See RESTATEMENT, CONTRACTS § 463 (1932).

6. CALIFORNIA UNEMPLOYMENT INSURANCE ACT § 8780(d) (Deering, 1949); TEMPORARY DISABILITY BENEFITS LAW, 43 N.J.S.A. §§ 21–25 *et seq.* (1948); UNEMPLOYMENT INSURANCE LAW, N.Y. LABOR LAW §§ 500 *et seq.* (1944); CASH SICKNESS COMPENSATION ACT, R.I. LAWS, c. 1200 (1942); RAILROAD UNEMPLOYMENT INSURANCE ACT, 45 U.S.C.A. §§ 351 *et seq.* as amended (1951). An act, proposed by the Washington legislature, was rejected by popular referendum in November 1950. In six states, unemployment insurance acts have been amended to continue an unemployed person's eligibility while he is temporarily disabled. Note, *Legislative Medicine for the Sick Worker*, 2 STAN. L. REV. 345, 347–48 (1950). It may be a commentary on the growing costs and delays of litigation and the consequent need for legislation that most of the cases involving employees' claims were brought before World War I. On the other hand, the law had perhaps become too well settled by default to encourage suits and appeals. Federal Wage and Hour Regulations are relevant only to the extent that they recognize the justifiability of wage payments during disability by allowing the time for which such payments are made to be divided into the total wages paid, thus resulting in a "regular rate of pay" that is not increased by the additional wages paid during disability. See 3 CCH LAB. LAW. REP. ¶ 25 (1951).

7. BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFIT PLANS UNDER COLLECTIVE BARGAINING, No. 9463 (1948); COLLECTIVE BARGAINING PROVISIONS—HEALTH, INSURANCE, AND PENSIONS, No. 908–17 (1949).

8. BUREAU OF LABOR STATISTICS, SALARIES OF OFFICE WORKERS IN LARGE CITIES, Nos. 960–1, 960–3, 960–4 (1949).

informal arrangements and by small employers, would seem to depend directly on their employer's generosity or on the rules of policy adopted by courts.

A court faced with the necessity of formulating a policy to deal with these cases must reconcile the demands of justice with the theories and the realities of the bargain of the parties. It will be convenient to exclude at this point cases where justice makes no demands for the employee; this will be true where there is clear evidence of malingering or fault. There remains a large body of case law, especially well developed in England, which lays open the problems and must be explored before the question of policy is reached.

## I

Not only did the court in *O'Grady v. Saper* vigorously deny that any common-law rule gives a temporarily disabled employee a right to full wages, it also castigated court reporters for their misapplied industry in publishing cases announcing such a rule. This is an old English custom, the last resort of precedent-bound courts,[9] and leads one to wonder whether the court doth not protest too much.

The case of *Cuckson v. Stones*,[10] decided by the Queen's Bench in 1859, is usually cited as authority for a right to wages during disability. Plaintiff, a master brewer, had been hired for ten years at £2 10*s*. per week and rent-free accommodations, the contract requiring " due, full and complete service" and that the plaintiff serve "well, truly and faithfully." After nine years' work, plaintiff stayed away from work owing to illness. He was paid during the first three months of his absence, during which he continued to give instructions in the art of brewing to the defendant. His pay for the last thirteen weeks of his absence was cut off and, after returning to work, he sued for it. Defendant pleaded that, although the contract continued during temporary disability, liability for wages should end where the absence lasts for more than a few days. On a rule nisi obtained by the defendant, Lord Campbell sustained the plaintiff's directed verdict. Failure to work was held not to be a defense under this contract which required only what

9. For some comments, see Note, 56 LAW Q. REV. 161 (1940); Note, 57 LAW Q. REV. 10 (1941); PLUCKNETT, HISTORY OF THE COMMON LAW 311 (2d ed. 1936).

10. 1 El. & El. 247, 120 Eng. Rep. 902 (Q.B. 1859).

the court described as readiness and willingness to work, not actual work. And since temporary disability did not terminate the contract, the plaintiff remained entitled to his wages whether absent a day, a week, or a month.

It is possible to rationalize the decision on several grounds. First, the court gave the contract a special construction under which actual work was not required to earn wages.[11] Second, the court might have decided differently had defendant not admitted that the contract remained in force and that under it the plaintiff would have been entitled to wages during a very brief absence. Third, the plaintiff was apparently able to render some services by continuing to teach defendant during the absence from work. Fourth, the plaintiff, having nearly completed a ten-year term of employment, could argue that his absence could have virtually no effect on the defendant's obtaining all of the benefits for which he had bargained. But subsequent English cases did not choose to draw any distinctions. *Cuckson v. Stones* became authority for a common-law rule which gave the employee a right to his wages during temporary disability as long as the contract did not terminate and did not contain express terms to the contrary.[12]

