Supreme Court of Canada

Dartmouth Ferry Commission *v*. Marks (1904) 34 SCR 366

Date: 1904-02-16

The Dartmouth Ferry Commission (Defendants)

Appellants

and

Jane Marks, Executrix of John H. Marks, deceased (Plaintiff)

Respondent

1903: Dec. 7; 1904: Feb. 16.

Present:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Master and servant—Contract of service—Termination by notice—Incapacity of servant—Permanent disability—Findings of fury—Weight o evidence.

Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor or by the employer paying or the employee forfeiting a month's wages:

*Held,* reversing the judgment appealed from (36 N. S. Rep. 158) that illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract.

*Held,* also, Killam J. dissenting, that an illness terminating in the employee's death and during the whole period of which he is incapacitated for service is a permanent illness though both the employee and his physician believed that it was only temporary.

By a rule of the employer an employee was only to be paid for time he was actually on duty. One of the employees had accepted and signed a receipt for a month's wages from which the pay for two days on which he was absent from duty was deducted and his conversations with other employees shewed that he was aware of the rule, but no formal notice of the same was ever given him. Having died after a long illness his executrix brought an action for his wages during such period and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in his employment under the terms thereof.

*Held,* that such finding was against evidence and must be set aside.

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Appeal from a decision of the Supreme Court of Nova Scotia[[1]](#footnote-2) maintaining the verdict at the trial in favour of the plaintiff.

This action was brought by the plaintiff, a widow, as executrix of the last will and testament of her husband, the late John H. Marks, deceased. The defendant is a body corporate and maintains and operates a line of ferry steamers across the Harbor of Halifax, between the Town of Darmouth and the City of Halifax. The said John H. Marks in his lifetime was in the employ of the defendant as captain of one of the defendant's ferry steamers. The agreement under which he was employed was in writing and is as follows:—

"No. 7 Memorandum of Agreement between the Darmouth Ferry Commission of the one part and John H. Marks of Darmouth in the Countyof Halifax of the other part.

"The said John H. Marks agrees to serve the Dartmouth Ferry Commission in the capacity of captain at the monthly wages of sixty dollars per month. Such service to commence on the first day of March, A. D. 1899, the wages for each calendar month to be paid on the 10th day of the following month, and such service to be terminated by one calendar month's notice on either, side, to be given at any time. Should either party wish to terminate the service without such notice the Commission to be entitled to do so by paying one month's pay, and the said John H. Marks by forfeiting to the Commission one months pay. Any period of service prior to the commencement of a calender month to be paid *pro raiâ* on the 10th day of such calendar month. Nothing in these presents to effect the right of either party to terminate the relation hereby created for lawful causes.

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"In witness whereof, the party of the first part has hereunto subscribed his name, and the parties of the second part have hereto affixed their corporate seal.

Witness JOHN H. MARKS.

H. Watt. A. C. JOHNSON,

*Chairman*.

WALTER CREIGHTON,

[Seal] *Act. Secretary.*

Under this agreement Marks began serving the defendant as captain on the first day of March 1899. A resolution was passed at the meeting of the commission held on 8th January, 1900, as follows, namely "Resolved. That after this date no employee will be paid for any time he or she be absent from duty." There is no evidence of any formal notice to Marks of the contents of this resolution but he submitted to a deduction of wages under it and admitted knowledge of it to other employees. Marks became ill on the 15th December, 1900, and from that time until the date of his death was not able to perform his duties as captain of the defendants' steamer. He was confined to the house for three or four months. In May, June and July, he was able to be out of doors and apparently was recovering. Dr. Cunningham, who attended him, thought that he might be able to get back to work in the summer and told him so. Dr. Stewart, a consulting physician who was called in consultation with Dr. Cunningham, also considered the illness a temporary one. However, early in July, 1901, Marks became much worse and called Dr. Smith in attendance upon him who diagnosed the case as cancer of the stomach in an advanced stage. He died on 16th July, 1901.

