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THE DEFAULTING PLAINTIFF IN NORTH CAROLINA

JOHN E. MULDER*

For more than a century the plight of the defaulting plaintiff¹ has been a prolific source of controversy among courts and legal scholars.² Until 1834 the unpaid willful defaulter was generally not entitled to judicial relief. This was the "common-law" rule.³ But in that year the Supreme Court of New Hampshire fired the first shot in a hundred year's legal war. Disregarding the hallowed precedents of the "common-law rule" that court, in the case of *Britton v. Turner*, created the "modern rule," by granting succor (to the extent of \$95) to a defaulting laborer.⁴ The reverberations of that shot threw the legal world into two camps, which have since then filled reams and reams of paper with attacks upon and defenses of the simple decision.⁵ And by way of demonstrating that the legal air still reverberates, another combatant recently launched a well planned attack on the common law rule in commemoration of the centennial of *Britton v. Turner*.⁶ The present effort is aimed at a review of the conflict in North Carolina.

A preliminary résumé of what the opposing camps are fighting about is perhaps in order. For, as in most contests (legal or otherwise), each side carries on its banner certain symbols whose emotional appeal rallies recruits to its support. Of course, each of the belligerents in this instance has enlisted justice on its side.⁷ The protagonists of the

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¹ The term "defaulting plaintiff" is herein employed to designate one who, after partial performance, abandons his contract without cause. It is thus broader than, and inclusive of, the term, "willful defaulter." "Willful default" means without cause; it does not necessarily involve elements of bad faith. The present article includes within its scope both terms. Usually the contracts involved call for payment in the entirety upon complete performance.

² KEENER, *QUASI-CONTRACTS* (1893) Chap. IV; WOODWARD, *THE LAW OF QUASI CONTRACTS* (1913) Chap. X; Ashley, *Britton v. Turner* (1915) 24 *YALE L. J.* 544; Ballantine, *Forfeiture for Breach of Contract* (1921) 5 *MINN. L. REV.* 329; Laube, *The Defaulting Employee* (1935) 83 *U. PA. L. REV.* 825; (1924) 24 *COL. L. REV.* 885.

³ Laube, *op. cit. supra* note 2, at 828. In the present article, to conserve space, the term "common-law rule" is employed to designate those cases denying relief, and the term "modern rule" to designate those cases which, following *Britton v. Turner* (see *infra*, note 4), permit recovery.

⁴ 6 N. H. 481 (1834). Plaintiff contracted to do farm labor, for one year, for a total compensation of \$120. He quit after nine and one half months of performance, the employer suffering no damage as a result.

⁵ See *supra* note 2.

⁶ Laube, *op. cit. supra* note 2.

⁷ An Iowa judge, defending *Britton v. Turner*, said: "It is bottomed on justice, and is right on principle, however it may be upon the technical and more illiberal rules of the common law, as found in the older cases." *McClay v. Hedge*, 18 *Iowa* 66, 68 (1864).

Criticizing the same case, Professor Woodward writes: "Considerations both of justice and of policy forbid its approval." WOODWARD, *QUASI CONTRACTS* (1913) 274.

common-law rule, championed successively by Keener and Woodward, have hoisted high the condition precedent as an instrument of justice.⁸ For since the days of Mansfield one who contracts to perform service in exchange for a flat sum of cash must allege and prove performance.⁹ Two persuasive slogans buttress this point of view; one, a willful defaulter deserves no sympathy;¹⁰ and the other, to permit recovery in such a case would be to encourage breaches of contract with impunity.¹¹

An equally appealing slogan appears on the banner of the opponents—the well established principle of compensation. Punitive damages, in most jurisdictions, belong not to the law of contracts—the amount of recovery is rather merely to compensate the innocent party for the wrong inflicted upon him.¹² Consequently, (runs this argument) the common-law rule is indefensible, for in denying the willful defaulter a recovery it in many instances allows to the defendant a benefit in excess of the damage suffered by him. *Britton v. Turner*, granting a recovery of the benefits conferred in excess of the damage suffered, is in line with the glorified principle of compensation. And since the plaintiff is on recoupment or counterclaim liable for the damages caused by his breach, willful default is not thereby encouraged.¹³

⁸ Keener, *op. cit. supra* note 2, at 222; Woodward, *op. cit. supra* note 2, at 264-7 (Woodward's rationale is in terms of assumption of risk rather than conditions precedent.); Laube, *op. cit. supra* note 2, at 827.