If there is an explanation for the growth of this rule, it lies in history and in the ways and means of the common law. In the arguments of the *Cuckson* case, it appears that plaintiff's counsel at first advanced the rule of the maritime law under which seamen are entitled to full pay even though disabled during a part of the voyage.[13] This rule developed from statutes, nautical traditions, and national policy encouraging ocean commerce and never seems to have been applied to ordinary employment relations. When the court refused to follow it, plaintiff switched to a theory based on the

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11. The court's interpretation, which is not free from doubt, may have been influenced by the so-called doctrine of constructive service. It was held in Gandell v. Pontigny, 4 Campbell 375 (N.P. 1816), that a wrongfully discharged employee who was willing to return to work could recover full compensation without having to mitigate damages. *Contra*: Smith v. Hayward, 112 Eng. Rep. 575 (K.B. 1837). The doctrine is no longer followed.

12. See 22 HALSBURY, LAWS OF ENGLAND 134 (2d ed. 1936); MACDONELL, MASTER & SERVANT 183 (2d ed., Innes, 1908); 2 LABATT, MASTER & SERVANT 1498 (1913); BURNS, JUSTICE OF THE PEACE 222 (30th ed. 1869); FRASER, MASTER & SERVANT 143 (3d ed., Campbell, 1882).

13. Chandler v. Grieves, (1795), reported in note (a) to Gienar v. Meyer, (1796) 2 H. Bl. 606, 126 Eng. Rep. 728, 730. See also ABBOTT, MERCHANT SHIPS AND SEAMEN 463 (12th ed., Prentice, 1881). The rule was subject to exceptions under the terms of the contract. Cutter v. Powell, 101 Eng. Rep. 573 (K.B. 1795).

so-called settlement cases.[14] It had been held in these cases that temporary disability did not bring a hiring for a year to an end unless one or the other party clearly showed that he did not intend to continue the employment. The purpose of these decisions was not, however, to adjudicate the rights of the two parties but to determine which parish had the responsibility of supporting the now impoverished employee. Under the English poor law[15] and the law of settlement and removal,[16] relief had to be given by the parish in which the employee had gained a settlement, and one way in which settlement could be gained was by working one year in a parish.[17] The question of whether a year's work had been performed could be brought before the court by the aggrieved parish by moving for or objecting to an order removing the employee from one parish to another. In general, the courts did not feel that the financial responsibility of the parish in which the employee had been working ought to be affected by a brief absence due to illness, and it was consequently held that the year's employment had not been interrupted.[18]

Although it was clear that the rights between employer and employee were not at all relevant to the decision in these cases, there were frequent dicta by such eminent judges as Lord Mansfield to the effect that the employer could not deduct wages on account of time lost through illness.[19] They could have been of little comfort to the losing parish since the employee was now a pauper anyway. At most, they bolstered up the courts' conclusion that the employment had continued for a year and served as a bit of social legislation from the bench. But what little legal significance these dicta had evaporates when it is realized that they were largely based on the Statute of Apprentices. This statute had been passed in the

14. 1 El. & El. at 252, 120 Eng. Rep. at 904 (Q.B. 1859).

15. 43 ELIZ., c. 2 (1601); 8 & 9 WM. III, c. (1697). For a description of the early poor law, see LEONARD, HISTORY OF ENGLISH POOR RELIEF 133–42 (1900).

16. 13 & 14 CHAS. II, c. 12 (1662).

17. 8 & 9 WM. III, c. 30, § 4 (1697).

18. Rex v. Christchurch, [1760] Burr. Sett. Cas. 494; Rex v. Madington, [1771] Burr. Sett. Cas. 675; Rex v. Wintersett, [1783] Cald. 298; Rex v. Whittlebury, 6 T.R. 464, 101 Eng. Rep. 650 (K.B. 1795); King v. Sudbrooke, [1803] 1 Smith's Rep. 55. In *Rex v. Islip* it was said that "[I]t is not to be presumed that the servant is less able to provide for himself at the year's end because he has had a slight indisposition during the year, and that presumption of an ability is the foundation of making a settlement." 1 Stra. 423, 424, 93 Eng. Rep. 611 (K.B. 1721). The name of the King appeared as the nominal moving party under the statute. The settlement cases are collected in FALEY, POOR LAWS (1758).

19. All of the cases cited in note 18 *supra* contain dicta to this effect although they clearly decided nothing more than which of two parishes had to furnish pauper relief to the employee.

sixteenth century to meet labor shortages and unrest by requiring all employment to be for one year and not terminable except for "good and sufficient cause."[20] Temporary disability not serious enough to make an early return to work unlikely was apparently not sufficient cause. However, by the nineteenth century the statute was all but a dead letter, and its repeal followed shortly.[21]