The plaintiff, as executrix, brought this action to recover $416.00 wages from 15th December, 1900,

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until 16th July, 1901, at $60 per month under the said agreement.

The action came on for trial before the Chief Justice of Nova Scotia with a jury, at Halifax, during the April term of the Supreme Court, 1902. Questions were submitted to the jury whose answers were as follows:

"1. Was the resolution of January 8th, 1900, communicated to John H. Marks shortly after its adoption by the defendant Commission? A. No."

"2. Did the said John H. Marks continue in the employ of the defendant Commission after notice of this resolution and acquiese in said employment under the terms of said resolution? A. No."

"3. Did the said John H. Marks remain in the active discharge of his duties in the employment of the defendant Commission until his death? A. In the employ but not active."

"4. Was the illness of said John H Marks and of which he died of temporary or permanent character? A. Temporary."

"5. Was John H. Marks after the 16th day of December, 1900, prevented by a permanent illness from performing any service under his contract with the defendant? A. No."

On these findings the learned Judge directed judgment to be entered for the plaintiff for $416.00, the amount of her claim.

From that judgment the defendant appealed to the Supreme Court of Nova Scotia *in banco* and moved to set aside the findings of the jury and for judgment in favour of the defendant.

The said appeal and motion came on for argument before the Supreme Court of Nova Scotia in *banco,* the following Judges being present, viz., Weatherbe J., Townshend J., Graham E. J., and Meagher J. The

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court were evenly divided in opinion, Mr. Justice Weatherbe and Mr. Justice Graham being of opinion that the appeal and application for new trial should be dismissed and that the plaintiff should have judgment, while Mr. Justice Townshend and Mr. Justice Meagher were of the opinion that judgment should be entered for the defendant. In accordance with the practice of the Supreme Court of Nova Scotia an order was granted dismissing the said appeal and application without costs. From this judgment the present appeal has been asserted by the defendants.

*Russell K C.* and *McInnis* for the appellants. In a contract for service it is an implied condition that the servant will continue to be in a state of health which will enable him to perform his services. *Johnson* v. *Walker[[2]](#footnote-3)*; *Robinson* v. *Davison[[3]](#footnote-4)*; *Boast* v. *Firth[[4]](#footnote-5)*.

Respondent's deceased husband was aware that he would not be paid for the time he was absent and acquiesced in that condition of his service.

Judgment can be entered for appellant notwithstanding the findings of the jury. *Nixon* v. *Queen Ins. Co.[[5]](#footnote-6)*; *McDowell* v. *Great Western Railway Co.[[6]](#footnote-7)*.

*W. B. A. Ritchie K. C.,* for the respondent. There was a yearly hiring of respondent which could not be divided. *Cuckson* v. *Stones[[7]](#footnote-8)*; followed in *K——* v. *Raschen[[8]](#footnote-9)*

There was no acquiescence in the resolution. *De Busche* v. *Alt[[9]](#footnote-10)*; and no estoppel; *Proctor* v. *Bennis[[10]](#footnote-11)*.

The CHIEF JUSTICE and SEDGEWICK and NESBITT JJ. concurred in the opinion of Mr. Justice Davies.

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DAVIES J.—The late Captain John Marks, on or about the 1st of March, A.D. 1899, entered into a written agreement with the Dartmouth Ferry Commission, as follows:

No. 7. Memorandum of agreement between the Dartmouth Ferry Commission of the one part and John H. Marks of Dartmouth, in the county of Halifax, of the other part.

The said John H. Marks agrees to serve the Dartmouth Ferry Commission in the capacity of captain at the monthly wages of sixty dollars per month. Such service to commence on the first day of March, A.D. 1899, the wages for each calendar month to be paid on the tenth day of the following month, and such service to be terminated by one calendar month's notice on either side, to be given at any time. Should either party wish to terminate the service without such notice, the commission to be entitled to do so by paying one month's pay, and the said John H. Marks by forfeiting to the commission one month's pay. Any period or service prior to the commencement of a calendar month to be paid *pro ratâ* on the tenth day of such calendar month. Nothing in these presents to affect the right of either party to terminate the relation hereby created for lawful cause.