"If a condition precedent is to be got rid of thus readily, they are not made of such 'stern stuff' as we have been taught to consider them." Redfield, J., dissenting in *Fenton v. Clark*, 11 Vt. 557, 567 (1839).

Professor Havighurst has made the plausible suggestion that the common-law rule is but a device for keeping such cases away from juries, which would, in all probability, be sympathetic to the plaintiff.

⁹ *Kingston v. Preston*, 2 Doug. 689 (K. B. 1773); 3 WILLISTON, CONTRACTS (Rev. ed. 1936) §817.

¹⁰ ". . . one whose hands are soiled by willful wrongdoing is hardly in a position seriously to complain. . . . But when it is remembered that the plaintiff's position is the direct consequence of a willful and inexcusable violation of his legal right and moral duty to the defendant, it is difficult to feel that the result complained of is harsh or unjust. Better far that the innocent defendant should profit by the breach than that the guilty plaintiff should be given a remedy in spite of it. . . ." Woodward, *op. cit. supra* note 2, at 272.

¹¹ *Smith v. Brady*, 17 N. Y. 173, 187 (1858).

¹² Laube, *op. cit. supra* note 2 at 833; (1933) 11 N. C. L. Rev. 160; 84 A. L. R. 1336.

¹³ "This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment, nor to the latter to desert his service before the stipulated time, without a sufficient reason. . . ." *Britton v. Turner*, 6 N. H. 481, 494 (1834).

"He who is required to repair the damage he has done, does not violate his contract with impunity. Reparation by the defaulting employee, and not enrichment by the employer, is the principle of substantial justice. The tearful utterances about the sacredness of solemn contracts is but the patter of solemn nonsense. They indicate an over-zealous apprehension. Although the venerable history of the condition precedent has enshrined it as a principle of justice, it now seems crudely superficial." Laube, *op. cit. supra* note 2, at 831.

Thus, it is apparent that each protagonist is guided by a principle which has a strongly-felt significance in our jumbled system of jurisprudence. But these principles, when applied to the case at hand, lead to different results. To be sure, the buttressing arguments in support of each purport to be factual—the one, that to grant a recovery encourages breach with impunity, the other that it does not. Yet in the course of this century of combat, one looks in vain for empirical justification of either point of view.¹⁴

Professor Laube, who has recently reviewed the development since the decision of *Britton v. Turner*, has skillfully pointed out that the contest has elements of a class war between employer and employee.¹⁵ Well established is the rule that a wrongfully discharged employee is required to seek other work in mitigation of damages. Coexistent with this, in so many jurisdictions, is the common-law rule which denies recovery to a defaulting employee. Such, says Professor Laube, is an inexcusable denial of equality.¹⁶ His argument is persuasive.¹⁷ In

¹⁴ Such a study might well vindicate the argument of either group. An even split would be at least revealing. Not easy, such an investigation is by no means impossible. Significant it may be that courts following *Britton v. Turner* have not been overburdened with an influx of actions by defaulting plaintiffs.

¹⁵ Laube, *op. cit. supra* note 2, at 844-851. Such is the general theme of the argument. The vigorous tone of the writer indicates his firm belief in his point of view. Purposely partisan, he pulls no punches. His persuasive words should be helpful to the lawyer arguing on behalf of a defaulting plaintiff.

¹⁶ The inequality is manifest, if two cases be considered side by side. (a) Under the common-law rule, the defaulting employee, having performed satisfactorily for several months, recovers nothing if he abandons the contract. The benefits thus retained by the employer may be greatly in excess of the damage he has suffered. Particularly would this be true where, as in *Britton v. Turner*, the employer suffered no damage. And this entirely at the expense of the employee, for the employer is required to do nothing by way of reducing the employee's loss. (b) Conversely, if the employee be wrongfully discharged, he is required to seek other employment by way of mitigating the employer's loss. Failing to take advantage of other opportunities for employment, he has his damages proportionately reduced. The result is that the defaulting employee in effect pays punitive damages, but the employer who discharges his employee without cause is liable only for compensatory damages.