While the settlement cases are not authority for a right to wages during temporary disability or even for the conclusion that temporary disability does not terminate employment, the dicta they contain are of historical interest. The courts' asides about the employer's duty to take care of a sick employee are but one manifestation of a long tradition of employer paternalism. Until the growth of the factories in the late eighteenth and the nineteenth centuries, employment was a personal although not necessarily altruistic relationship.[22] Apprentices, domestic servants, and, frequently, farm laborers lived in the employer's household. In the textile and, to a lesser degree, in the metal products industries, production was carried on in small home shops, and journeymen were often hired with "the privilege of small beer, lodging and firing."[23] While it is probable that under these conditions employees were usually retained during temporary disability, there is little evidence that they continued to receive wages. Piece rates, which were customary, were certainly not paid without work. Family budgets collected during the eighteenth century indicate that farm laborers lost their wages during sickness.[24] And the so-called Friendly Societies that mushroomed among workers in shops and later in factories attest to the need of employees to provide their own protection against losses from sickness.[25]

To the extent that historical facts are available, they do not seem to bear out fully the dicta in the settlement cases that wages are due

20. 5 ELIZ., c. 4, §§ 3, 5, 6 (1562). See DALTON, COUNTREY JUSTICE c. 31 (1643); 1 BL. COMM. c. 14 (1765).

21. Repealed by 53 GEO. III, c. 40 (1813), 54 GEO. III, c. 96 (1814), 38 & 39 VIC., c. 86, § 17 (1875). See BOWDEN, INDUSTRIAL SOCIETY IN ENGLAND TOWARDS THE END OF THE EIGHTEENTH CENTURY 233 (1925); RUEGG, EMPLOYER AND WORKMAN IN ENGLAND c. 1 (1905); WEBB, ENGLISH LOCAL GOVERNMENT c. 5 (1927); Dodd, *From Maximum Wages to Minimum Wages*, 43 COL. L. REV. 643, 645–51 (1943).

22. See Witte, *Labor Legislation* and Hale, *Anglo-American Labor Law*, in 8 ENCYC. SOC. SCI. 657 and 667 resp. (1932).

23. See 2 CLAPHAM, ECONOMIC HISTORY OF MODERN ENGLAND 289 (1932); 2 LIPSON, ECONOMIC HISTORY OF ENGLAND 31, 166, 382 (1931); RUEGG, *op. cit. supra* note 21, at 117; TREVELYAN, HISTORY OF ENGLAND 601 (7th Impr. 1929).

24. BOWDEN, *op. cit. supra* note 21, c. 4, § 2.

25. *Id.* at 295; 1 CLAPHAM, ECONOMIC HISTORY OF ENGLAND 588 (2d ed. 1930); 11 HOLDSWORTH, HISTORY OF ENGLISH LAW 492 (1938).

during temporary disability. One is led to speculate whether these judicial pronouncements are not an example of how common-law courts sought to remedy social evils by manipulation and adaptation of established rules and customs. This is even more likely in the case of *Cuckson v. Stones* and the decisions that followed it in the late nineteenth century. During that period employer paternalism had been replaced by the factory system, and the great evils attending the latter had led to an unwarranted idealization of the former. The deplorable working conditions in homes, farms and small shops, and the bitter relations between employer and workmen prevailing before the coming of the factories, had been forgotten.[26] To a judge faced with the suffering and agitation of the times, a limited retreat to employer paternalism may have appeared promising. Here was an opportunity to deal with a pressing social problem, the impact of sickness on the wage earner, without abandoning tradition for the uncharted seas of collectivistic legislation.[27]

## II

A substantial body of case law on the employee's right to wages grew up in England between the *Cuckson* and *O'Grady* cases. All of it appears to rest on Lord Campbell's analysis in *Cuckson v. Stones* that the continued existence of the employment relation during temporary disability carries with it a continued right to wages. English commentators have at times doubted whether his analysis extends to cases that do not involve contracts for a long term or "of a peculiar nature,"[28] but it is submitted that the decisions, most of which came within fifty years of the *Cuckson* case, dispel any doubts.

The *Cuckson* case and several others, in which the employee recovered, involved employment contracts for a year or more. A disability which was serious enough to make the employee's return to work during the term improbable or otherwise to result in a material failure of consideration terminated a contract automatically.[29] If less serious,[30] or if the contract terms indicated that the employer

26. 2 LIPSON, ECONOMIC HISTORY OF ENGLAND 42 (1931).

27. See note 22 *supra*, and DICEY, LAW AND PUBLIC OPINION IN ENGLAND cs. 8, 11 (2d ed. 1940).

28. See Note, *Wages during Sickness*, 55 LAW Q. REV. 353 (1939).

29. *See, e.g.*, Poussard v. Spiers & Pond, [1876] 1 Q.B. 410.