Captain Marks continued in the service of the Commission until the 15th of December, 1900, when he became ill and unable to work. He never was able to resume his work after that date, and on the 16th July, 1901, he died. The commission paid him his wages up to the 15th of December, 1900, that being the last day he worked for them, and he signed the December wage or pay list acknowledging receipt of the amount paid to him. There is no evidence whatever as to what took place at the time Captain Marks received this payment and signed the pay list. Some time previously, on 8th January, 1900, the commission had passed a resolution

that, after this date, no employee will be paid for any time he or she be absent from duty,

but there was no evidence that this resolution had been communicated to Marks. There was abundant evidence, however, that he knew of the resolution having been passed, and complained or grumbled to

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some of his fellow employees about it. Evidence was also given that in the month of April, 1900, four months after the resolution was passed, Marks was docked in the pay sheet for the month for one day he had been absent, and that he signed the pay sheet receiving $58 for his month's pay; also that he signed the December pay sheet in which he was docked for all the working days of the month after the fifteenth when he was taken ill and gave up work.

After Captain Marks's death, his executrix brought this action for seven months' wages up to the day of his death, contending, first, that the commission could not by resolution change or import a new term into the written contract with deceased, and that the evidence did not show any such acquiescence or consent on his part to the resolution as bound him, nor any conduct on his part inconsistent with his rights under the agreement. She contended, further, that illness on the part of Captain Marks incapacitating him during all the seven months sued for from discharging any of his duties under his agreement with the commission and terminating with his death, while it might have justified the commission in putting an end to the agreement by notice as therein provided, did not, in the absence of any such determination of the contract, prevent him or his executrix, after his death, from recovering his wages.

The case was tried before the Chief Justice, with a jury, and the questions put to the latter and the answers given by them are as follows:

1. Was the resolution of January 8th, 1900, communicated to John H. Marks shortly after its adoption by the defendant Commission?—No.

2. Did the said John H. Marks continue in the employ of the defendant Commission after notice of this resolution and acquiesce in said employment under the terms of said resolution?—No.

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3. Did the said John H. Marks remain in the active discharge of his duty in the employment of the defendant Commission until his death?—In the employ, but not active.

4. Was the illness of the said John H. Marks, and of which he died, of temporary or permanent character?—Temporary.

(Added at the instance of Mr. Ritchie.)

5. Was John H. Marks, after the 16th day of December, 1900, prevented by a permanent illness from performing any services under his contract with the defendant?—No.

Under these findings, the Chief Justice directed judgment to be entered for the plaintiff for the full amount of the claim and, on the case coming before the full court of Nova Scotia on a motion to set aside these findings, the court being equally divided, the motion was dismissed.

From this judgment the Dartmouth Ferry Commission appealed to this court.

In the view I take of the law, it is not necessary for me to say anything on that branch of the appeal which relates to the "no work no pay" resolution, so-called.

I agree with Mr. Justice Townshend on the substantial question of the liability of the defendants to pay Captain Marks wages for the seven months during which he never worked or was able to work. From the day when he first gave up his work, 15th December, until the day of his death, Captain Marks was a sick man, utterly unable to discharge his duties and made no pretence of being able to do so. He was from that date, beyond any doubt, permanently disabled by sickness from attending to his work. Some argument was attempted to be advanced that when he was first taken ill, he himself hoped and his medical adviser also hoped and believed his illness was only temporary. But in the face of the facts which subsequently developed that he was suffering from an incurable malady, which soon afterwards caused his death, it does not appear to me possible seriously to argue that