If a court be adamant in its refusal to follow *Britton v. Turner*, Professor Laube suggests, as an alternative for removing this inequality, restoration of the now generally abandoned doctrine of constructive service. Under this theory, a wrongfully discharged employee, by remaining ready and willing to perform, is constructively performing, and may recover his wages in full. He need not seek other employment in mitigation. The doctrine has become practically obsolete upon the ground that it encourages idleness. *Howard v. Daly*, 61 N. Y. 362, 373 (1875); *cf. Smith v. Cashie and Chowan R.R. & Lumber Co.*, 142 N. C. 26, 54 S. E. 788 (1906). Establishment of desired equality by resurrecting the doctrine of constructive service is akin to modern manufacturing by old-fashioned methods. Adoption of *Britton v. Turner* as a more desirable alternative should call forth few dissents.

¹⁷ The writer finds himself in sympathy with the result Professor Laube seeks to achieve. The argument of the latter is not one of pure logic; it represents a social point of view; it is based upon a factual inequality which operates seriously to the detriment of the laborer.

As a matter of logic, however, Professor Laube's analogy between the laborer who wilfully defaults and one who is wrongfully discharged, is open to question.

the gradual succession of concessions, so begrudgingly granted to labor, the next step is adoption of the precept of *Britton v. Turner*.

Still another suggested weapon for the laborer has recently been methodically developed.¹⁸ In long term service contracts, though a periodic rate of compensation is expressly designated, courts are prone to treat the obligation as entire.¹⁹ The result, if *Britton v. Turner* be not followed, is that a plaintiff who has performed satisfactorily for several of the designated periods, is denied any relief whatsoever if he voluntarily abandons work prior to the end of the term. The suggestion is that, consistently with the so called systematic body of common-law rules of contract, this may be changed. Where there exists a contract for a year at a monthly rate of compensation, courts may easily treat the agreement as divisible rather than entire.²⁰ Hence, if after working for six and one-half months the employee defaults, he may recover on the contract for the six units of service which he has satisfactorily completed (subject to the damages inflicted by the breach). As to the remaining half month, the application of *Britton v. Turner* would permit a *quantum meruit* recovery.

Such discussion is a woefully brief commentary upon the argumentative weapons of the opposing camps. Amplification would be but repetition of their efforts, and seems hardly efficacious. There remains, then, to consider how the defaulting plaintiff has fared before the North Carolina Court.

It must be admitted that this judiciary has not consistently favored either of the opposing camps.

In *Britton v. Turner* the New Hampshire court refused to differen-

A closer analogy exists between the defaulting laborer and the employer who, having overpaid his employee, then wrongfully terminates the contract, and seeks to recover the amount of the overpayment. Such cases are not to be found among the reports; they seldom occur. It seems to be generally held that a salesman who, under a contract of definite duration, overdraws his account, is not required to repay the amount of the overdraft, when the contract is terminated. (See cases collected in 57 A. L. R. 33). But in most of these cases the contracts were terminated by lapse of time or by mutual agreement.

¹⁸ McGowan, *Divisibility of Employment Contracts* (1935) 21 IOWA L. REV. 50.

¹⁹ Williston sees a trend in the direction of finding contracts divisible. 2 WILLISTON, CONTRACTS (1920) §862. (But the statement is omitted in his revised edition.) Mr. McGowan states that since there are so few recent cases on the subject, the majority rule is still against finding such contracts divisible.

²⁰ "A contract under which the whole performance is divided into two sets of partial performances, each part of each set being the agreed exchange for a corresponding part of the set of performances to be rendered by the other promisor, is called a divisible contract." WILLISTON, CONTRACTS (Rev. ed. 1936) §860A. To which Mr. McGowan adds, "Over and above this there must be found agreement or intention of the parties that the contract they have made is to be so divided." McGowan, *op. cit. supra* note 18, at 52. Even if this addition is to be taken seriously, it is remarkable how easily an astute court can find such intent when it seems desirable. And in the large number of cases where direct evidence of intent is lacking, a presumption of divisibility would be helpful to the laborer, and would obviate the hardship of an antithetical rule.

tiate between the rights of a defaulting employee and those of a defaulting seller under a contract for the sale of goods.²¹ For reasons never satisfactorily articulated some courts which have consistently denied recompense to a defaulting employee have granted relief to a defaulting seller.²² The Uniform Sales Act provides that if the buyer retains the goods knowing that the seller intends not to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows of the seller's intent to default before performing in full, the buyer will not be liable for more than the fair value to him of the goods so received.²³ Many of the thirty-one States which have adopted the Uniform Sales Act have repudiated *Britton v. Turner*.²⁴ Why?