30. Cuckson v. Stones, 1 El. & El. 248, 120 Eng. Rep. 902 (Q.B. 1859); K——— v. Raschen, 38 L.T. 38 (K.B. 1878); Warren v. Whittingham, 18 T.L.R. 508 (K.B. 1902); Storey v. Fulham Steel Works Co., 24 T.L.R. 89 (C.A. 1907).

must have assumed some of the risk of such disability,[31] only a privilege to terminate was given. Disability of very brief duration probably did not even give a privilege to terminate and did not affect the right to continued full compensation.[32]

If the employment contract was of indefinite duration but required that notice be given, it continued until the stated notice period had expired.[33] Where the parties did not provide for notice, the law nevertheless required notice to be given, and the hiring lasted for a reasonable period after that. The old presumption that all hiring was for a year, an outgrowth of the statute of apprentices and of changing seasonal demands on agricultural labor, gradually disappeared.[34]

Only after it had been established in each case that the hiring had not come to an end automatically or by the exercise of the employer's privilege to terminate could the question of compensation during absence be considered. Whether guided by fact, fiction, or mistake, courts favored an interpretation of long-term contracts under which so-called readiness and willingness to work was the sole prerequisite to wages.[35] Where this interpretation could not be reached, the courts relied on *Cuckson v. Stones* and held that full compensation was due while the employment relation continued,[36] subject to only a few exceptions which will be examined below.

It is striking that in none of these cases were contract principles of impossibility explored at any length. Although impossibility was held to relieve the employee of liability for damages and, in some cases, to discharge the entire contract, its effect on the employ-

31. Loates v. Maple, 88 L.T. 288 (1903).

32. See Cuckson v. Stones, 1 El. & El. 248, 257, 120 Eng. Rep. 902, 906 (Q.B. 1859). The opinion suggests that any disability lasting for less than the contract term is an insufficient excuse for termination but this does not appear to have been the law after this case.

33. Carr v. Hadrill, 39 J.P. 246 (Q.B. 1874).

34. See Elliott v. Liggens, [1902] 2 K.B. 84; Warburton v. Co-operative Wholesale Soc., Ltd. [1917] 1 K.B. 663, 665, 667, 668 (C.A.); Marrison v. Bell, [1939] 2 K.B. 187 (C.A.); Notes, 42 COL. L. REV. 107 (1942), 48 MICH. L. REV. 80 (1949).

35. Cuckson v. Stones, 1 El. & El. 248, 120 Eng. Rep. 902 (Q.B. 1859); Warren v. Whittingham, 18 T.L.R. 508 (1902). See note 11 *supra*.

36. Marrison v. Bell, [1939] 2 K.B. 187 (C.A.); Montague v. G.T.P. Development Co., 25 Manitoba L.R. 372 (1915); Colman v. Naish, 28 Western L.R. 487 (Brit. Col. 1914); K—— v. Raschen, 38 L.T. 38 (K.B. 1878); Carr v. Hadrill, 39 J.P. 246 (Q.B. 1874); Lind v. Johnson, 54 T.L.R. 95, 97 (K.B. 1937) (dictum). Because the strict common-law rule, barring any recovery where a contract had been only partly performed, was still rampant in the eighteenth century, courts may have tried to soften its impact by using the theory of the continuing contract in temporary disability cases. It is clear today that recovery may be had for part performance, at least if the unperformed part is excused. See Williams, *Partial Performance of Entire Contracts*, 57 LAW Q. REV. 373, 375–83 (1941).

er's duty to pay wages where it excused only a part of the employee's performance was not discussed. This problem of partial impossibility was considered in other classes of cases but, for a number of reasons, was left in an unhappy state of confusion.

First, courts have found it difficult to make the sometimes tenuous distinction between impossibility of performing a part of an entire contract as distinguished from a part of a severable contract.[37] While impossibility may not be material enough to excuse the entire performance that is due, it may nevertheless be very material with respect to a severable portion of it. Even where this distinction has been applied to excuse a part of the promised performance, courts have been reluctant to make a corresponding reduction in the liability of the return promisor for fear that they were making a new contract for the parties.[38] The issue has arisen in relatively few cases for the obvious reason that few attempts have been made to recover full payment where only part performance has been rendered. Apparently only in sales contracts, where the price is computed unit by unit, has liability been ratably reduced.[39] In other cases, where the court was not absolutely convinced that the contract was equally severable and divisible on both sides, full payment remained due unless impossibility was so material that it discharged the contract entirely.[40] Applied to the employment cases, this reasoning would frequently have led to the same conclusion that was reached in *Cuckson v. Stones*, since an employment contract for a definite term conceivably may not be subject to ratable apportionment on both sides. This will be discussed at length below.[41]

The failure to establish a sound analytical basis for the tempo-

37. See, *e.g.*, the discussion of cases which do not recognize partial impossibility in the performance of obligations under a lease, in Walford, *Impossibility and Property Law*, 57 LAW Q. REV. 339, 347–60 (1941).

38. Compare the language of the House of Lords in British Movietonews, Ltd. v. London & District Cinemas, Ltd., [1951] 2 All E.R. 617, at 625, *reversing* [1950] 2 All E.R. 390 (C.A.), with that of Denning, L.J. rendering the opinion below, at 395.