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the deceased's illness was only temporary. The findings of the jury on this point are clearly contrary to the evidence and the facts and must be set aside. It is quite true that the deceased and his medical adviser both hoped and believed, at first, that his illness was only temporary, but their belief or hope cannot alter the truth subsequently disclosed. That truth is now admitted and is beyond controversy that on and after the 15th of December, when Captain Marks ceased working, he was permanently disabled from doing his work he had contracted to do. In law, this disablement is termed the act of God. It not only, in my opinion, justified the Commission in formally determining the contract, if they had chosen to take that course, but by rendering it impossible that he could ever afterwards discharge his duties under his contract, the permanent disablement determined and ended the contract. The consideration which moved the Commission to promise wages was gone. The mutuality necessary for longer continance of the contract ceased Captain Marks could not be sued by the Commission for non-performance by him of his promise to serve them in the capacity of captain of one of their steamers. He could plead to any such action, disablement or incapacity by the act of God. The same result would have followed if he had become insane or had lost the physical use of his limbs. The fact of the disablement arising from occult internal troubles cannot make any difference. There is no analogy between such permanent disablement and temporary sickness. The law permits the latter on the ground of common humanity to be offered as an excuse for not discharging duty temporarily and suffers the disabled party to recover wages for the time he is temporarily away from his work. But while releasing the permanently disabled workman from damages for the non-performance of his

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contract, it does not permit him to recover wages without doing, work. No case can be found so deciding. We are asked to create a precedent. This permanent disability goes to the very root of the consideration for the promise on the part of the Commission to pay wages. The covenant on the part of the employee to serve as master was not one independent of the employer's covenant to pay wages. They were interdependent and the promise to pay was dependent upon the performance of the work covenanted to be done. The belief of the employee or his medical adviser that the former's disability was only temporary cannot affect the question in the light of the subsequent knowledge which revealed its permanency. The excuse for not working for a short time, which a temporary illness would justify, cannot apply to absence from work caused by permanent disability. The reasoning on which the cases were decided of *Boast* v. *Frith[[11]](#footnote-12)*; *Robinson* v. *Davison[[12]](#footnote-13)*; *Poussard* v. *Spiers[[13]](#footnote-14)*; and also the case of *Johnson* v. *Walker[[14]](#footnote-15)*; fully sustain these propositions.

The action, therefore, must fail, but, while setting aside the findings of the jury on the fourth and fifth questions, as being contrary to the evidence, we are not able, under the Judicature Rules of Nova Scotia, as interpreted by this court in the recent case of *Green* v. *Miller[[15]](#footnote-16)*, to direct judgment to be entered for the defendant as such a judgment would be inconsistent with the findings of the jury.

The appeal should be allowed with costs in this court and in the court appealed from and a new trial ordered, the costs of the trial to abide the event.

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KILLAM J.—This is an appeal from a decision of the Supreme Court of Nova Scotia in an action brought by the executrix of the will of the late John H. Marks, a former employee of the appellant commission, to recover wages for a period during which the deceased was wholly incapacitated by illness from performing any service. The cause was tried by a jury, and upon their answers to certain specific questions judgment was entered for the plaintiff for the full amount claimed. A motion was made to set aside the findings as being against the weight of evidence and to have the action dismissed. Upon an equal division the court refused the motion.

There is a singular dearth of clear authority respecting the effect of the disability of an employee arising from illness upon the right to wages and in determining or giving the right to determine the contract of service.

In *Chandler* v. *Grieves[[16]](#footnote-17)*, it was held that a seaman was entitled to wages for a period during which he was wholly disabled through an injury received in the course of his duty. The court said that

clearly the law marine ought to be followed in the construction of the contract, and they directed an inquiry to be made in the Court of Admiralty whether, according to the usage there adopted, a disabled seaman, in similar circumstances, would be entitled to wages for the whole voyage, or only up to the time he was so disabled.

After inquiry, it was stated

that in every case there to be found, a seaman disabled in the course of his duty was holden to be entitled to wages for the whole voyage, though be had not performed the whole.

In Abbott on Shipping, (7 ed.) p. 619, it is laid down that

as a seaman is exposed to the hazard of losing the reward of his faithful service during a considerable period in certain cases so, on the other hand, the law gives him whole wages, even where he ha3 been

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unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty or from natural sickness happening to him in the course of the voyage.