Sales of Goods

For convenience in organization, the sales and employment cases will be discussed separately. The North Carolina legislature, unfortunately, has not yet adopted the Uniform Sales Act.²⁵ But it is to its credit that the North Carolina court has never consciously distinguished between sales and employment contracts where the plaintiff is in default. In fact, the cases have been cited indiscriminately.²⁶ Here, however, the uniformity ceases.

Thirteen times the North Carolina Supreme Court has been called upon to adjudicate the rights of a seller who has defaulted after part performance.²⁷ In nine of these instances it was recognized that a recovery should be granted for the part performance; four times the seller was left "holding the bag." How fortunate if the latter four had been first chronologically, and hence, since disapproved. But the line has not been so drawn. The first three, arising respectively in 1841, 1848, and 1851, permitted recovery.²⁸ There followed three to the contrary in 1855, 1859, and 1870.²⁹ In no instance was the inconsistency explained by the court. Then, in order, the following results were ob-

²¹ *Britton v. Turner*, 6 N. H. 481, 490 (1834).

²² Laube, *op. cit. supra* note 2, at 842.

²³ §44; 2 WILLISTON, SALES (2nd ed. 1924) §460.

²⁴ See *supra*, note 22.

²⁵ Twice submitted, it has both times failed of enactment when the legislature became involved in seemingly more important business.

²⁶ Thus, in *Dula v. Cowles*, 47 N. C. 454 (1855) a sales case, denying recovery, reliance was placed upon *White v. Brown*, 47 N. C. 403 (1855), which involved a defaulting employee. And in *Indian Mountain Jellico Coal Co. v. Asheville Ice and Coal Co.*, 134 N. C. 574, 47 S. E. 116 (1904), also a sales case, the court relied upon *Britton v. Turner*.

²⁷ Included herein are *dicta*, and instances of defective performances, as well as cases involving willful default. That is, they deal with inexcusable breach by the plaintiff.

²⁸ *Carter v. McNeely*, 23 N. C. 448 (1841); *Freeman v. Skinner*, 31 N. C. 32 (1848); *McEntyre v. McEntyre*, 34 N. C. 299 (1851).

²⁹ *Dula v. Cowles*, 47 N. C. 454 (1855); *Dula v. Cowles*, 52 N. C. 290 (1859); *Russell v. Stewart*, 64 N. C. 487 (1870).

tained: two sellers recovered,³⁰ one lost,³¹ and the last four were successful.³²

In *Russell v. Stewart*, decided in 1870,³³ where recovery was denied, the court used language typically employed by courts which have refused to adopt *Britton v. Turner*. Apparently the contract called for payment in Confederate money. Having delivered fifty bushels of wheat, one-half the total amount, the seller wrongfully refused to complete performance unless paid in specie (about twice the amount due in Confederate money). In defense of its position the court said, "The harshness of this rule has sometimes been the subject of criticism; but it is justified upon the ground that it is more important to compel parties to stand by their contracts than it is to relieve the few hard cases which arise under it. . . . If the biter has been bitten, it will perhaps admonish him and others to stand firmly by their contracts in the future."³⁴

On the other hand, in *Indian Mountain Jellico Coal Company v. Asheville Ice and Coal Company*, the court in 1904, granting recovery for part performance to a defaulting seller, incorporated in its opinion the following words of an Iowa judge, in approving *Britton v. Turner*: "That celebrated case has been criticized, doubted, and denied to be sound, yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules as found in the older cases."³⁵

However, from these cases, a prediction may be ventured. It is to be noted that not since 1895 has a defaulting seller been denied relief, and then only by *dictum*. (The last holding to that effect seems to have been in 1870.)³⁶ On the other hand, four times since that date, the last being in 1926, recovery has been granted.³⁷ *Indian Mountain Jellico Coal Company v. Asheville Ice and Coal Company*, decided in 1904, and often cited as a leading case, may possibly be recognized as a definite turning point. If so, perhaps the right of a defaulting seller to recover for part performance has become definitely established. This prophecy assumes that subsequent employment contract cases, to be hereafter discussed, will not lead in the opposite direction.

Another aid in permitting recovery has already been briefly sketched;

³⁰ *Howie v. Rea*, 70 N. C. 559 (1874); *Brown v. Morris*, 83 N. C. 252 (1880).

³¹ See *Ducker v. Cochrane*, 92 N. C. 597 (1885).