39. Biggerstaff v. Rowatt's Wharf Ltd., [1896] 2 Ch. 93; Devaux v. Conolly, [1849] 8 C.B. 640.

40. Greeves v. The West India and Pacific S.S. Co. Ltd., 22 L.T. 615 (1870); Modern Transport Co. v. Duneric S.S. Co., [1917] 1 K.B. 370. MCELROY, IMPOSSIBILITY OF PERFORMANCE 25, 93–94, 103–7 (1941). In some of the cases, payment by lump sum or otherwise had been made before performance was due as required by the contract. This sequence of performance led the courts into confusion between conditions and consideration as a result of which recoupment of an apportioned part of the prepayment was denied. See Whincup v. Hughes, L.R. 6 C.P. 78, 81 (1871); Williams, *supra* note 36, at 497–504; LAW REFORM (FRUSTRATED CONTRACTS) ACT, 1943, 6 & 7 GEO. VI, c. 40; FULLER, BASIC CONTRACT LAW 702–5 (1947).

41. See page 42 *infra*.

rary disability cases has left related questions in doubt. When, for example, may suit be brought by the employee? In all of the decided cases, the employee apparently had first returned to work or had been willing to return but was discharged. Had he failed to return, he would have broken his contract or at least terminated the employment. Nothing in the cases indicates, however, that return is a condition precedent to recovery; it follows that theoretically he is entitled to sue for his wages while he is still absent from work until the time when it becomes clear that he will not return. Only rules against multiplicity of actions would bar him from suing each payday.

A more difficult question concerns the right to wages where disability deteriorates into serious failure of consideration although apparently only temporary at the beginning. Assuming that the employee does not have to return in order to recover and that the employer had no reason to expect a material failure of consideration early in the absence, courts are nonetheless reluctant to award any wages to the employee where retrospect shows that the contract eventually became discharged.[42] This answer seems unfair to other employers who are bound to pay wages during temporary disability. It is also unfair to the employee who continues to be bound by the contract and is unable to make different arrangements while the employer can gamble on the possibility that the employee will be able to return before his accumulated wage claim becomes too high. There is, in other words, no very good reason for excusing an employer retroactively from liability for wages during temporary disability under these circumstances where he would not otherwise be excused from this obligation. If the disability threatens to become serious, he may always terminate the employment without liability as of that time.

The few English cases in which recovery was denied form a fairly clear pattern of exceptions to the rule of *Cuckson v. Stones*. Where the employee has been receiving benefits which the court finds, by interpretation of the terms of the employment or of the authorizing statute, to be wage substitutes, recovery is barred.[43]

42. Unger v. Preston Corp., [1942] 1 All E.R. 200; see Note, 6 MOD. L. REV. 160 (1943); Marks v. Dartmouth Ferry Comm., 34 Can. Sup. Ct. 366 (1904), *reversing* 36 Nova Scot. R. 158 (1903).

43. Elliott v. Liggens, [1902] 2 K.B. 84 (Workmen's Compensation); Niblett v. Midland Railway Co., 96 L.T. 462 (K.B. 1907); Petrie v. Mac Fisheries Ltd., [1940] 1 K.B. 258 (C.A.). *But cf.* Marrison v. Bell, [1939] 2 K.B. 187.

A few decisions have relied on trade customs against the payment of wages during disability and others have used the terminology of implied contract terms.[44] It is not easy to fit the *O'Grady* case into the exceptions. It may rest on custom or implied terms, but the language of the court seems to point to the assumed rather than the actual intent of the parties. The case may equally well overrule the common law rule with its exceptions and lay down a new one.

*O'Grady v. Saper* has sufficiently unsettled the English law so that it is now in a state approximating that of the American law which has developed in total disregard of English decisions. On the issue of what the effect of temporary disability is on the duration of the employment relation, English law and American law are quite similar. Temporary disability does not automatically end a hiring for a definite term,[45] although death and permanent disability do.[46] If it becomes probable that the employer will be deprived of the benefits for which he contracted due to the disability of his employee, he has a privilege to terminate.[47] An indefinite hiring providing for a stated period of notice is treated as a hiring for a term until notice is given.[48]

There is less agreement with respect to employment without a definite duration. A few cases consider it to be purely at will; disability automatically ends it and discharges the employer from further liability for wages. Cases so holding are perhaps distinguishable because they involve permanent disability or contain alternate grounds for decision.[49] The greater number of American

44. Hancock v. B.S.A. Tools Ltd., 38 L.G.R. 102 (K.B. 1939); *see* Petrie v. Mac Fisheries Ltd., [1940] 1 K.B. 258, 266, 269; Niblett v. Midland Railway Co., 96 L.T. 462, 464 (1907); Miller v. Morton, 8 Manitoba L.R. 1 (1891) *semble*; Smart v. Spencer, [1948] 2 K.B. 105 (C.A.) *semble*. After the decision in *Marrison v. Bell*, employers in the printing industry successfully forestalled claims similarly inspired as in *O'Grady v. Saper* by announcing in a circular letter an established custom in the industry barring recovery. The custom was upheld in an unreported case in the Mayor's and City of London Court in 1941. See CLOUTMAN, LAW FOR PRINTERS AND PUBLISHERS 226–27 (2d ed., Hale, 1949).

45. Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 N.E. 745 (1908); Fischhoff v. Adels-Loeb, Inc., 192 Misc. 221, 83 N.Y.S.2d 548 (Albany City Ct. 1947); Fahey v. Kennedy, 230 App. Div. 156, 243 N.Y. Supp. 396 (3d Dep't 1930); Rubin v. International Film Co., 122 Misc. 413, 204 N.Y. Supp. 81 (N.Y. City Ct. 1924). *Contra*: Johnson v. Walker, 155 Mass. 253, 29 N.E. 522 (1892).

46. Prior v. Flagler, 13 Misc. 115, 34 N.Y. Supp. 152 (C.P. 1895); Wolfe v. Howes, 20 N.Y. 197, 75 Am. Dec. 388 (1859).

47. *Compare* Hubbard v. Belden, 27 Vt. 645 (1855), *with* Gaynor v. Jonas, 104 App. Div. 35, 93 N.Y. Supp. 287 (2d Dep't 1905). See the cases cited in note 45 *supra*; also Fisher v. Monroe, 16 Daly 461, 465–66 (N.Y. 1891). The disability may constitute a breach if it is known to the employee at the time of hiring. Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57 (1876) (pregnancy).

48. Red Cross Mfg. Co. v. Stroop, 79 Ind. App. 532, 135 N.E. 351 (1922).

49. Kowalski v. Aetna Life Insurance Co., 266 Mass. 255, 165 N.E. 476 (1929); American Nat. Insurance Co. v. Jackson, 12 Tenn. App. 305 (1930) (both cases involved

cases regard an indefinite hiring to be for at least the pay period (unless strong evidence to the contrary is presented) and not automatically terminated by temporary disability.[50]

In deciding that an employee is entitled to pay, however, the courts have not relied on the continued existence of the employment relation. They could tacitly assume it, of course, where the contract expressly provided for the payment of wages[51] or where such a right was found in custom.[52] But in the only other class of cases in which the employee won, the employer had continued to pay wages during disability and was not permitted to set off or recover his voluntary payments.[53] The cases do not support Professor Williston's statement that, except where the disability is very minor, the employer has a privilege to terminate, but until he elects to exercise it, the contract continues and with it the right to receive undiminished wages.[54] In the absence of contract terms, custom, or voluntary payment, the cases have uniformly refused to permit wages to be recovered for the reason that the work had not actually been performed.[55]

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claims under group insurance plans); Shaw v. Ward, 107 N.Y. Supp. 36 (1918) (waiver or election).

50. Devlin v. City of New York, 41 Hun 281 (N.Y. 1886), and see Note, *Employment Contracts of Unspecified Duration*, 42 COL. L. REV. 107, 108 (1942), and Comment, 48 MICH. L. REV. 80, 84–85 (1949) (the authors appear to reason to opposite conclusions); Crockett, *Contracts of Hire for Personal Services Indefinite as to Time*, 47 CENT. L.J. 426 (1898).

51. Ginsberg v. Reliable Linen Service Co., 292 Mich. 70, 290 N.W. 331, (1940); Red Cross Mfg. Co. v. Stroop, 79 Ind. App. 532, 135 N.E. 351 (1922); Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 N.E. 745 (1908) (by implication); Dunlap v. Montgomery, 123 Pa. 27, 16 Atl. 41 (1888) *semble*.

52. Missouri Pac. Ry. v. Texas & Pac. Ry., 33 Fed. 701 (C.C.E.D. La. 1888) (Bradford); Fischhoff v. Adels-Loeb, Inc., 192 Misc. 221, 83 N.Y.S.2d 548 (Albany City Ct. 1947) *semble*; *see* Mott v. Baxter, 13 Colo. App. 63, 66, 56 Pac. 192, 194 (1899), *rev'd on other grounds*, 29 Colo. 418, 68 Pac. 220 (1902); Nichols v. Coolahan, 51 Mass. 449, 450 (1845).

53. Prussing Vinegar Co. v. Meyer, 26 Ill. App. 564 (1888) (suit on note given in payment); Clark v. Irondequoit Coal & Supply Co., 257 App. Div. 63, 11 N.Y.S.2d 689 (4th Dep't 1939); Raipe v. Gorrell, 105 Wis. 636, 81 N.W. 1009 (1900) (employee absent through own fault); Dickinson v. Norwegian Plow Co., 101 Wis. 157, 76 N.W. 1108 (1898). In Devlin v. City of New York, 41 Hun 281 (N.Y. 1886) and O'Leary v. Board of Education, 93 N.Y. 1, 45 Am. Rep. 156 (1883), the fact that the employee's name continued to appear on the payroll was held to indicate an intent to retain and pay him, although payment never took place. The facts of the cited cases suggest that the use of waiver, estoppel and election terminology with respect to liability for wages is as unnecessary as it is unsatisfactory. See EWART, WAIVER DISTRIBUTED c. 2 (1917).