In *Beale* v. *Thompson[[17]](#footnote-18)*, after referring to *Chandler* v. *Grieves[[18]](#footnote-19)*, Chambre J. said:

In every contract of service, the contract goes on though the servant be disabled by sickness. A servant is never conceived to enter into an engagement that he will continue in health; it is no part of the contract that he will do so.

Heath J. said;

The hiring of mariners for a voyage is an executory contract, the service must be performed before. the wages become due. There are many things which will dispense with the actual service, such as sickness and any accidental infirmity that happens after the mariner has entered on his services; but then the mariner is usually on the ship and the ship is earning freight, so that there is a fund out of which the wages may be paid.

And Lord Alvanley C. J. said:

On these articles the contract must be considered as entire, and as long as that contract subsists there can be no such thing as an interruption; it is either entirely at an end or entirely subsists.

The case usually cited as the leading authority is *Cuckson* v. *Stones[[19]](#footnote-20)*. In reality, however, the decision was founded upon the special nature of the contract in question, as Lord Campbell C. J. distinctly indicated.

The plaintiff was employed as an expert brewer for ten years. The defendants were to pay him a lump sum in advance and weekly wages and to furnish him with a house and with coals for the whole term. About a year from the end of the term, the plaintiff became ill and continued so for about seven months, during which time he was unable to personally attend to the business, but gave advice to the defendants who consulted him from time to time. The defendants paid the wages for some months of the period of illness and, upon the plaintiff's recovery, he went on with his

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work and was paid as before. It was admitted that the contract continued. As declared and as proved, the promise to pay was clearly an independent promise, the consideration for which was the plaintiff's executory promise to serve; and the agreement to pay wages was only a part of the consideration for the plaintiff's promise. There was but one entire contract. Upon general principles, the performance of the service was not a condition precedent to the obligation to pay. Disability arising from natural illness was an absolute excuse for non-performance. There was no default on the part of the plaintiff. The decision affords very little assistance in determining whether, under a contract such as that now in question, actual service is an absolute condition precedent to the right of payment. It is important, however, for an expression of opinion by Lord Campbell regarding the effect of illness upon the relation of the parties. He said:

We concur in the observation of Willes J. in *Harmer* v. *Cornelius[[20]](#footnote-21)*, and if the plaintiff from unskilfuness had been wholly incompetent to brew, or by the visitation of God he had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of brewer for the defendant, we think the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, we think the defendant ought to have dismissed him and employed another in his stead. Instead of being dismissed, he returned to the service of the defendant when his health was restored and the defendant employed him and paid him as before. At the trial the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that under this contract, there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force, we see no difference between his being so disabled for a day or for a week or for a month.

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These views were pronounced as indicating the considered opinion of the court. They do not seem to have been since questioned by any court. They should, I think, be accepted as governing the rights of the parties under contracts of a similar nature.

In *K ——* v. *Raschen[[21]](#footnote-22)*, the plaintiff had been employed at a yearly salary subject to dismissal on one month's notice. The service began on the 2nd of July, and continued until the 30th of July, when the plaintiff was given leave of absence until the 6th of August, on account of illness. He remained unable to work until the 2nd of September, when he returned and tendered his services, which were refused. On the 20th of August he was given notice that he was dismissed. He Was held entitled to recover his wages for the whole period of illness. So far as the report shews the only serious position raised was upon the defendant's contention that there was no liability because, it was claimed, the illness was due to the plaintiffs own misconduct. It appeared, however, that the misconduct occurred before the engagement, and there was nothing to indicate that the plaintiff knew, when he contracted, that he was afflicted with an infirmity likely to disable him. The court considered that illness was to be taken as *primâ facie* due to the act of God, and that the plaintiff should not be deemed to have warranted his permanent capacity for work.