³² *Indian Mountain Jellico Coal Co. v. Asheville Ice and Coal Co.*, 134 N. C. 574, 47 S. E. 116 (1904); *Willis v. Jarrett Construction Co.*, 152 N. C. 100, 67 S. E. 265 (1910); *Maney v. Greenwood*, 182 N. C. 579, 109 S. E. 636 (1921); *Ritchie v. Ritchie*, 192 N. C. 538, 135 S. E. 458 (1926).

³³ 64 N. C. 487.

³⁴ *Russell v. Stewart*, 64 N. C. 487, 488 (1870).

³⁵ 134 N. C. 574, 580, 47 S. E. 116, 118 (1904).

³⁶ *Russell v. Stewart*, 64 N. C. 487 (1870).

³⁷ *Supra*, note 32.

that of holding the contract divisible where its terms lend themselves to that interpretation, resulting in recovery on the contract for the units performed.³⁸ Perhaps the North Carolina court has gone as far as any in this respect. It has shown a willingness to treat contracts as divisible unless clearly shown to have been intended otherwise.³⁹ This is laudable.

An element of confusion is injected into some of the sales cases where the court, in permitting recovery, intimates that were plaintiff's default willful, recovery would be denied.⁴⁰ No precise distinction between a default which is willful and one which is not has been spelled out. Perhaps the court feels that in the former an element of bad faith is involved. From a purely compensatory point of view the distinction is unsound. Fortunately the distinction has not been elevated to the dignity of a square holding.

Employment Cases

In employment cases, as in those involving sales of goods, the North Carolina cases lack consistency. The course of decisions has followed a zig-zag, rather than a straight and narrow, path. The question first appeared in a dictum in *Clayton v. Blake*, decided in 1844.⁴¹ Though a willful breach was not directly involved, the case indicates that a *quantum meruit* recovery would be allowed where plaintiff has been guilty of a breach of a building contract. In chronological order thereafter the following results were obtained: one case granting recovery,⁴² one denying,⁴³ one granting,⁴⁴ three denying,⁴⁵ one granting,⁴⁶ one deny-

³⁸ McGowan, *op. cit. supra* note 18.

³⁹ This has not always been true. In *Dula v. Cowles*, 52 N. C. 290 (1859), Pearson, C. J., intimated that a contract would not be considered divisible unless made expressly so by its terms. See also *Russell v. Stewart*, 64 N. C. 487 (1870). But the tide turned in *Chamblee v. Baker*, 95 N. C. 98 (1886). The tendency to treat contracts as divisible seems to have become well established when *Indian Mountain Jellico Coal Co. v. Asheville Ice and Coal Co.*, 134 N. C. 574, 47 S. E. 116 (1904), and *Willis v. Jarrett Construction Co.*, 152 N. C. 100, 67 S. E. 265 (1910) were decided.

⁴⁰ *Brown v. Morris*, 83 N. C. 252 (1880); *Maney v. Greenwood*, 182 N. C. 579, 109 S. E. 636 (1921). In the latter case the court, in permitting recovery, pointed out that the default was not willful. The facts do not indicate whether there was a *bona fide*, but ineffective, attempt to perform in full.

⁴¹ 26 N. C. 497. The action was in debt, and hence on the express contract. A building contract was involved. Such are herein treated with employment contracts, because only in Missouri is a distinction made between the two. In that State recovery is granted to a defaulting building contractor, but is denied in other types of agreements. "This peculiarity of the Missouri law has been said to be due to the fact that the visible and tangible fruit of the builder's part performance is so realistically presented to the judicial eye that equity prevails." *Laube, op. cit. supra* note 2, 839-841; (1924) 24 Col. L. Rev. 885, 888.

⁴² *Dover v. Plemmons*, 32 N. C. 23 (1848).

⁴³ *Winstead v. Reid*, 44 N. C. 76 (1852). The court relies upon *Cutter v. Powell*, 6 T. R. 320 (1795). That famous case involved a contract to pay a sailor a specified sum, provided he performed his duties on the ship to and from the port of Liverpool, on a specified trip. Recovery for part perform-

ing,⁴⁷ four granting,⁴⁸ one denying,⁴⁹ two granting,⁵⁰ and a final case, decided in 1934, denying relief.⁵¹ Thus, ten times *Britton v. Turner* has been followed, and seven times the common-law rule. Confusion has herein found its masterpiece. Prediction seems almost futile.