54. 6 WILLISTON, CONTRACTS § 1942 (rev. ed. 1938). Corbin takes the other extreme by making the employee's right to wages conditional on substantial performance in the traditional sense. 3 CORBIN, CONTRACTS §§ 675–78 (1951).

55. Sickelco v. Union Pac. R.R., 111 F.2d 746 (9th Cir. 1940); Wilson v. Smith, 111 Ala. 170, 20 So. 134 (1895); Noon v. Salisbury Mills, 85 Mass. 340 (1862); Flournoy v. United Mfg. Co., 199 S.W. 723 (Mo. App. 1917); Hughes v. Toledo Scale & Cash Register Co., 112 Mo. App. 91, 86 S.W. 895 (1905); Adlets v. Progressive Shoe Co.,

The discrepancy between the Williston view and the cases again draws attention to the problem of partial impossibility. The effect of partial impossibility of performance on the duty of the return promisor to pay seems to have been largely ignored by American cases and commentators. The Restatement of Contracts deals with it only briefly. It provides that a person who is entitled to receive performance of which a material part has become impossible may require the balance to be performed if he pays the full agreed price.[56] If impossibility is partial and not serious enough to constitute failure of consideration, he must pay the full price.[57] These rules were apparently drawn from the English cases previously discussed.[58]

While American courts have not yet analyzed the duty of the person who was to receive the partially impossible performance, one would hardly expect them to apply the above rules to require full payment for partial delivery under a sales contract. Employment contracts, perhaps, present a different problem. It is difficult in some of them to apportion accurately performance on one side against consideration on the other, this difficulty being the likely rationale of the Restatement rule. The full benefits of an employee's labor do not always accrue to the employer during the period that it is being performed. This is especially true in the case of administrative and supervisory work, as compared with physical production. Apart from the difficulty of apportionment, a contract that is divisible is not necessarily severable. The parties may have intended that a certain total amount should be paid, albeit in installments. Furthermore, employee disability is not dissimilar to temporary machine breakdowns, both being a necessary cost of production.

In any event, the Restatement rule applied to employment relations is no less justifiable than the rule followed by most of the American cases under which wages are deducted for all absences unless the contract expressly forbids it. These cases appear to

84 Mo. App. 288 (1900); Hargrave v. Conroy, 19 N.J. Eq. 281 (1868); McGarrigle v. McCosker, 83 App. Div. 184, 82 N.Y. Supp. 494 (2d Dep't 1903); Foster v. Henderson, 29 Ore. 210 (1896); MacFarlane v. Allan-Pfeiffer Chemical Co., 59 Wash. 154, 109 Pac. 604 (1910). Although contract terms appear in some of these cases, they do not seem to have been considered conclusive of whether the employer had a right to abate wages during disability. Instead, the converse approach seems to have been taken, giving a right to abate as long as there were no contract terms to the contrary.

56. RESTATEMENT, CONTRACTS § 460, comment *b* (1932).

57. RESTATEMENT, CONTRACTS § 463, comment *a* (1932).

58. See pages 37–38 *supra*.

have equated conditions governing the order of performance and the consideration for that performance. But conditions are merely conveniences, readily excused when they become impossible, and ought to be sharply distinguished from the substance of the bargain.[59] It does not follow from the tradition that work precedes payment that there ought never to be full payment without complete work. Support for the latter proposition is more likely to be found in earlier American conceptions of desirable economic policy. The cases suggest that a fear of malingering and a preoccupation with the virtues of hard work frequently led courts to minimize the nature of the bargain made by the parties. A full examination of the circumstances surrounding the employment may not infrequently prove that a certain amount of absence due to disability does not prevent the employer from substantially realizing the benefits of his bargain.

Since recovery in the United States has been limited to theories of express contract terms, custom, and voluntary payment, it has been unnecessary so far to answer certain questions. Must the employee continue willing and able during sickness to return to his employer in order to recover wages from him?[60] When may suit be brought, and how often?[61] Will the court determine the seriousness of the absence by what the parties could have reasonably expected at the outset or by the final outcome?[62] Unless a court adopts the view of Williston and the English cases, no answers seem needed.

No American cases have passed on claims brought after the employee had collected other benefits to which his disability entitled him. So long as these benefits are intended to be wage substitutes and do not come from the employee's personal savings, there is no good reason why additional recovery should be allowed.[63] In

59. See RESTATEMENT, CONTRACTS § 270, comment *a* (1932). Analogous is the case of a pledgee who may recover from the pledgor even though the return of the pledge has become impossible. Williston, *Contractual Relations Between Pledgor and Pledgee*, 55 HARV. L. REV. 713, 714–18 (1942).