In *Elliott* v. *Liggens[[22]](#footnote-23)*, the plaintiff was employed at weekly wages, subject to dismissal on a week's notice He was partially incapacitated by accident but continued to work as well as his condition allowed for several months, when he was dismissed upon the agreed notice. He claimed and was awarded, by agreement, half his weekly wages by way of

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compensation under the "Workmen's Compensation Act, 1897." After his discharge, he sued in a County Court for the remainder of the weekly wages and recovered judgment. The King's Bench Division reversed the decision on the ground that, by claiming and receiving the compensation, he lost any right which he might otherwise have had to his ordinary wages. The opinion of the court upon the right, if this had not been done, was not indicated.

It seems clearly settled that under a contract to furnish the personal services of a particular person, there is an implied qualification that it is subject to such person being in health to perform the services when the time for their performance comes, and that the party so contracting is excused by the disability, without his fault, of the person who is to render the services. *Boast* v. *Frith[[23]](#footnote-24)*; *Robinson* v. *Davison[[24]](#footnote-25)*; *Poussard* v. *Spiers[[25]](#footnote-26)*; *Spalding* v. *Rosa[[26]](#footnote-27)*; *Dickey v. Linscott[[27]](#footnote-28)*.

In *Poussard* v. *Spiers* (3), the employer was held excused for refusing to accept the services where the performer was disabled when the time came for entering upon them and the time was deemed so material as to be of the essence of the contract.

The contract in question in the present case was in writing and was set out and admitted in the pleadings. It was as follows:

No. 7.—Memorandum of Agreement between The Dartmouth Ferry Commission, of the one part, and John H. Marks, of Dartmouth, in the County of Halifax, of the other part.

The said John H. Marks agrees to serve The Dartmouth Ferry Commission in the capacity of captain at the monthly wages of sixty dollars per month. Such services to commence on the first day of March, A.D. 1899, the wages for each calendar month to be paid on the tenth day of the following month, and such service to be

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terminated by one calendar month's notice on either side, to be given at any time. Should either party wish to terminate the service without such notice, the commission to be entitled to do so by paying one month's pay, and the said John H. Marks, by forfeiting to the commission one month's pay. Any period of service prior to the commencement of a calendar month to be paid *pro* *ratâ* on the tenth day of each calendar month. Nothing in these presents to affect the right of either party to terminate the relation hereby created for lawful cause.

In witness whereof, the party of the first part has hereunto subscribed his name and the parties of the second part have hereunto affixed their corporate seal.

Witness,

(Signed) H. Watt.

(Signed) JOHN H. MARKS.

(Signed) A. C. JOHNSTON,

*Chairman,*

(Signed) WALTER CHREIGHTON,

(Seal.) *Act Secretary.*

Marks served the commission in the capacity of master of a ferry boat from the 1st of March, 1899, to the 15th of December, 1900. From the latter date until the 16th of July, 1901, when he died, he was wholly incapacitated by illness from performing any services and performed none. This is distinctly established by the evidence of the plaintiff herself.

If then, upon a proper construction of this contract, the actual performance of service during each month was an absolute condition precedent to the right to payment of the wages for the month, the action should have been dismissed.

Although the deceased was employed in the work of navigation, it does not appear to me that it is to be presumed that the parties contracted with reference to the custom found in *Chandler* v. *Grieves[[28]](#footnote-29)* to prevail in the employment of mariners on sea-going ships. There is no evidence of any custom which the parties can be assumed to have had in view.

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In *Lampleigh* v. *Braithwaite[[29]](#footnote-30)*, it is said;

But, if it be executory, as in consideration that you will serve me a year I will give you ten pounds, here you cannot bring your action till the service performed. But if it were a promise, on either side, executory, it needs not to aver preformance; for it is the counter-promise and not the performance that makes the consideration.

And in *Thorp* v. *Thorp[[30]](#footnote-31)*, Holt C. J. said:

If A. covenant with B. to serve him for a year and B. covenant with A. to pay him ten pounds, there, A. shall maintain an action for ten pounds before any service; but if B. had covenanted to pay ten pounds for the said service, there A. could not maintain an action for the money before the service performed. And there is a great reason for this diversity; for when one promises, agrees or covenants to do one thing for another, there is no reason he should be obliged to do it till the thing for which he promised to do it is done; and the word "for" is a condition precedent in such a case. See also Y. B. 15 H. VII.. 10 pl. 17.