But the above enumeration is subject to qualification. The ten cases cited as following *Britton v. Turner* are not all square holdings. They include *dicta*—cases where plaintiff sued unsuccessfully on the contract, or where he sued on *quantum meruit* and failed because he could not show that defendant had received a benefit from the part performance.⁵² But in each instance there is language to the effect that had a benefit been conferred, plaintiff could have recovered to that extent in *quantum meruit*.

Obviously the early cases denying recovery are based on the common-law rule. They rely chiefly upon the early case of *Winstead v. Reid*, which emphasizes the conventional argument that plaintiff, not having performed his conditions precedent, has no standing in court.⁵³

In *Winston v. Reid* plaintiff quit without cause, after half completion of a contract to build additions to defendant's house. Emphasis was placed upon the fact that the contract was entire and indivisible. *Cutter v. Powell* was cited as an authority, but that celebrated English case has been adequately distinguished.⁵⁴

ance was denied. The case is distinguishable from that of a willful defaulter upon two grounds: (1) The cause for the non-performance was the death of the sailor. (2) The opinion indicates that the risk of full performance was assumed by the sailor in consideration of a higher than customary compensation. WOODWARD, QUASI CONTRACTS (1913) §113; (1924) 24 COL. L. REV. 885, n. 2.

⁴⁷ See *Byerly v. Kepley*, 46 N. C. 35 (1853).

⁴⁸ *White v. Brown*, 47 N. C. 403 (1855); *Brewer v. Tysor*, 48 N. C. 181 (1855), on a retrial, plaintiff recovered by proving the contract divisible, *Brewer v. Tysor*, 50 N. C. 173 (1857); *Niblett v. Herring*, 49 N. C. 262 (1857).

⁴⁹ *Gorham v. Bellamy*, 82 N. C. 497 (1880).

⁵⁰ *Thigpen v. Leigh*, 93 N. C. 47 (1885) (involving a sharecropper's contract).

⁵¹ *Chamblee v. Baker*, 95 N. C. 98 (1886); *Booth v. Ratcliffe*, 107 N. C. 6, 12 S. E. 112 (1890); *Simpson v. Carolina Cent. R. R.*, 112 N. C. 703, 16 S. E. 853 (1893); *Dixon v. Gravely*, 117 N. C. 84, 23 S. E. 39 (1895).

⁵² *Beacom v. Boing*, 126 N. C. 136, 35 S. E. 250 (1900), involving a sharecropper's contract, and relying upon *Thigpen v. Leigh*, 93 N. C. 47 (1885), *supra*, note 47.

⁵³ See *Corinthian Lodge v. Smith*, 147 N. C. 244, 61 S. E. 49 (1908); *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244 (1915).

⁵⁴ *Lipe v. Citizens Bank and Trust Co.*, 206 N. C. 24, 173 S. E. 316 (1934).

^(a) Action on contract, with *dictum* recognizing right of *quantum meruit* recovery, *Clayton v. Blake*, 26 N. C. 497 (1844); *Corinthian Lodge v. Smith*, 147 N. C. 244, 61 S. E. 49 (1908).

^(b) Recognizing right of *quantum meruit* recovery, provided defendant has received a benefit, *Byerly v. Kepley*, 46 N. C. 35 (1853).

^(c) Recognizing right of *quantum meruit* recovery, but defendant also guilty of breach, *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244 (1915).

⁵⁴ 44 N. C. 76 (1852).

⁵⁴ See *supra*, note 43.

Before many years, however, the language of the opinions clearly indicates a disposition to relax the rigors of the strict common-law rule. The sting was taken from its bite. The crucial turning point, previously foreshadowed, appears to have taken place in the famous case of *Chamblee v. Baker*, decided in 1886.⁵⁵ Plaintiff, a farm laborer, was employed under an agreement to extend from February until the end of the year. It was agreed that the contract was entire. Seven months later he left without cause, defendant sustaining no damage. Plaintiff recovered in *quantum meruit*. Noting expressly the previous decisions in which recovery was denied, the court said: "The manifest injustice upon such technical grounds, of refusing all compensation for work done and not completed, or for goods supplied short of the stipulated quantity, and of allowing the party to appropriate them to his own use, without paying anything, has often been felt and expressed by the judges, and a mode sought by which the wrong could be remedied.

"The inclination of the courts is to relax the stringent rule of the common law, which allows no recovery upon a special unperformed contract, nor for the value of the work done, because the *special*, excludes an implied contract to pay. In such case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. Accordingly, restrictions are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when by the nature of the agreement, or by express provision, nothing is to be paid till all is performed."⁵⁶ (Italics added.)