60. Orpin v. Westmacott Gas Furnace Co., 74 Atl. 481 (R.I. 1909) *semble*.

61. See Doherty v. Schipper & Block, 250 Ill. 128, 95 N.E. 74 (1911) (only one recovery permitted). Even if the court admits evidence of speculative prospective losses to the employee, this does not appear to be the way to do maximum justice between employer and employee.

62. The converse situation is covered by RESTATEMENT, CONTRACTS §§ 465–66 (1932), which excuse the person who is to perform on reasonable apprehension of impossibility.

63. *Cf.* Orpin v. Westmacott Gas Furnace Co., 74 Atl. 481 (R.I. 1909) (no further recovery where employee had accepted reduced wages during disability). See note 43 *supra*.

many cases the further question has been raised whether the employer can set off damages resulting from the employee's disability.[64] Because disability excuses performance, there is no breach and, theoretically, no right to damages.[65] If a court decides, however, that the employee may receive wages during temporary disability, it may also decide that those wages are to be reduced by the cost of necessary substitutes[66] or by the amount of other losses which were a foreseeable consequence of the employee's absence.

## III

The decided cases do not supply satisfactory solutions to the two problems that they raise: the practical one of employee sickness and the theoretical one of adaptation of contracts to unforeseen events. What they do supply—or suggest—are facts that are relevant to any decision.

In deciding if wages are due, a court should consider, first, the extent to which the benefits from the employee's work cannot be ratably apportioned to the period for which he receives pay. The salesman who builds up good will, the office worker who maintains a filing system, the supervisor who keeps an operation running—all of them produce results that carry over into periods during which they may be briefly absent from work. The longer the employment has lasted, the more definite is this carry-over likely to be. With an increasing duration of employment, moreover, some disability becomes increasingly probable. Disability then becomes less of an unforeseen event in the usual calamitous sense and more of a normal risk ignored by the contract.

Two approaches have been taken in dealing with risks which

64. In Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 N.E. 745 (1908), the suit was for full wages during disability; in all of the following cases, the suit was for compensation for work actually done in partial performance of a contract: Hunter v. Waldron, 7 Ala. 753 (1845); Noon v. Salisbury Mills, 85 Mass. 340 (1862) (forfeiture clause enforced); Hughes v. Toledo Scale & Cash Register Co., 112 Mo. App. 91, 86 S.W. 895 (1905); Casten v. Decker, 3 N.Y. St. 429 (1886); Clark v. Gilbert, 26 N.Y. 279, 84 Am. Dec. 189 (1863); Patrick v. Putnam, 27 Vt. 759 (1855); Hubbard v. Belden, 27 Vt. 645 (1855).

65. See Dickey v. Linscott, 20 Me. 453 (1841); McClellan v. Harris, 7 S.D. 447, 64 N.W. 522 (1895); 2 LABATT, MASTER & SERVANT § 525 (1913). There will be liability for damages where the employee performs his work improperly due to disability, Dryer v. Lewis, 57 Ala. 551 (1877), but not to make up time lost due to disability, MacDonald v. Montague, 30 Vt. 357 (1858).

66. See Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 N.E. 745 (1908); Hart v. Myers, 59 Hun 420, 13 N.Y. Supp. 388 (1891).

the contract did not distribute. One has been to apply a fixed rule which did not allow for the peculiar facts of each case. The other has been to decide what the parties would have provided had they provided anything. Not much can be said for the former as an instrument for achieving just results except that it serves the interest in certainty. The latter, on the other hand, leaves the attainment of just results solely to the judge who is as free to resort to fiction as he is to fact.

The concept of justice in this type of case is complicated by the realities of the situation. It is not sufficient to weigh the benefits to the employer carrying over from past performance by the employee against the loss resulting from the absence. Nor is it adequate to attempt to compare the impact that temporary loss of wages has on the employee to that of temporary absence on the employer's business. In any such comparison, the court is confronted with evidentiary problems, with questions of burdens of proof, and, finally, with an appalling lack of standards for comparison. Apart from these difficulties, any effort to find a solution in the circumstances surrounding the bargain of the parties must include an appraisal of the comparative bargaining position of the parties. Failure to deal with disability may be due as much to one party's feeling that nothing favorable could have been gained as it is to forgetfulness. The court's decision will inevitably reinforce the assumed past bargaining position (as in the American cases) or compensate for it (as in the English cases).

Where legislation does not offer an escape, the courts will have to live with the dilemma presented by unequal bargaining positions. Perhaps the best that can be hoped for is that courts will seek reasonable, fair, and workable solutions in the facts of each employment relation rather than rely on arbitrary rules or fictions. It must be remembered that the effect of their decisions transcends the particular controversy and will be reflected in the informal adjustments by which employers and employees seek themselves to settle differences and achieve justice.