Rigid adherence to this modified rule would result in a denial of recovery only as to contracts most carefully drafted to meet precisely such contingencies. If in those cases, prior and subsequent, which denied recovery, the contracts were expressly made entire, and provided against payment before complete performance, then there is no conflict. But the language of *Chamblee v. Baker* itself reveals that the common-law rule was having the thorns removed from its stem.

The actual decision seems to go even beyond the confines of its liberalized formula. The contract was expressly stated to be entire, yet the court "discovered" in the fact that twenty dollars had been paid at some time during the seven months an intent that full performance was not a prerequisite of recovery.

In some respects this decision has been justifiably recognized as epochal. It has been approved and followed, and never once has the

⁵⁵ Foreshadowed in *Gorham v. Bellamy*, 82 N. C. 497 (1880), accomplished in *Chamblee v. Baker*, 95 N. C. 98 (1886). This turning point, crucial in that it changed the law for several years, became less so when the court more recently reverted to the earlier cases. See *infra* notes 58 and 59.

⁵⁶ 95 N. C. 98, 101 (1886).

court uttered against it a word of disapproval.⁵⁷ Substantially in line with *Britton v. Turner*, it has with that case been accorded equal local praise. How strange then that mingled with subsequent cases are two in which the court proceeded as if *Chamblee v. Baker* had never been decided, and relied instead upon the harsh rule of *Winstead v. Reid*. The first of these, decided in 1900, involved indirectly the rights of a defaulting sharecropper.⁵⁸ Perhaps such a case is in line with the reasoning of *Chamblee v. Baker*. It is at least arguable that as to sharecropper contracts, economic reasons exist for withholding payment until performance has been completed. But this distinction does not appear in the opinion.

Less easily explained, however, is the recent case of *Lipe v. Citizens Bank and Trust Company*.⁵⁹ Here there was a contract to perform services for an elderly lady, in exchange for a promise to devise all her property to plaintiff. Testatrix died, leaving an estate valued at approximately \$16,000, and devising only \$3,000 to plaintiff. The action included counts on the contract and in *quantum meruit*. There was a finding of fact that plaintiff had not performed his contract, but he was allowed \$3,000 in *quantum meruit* by the lower court. This was reversed. Citing no authority, Mr. Justice Clarkson resolved the matter with dispatch: "In the present case the jury found on the first issue that there was a 'special contract,' and on the second issue that it was 'breached.' The finding on these two issues, the fifth issue, *quantum meruit*, became inoperative."⁶⁰ If this decision represents the law of North Carolina today, then the court has, without explaining away an imposing line of cases, reverted to the pre-*Chamblee v. Baker* "horse and buggy" days.

The plaintiff Lipe was fortunate in escaping the effect of the court's regression. On a subsequent trial, he obtained a finding that he had performed his contract in full, and received an affirmance on appeal.⁶¹ Yet on the facts found, the original decision before the Supreme Court stands as its latest pronouncement of the plight of the defaulting plaintiff.

Alleviating the harshness of the common-law rule by a policy of holding contracts divisible where possible has already been discussed.

⁵⁷ Followed in *Booth v. Ratcliffe*, 107 N. C. 6, 12 S. E. 112 (1890); *Indian Mountain Jellico Coal Co. v. Asheville Ice and Coal Co.*, 134 N. C. 574, 47 S. E. 116 (1904) (sales contract); *Willis v. Jarrett Construction Co.*, 152 N. C. 100, 67 S. E. 265 (1910) (sales contract).

⁵⁸ *Beacom v. Boing*, 126 N. C. 136, 35 S. E. 250 (1900). The action was by a mortgagee of a sharecropper, to foreclose his lien. The court held that the lien was lost when the sharecropper defaulted in performance of his contract with the owner of the land.

⁵⁹ 206 N. C. 24, 173 S. E. 316 (1934).

⁶⁰ 206 N. C. 24, 30; 173 S. E. 316, 319 (1934).

⁶¹ *Lipe v. Citizens Bank and Trust Co.*, 207 N. C. 794, 178 S. E. 665 (1935).

In this respect, too, *Chamblee v. Baker* appears as a vital turning point in judicial attitude.⁶² This has subsequently found frequent manifestations. At times it is effected by interpretation of the contract; *i. e.*, where rates of compensation are specified for successive units of performance.⁶³ Or the same result has been obtained by the type of proof offered. For example, in *Brewer v. Tysor*, plaintiff, a willful defaulter, failed to recover. But on a new trial he secured a judgment for units performed by proving that the contract was divisible.⁶⁴

This, to date, ends the checkered career of the defaulting plaintiff in North Carolina. In employment and in sales contracts his hopes for future victories depend largely upon his ability to employ *Indian Mountain Jellico Coal Company v. Asheville Ice and Coal Company*⁶⁵ and *Chamblee v. Baker*⁶⁶ as effective implements of legal warfare, and in his power to convince the court that his contract is divisible.

One writer has observed that the defaulting plaintiff has with less frequency sought relief in the past quarter century.⁶⁷ Since the question has been before the North Carolina court eight times since 1900,⁶⁸ this statement is not locally applicable. Small wonder, since the two lines of authority make prediction by the attorney so much a matter of guesswork. Favorable legislation has in other jurisdictions rendered legal battles less frequently necessary. Most important is that requiring

⁶² That is, the common law rule of no recovery "is confined to contracts entire and indivisible, and when by the nature of the agreement, or by express provision, nothing is to be paid till all is performed." *Chamblee v. Baker*, 95 N. C. 98, 102 (1886). The suggestion of Mr. McGowan, to which reference has been previously made (see *supra*, note 18), is that if the contract is found to be divisible, plaintiff's recovery for units performed would be by action on the contract. It is not clear whether the above quotation from *Chamblee v. Baker* calls for an action on the contract or in *quantum meruit*. The action in that case was in *quantum meruit*. But in *Johnson v. Dunn*, 51 N. C. 122 (1858) it was on the contract, Pearson, C. J., finding the agreement divisible. Plaintiff recovered in both cases. See also, *infra*, note 64.

⁶³ In *Johnson v. Dunn*, 51 N. C. 122 (1858) the rate of compensation was \$25 per month. The court held the contract divisible, in spite of an express provision for payment in a flat sum at the end of the year. See also *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 736 (1892), contract for sale of building and stock of goods; *Pasquotank and N. River Steamboat Co. v. Eastern Carolina Transportation Co.*, 166 N. C. 582, 82 S. E. 956 (1914), contract for hire of steamboat every Sunday, at \$80 per Sunday, for a specified period. For an early case to the contrary, involving an employment contract, see *White v. Brown*, 47 N. C. 403 (1855).

⁶⁴ *Brewer v. Tysor*, 48 N. C. 181 (1855); *Brewer v. Tysor*, 50 N. C. 173 (1857). The action on the second trial was on the contract.

⁶⁵ *Supra*, note 35.

⁶⁶ *Supra*, note 55.

⁶⁷ McGowan, *Divisibility of Employment Contracts* (1935) 21 IOWA L. REV. 50, 66.

⁶⁸ See *supra*, notes 32, 49, 50 and 51. It may be true, even in North Carolina, that in many instances the defaulting laborer chooses to suffer a loss rather than incur the expense of carrying his case through the courts, with the spectre of an unfavorable decision in the offing. It is not improbable also, that trial courts in the State are disposing of the cases in a sensible manner.

payment of wages at frequent intervals.⁶⁹ Such legislation in North Carolina is conspicuously absent.⁷⁰ Speculation as to the causes suggests legislative inertia, or the lack of organized pressure among those most interested—unskilled laborers. In many respects such legislation may be now unnecessary. Indeed, for factory hands, the problem is perhaps largely non-existent. Their employment is from week to week, and in like manner are they paid.

But for present purposes such legislation is beside the point. It is usually applicable only to employers operating on a fairly large scale. Not one of the cases discussed in this paper involved a factory hand. Rather they include farm hands, sharecroppers, one who promises to support in exchange for a flat sum or a devise of land, one who occasionally contracts to do a specific piece of labor, etc. All these latter remain beyond the legislative pale. At present they can only hope for a judicial attitude of friendliness toward the rule of *Britton v. Turner*.

⁶⁹ McGowan, *Divisibility of Employment Contracts* (1935), 21 IOWA L. REV. 50, 69-78; Laube, *The Defaulting Employee* (1935) 83 U. OF PA. L. REV. 825, 844-7, 850-1.

⁷⁰ N. C. CODE ANN. (Michie, 1935) §6558 provides for payment of railroad employees twice monthly. It seems to be the only North Carolina enactment of its kind.