The modern principle is to endeavour to ascertain from an examination of the whole contract what was the real intention of the parties; but if it appears that it was the performance and not the promise that was to constitute the consideration for the counter-promise, this still gives rise to the presumption that performance was intended to be a condition precedent.

Here the only specific promise is that of Marks to serve in a certain capacity at certain wages. The counter-promise to pay must be inferred from the words "to be paid". The monthly wages were to be paid after the month's service was to be rendered. Upon these circumstances alone, the natural presumption would appear to be that the performance of each month's service was to be a condition precedent to the right to the month's wages. But, if so, complete performance would be necessary. Failure of performance for one day would, unless some qualification is to be implied from the nature and subject

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matter of the contract, involve the same result as a failure for all but one day. It is a well established principle that, under such a contract, failure to serve for a portion of a month, when attributable to the fault of the employee, disentitles him to the wages for the whole month. For each month the contract is entire. I do not think that, in the absence of an express stipulation, an intention would be implied that, upon partial failure of performance due to illness, the monthly wages were to be apportioned. In the case of a domestic servant this would certainly not be done. I see no greater reason for implying it in the case of a clerk employed in an office or shop, or of one in the occupation of the deceased.

In the contract before us are the words,

any period of service prior to the commencement of a calendar month to be paid *pro rata* on the tenth day of such calendar month.

These follow immediately the provisions for termination of the contract at any time, not necessarily at the end of a month, and were probably directed particularly to that contingency. I cannot infer from their use an intention that a deduction should be made for time lost through illness if this should not be inferred from the previous language.

The real qualification to be implied is, I think, the one recognized in the cases to which I have referred. As the employee does not warrant the continuance of his physical ability to work, he does not contract absolutely and at all events to do so. Disability due to illness excuses him. And since his promise is so qualified, strict and full performance of service is not a condition precedent to the right to wages. The wages are payable for such service as he can reasonably be called upon to give and for such only.

These appear to me to be the principles justifying the decison in K———v *Raschen[[31]](#footnote-32)* and the judicial

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opinions expressed in *Beale* v. *Thompson[[32]](#footnote-33)* And there seems to be no ground for distinguishing between different periods of illness, so long as the contract subsists. Disability due to this cause and lasting for months would not seem to have a different effect from such disability lasting for nine-tenths of a month or for one day only. There is no precise point at which a line can be drawn. I cannot concur in the opinion which I understand to be held by the other members of this court, that the illness of Marks, *ipso facto,* put an end to the contract. Both the question as to whether the illness of which Marks died was of a temporary or permanent character and the answer appear, at first sight, anomalous. But they were evidently dictated by the peculiar nature of the case. Apparently, Mark's illness was not considered to be permanent until a few days before his death. He appeared to be recovering, but he then had a relapse which resulted fatally. And it was fully open to the jury to find, upon the medical evidence, that the malady which incapacitated him for nearly the whole of the seven months was independent of that which brought about the death and that the existence of the latter was unsuspected until the relapse occurred.

The jury have found that Marks remained in the employ of the commission until his death; that is, they found that the contract remained undetermined. The evidence appears to me to have justified the finding. There was no date, prior to the end of June, when the parties deemed the contract as determined. Month by month, as I interpret the original contract, the wages would accrue. And once accrued, the right to them could not be taken away by what subsequently occurred or became apparent.

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In the words of Lord Alvanley *in Beale* v. *Thompson,[[33]](#footnote-34)*

as long as that contract subsists there can be no such thing as an interruption; it is either entirely at an end or entirely subsists.

Lord Campbell, in *Cuckson* v. *Stones,[[34]](#footnote-35)* put incapacity arising from illness on the basis of incompetency, as giving a right to determine the contract. But it would be clearly in the power of the master to waive a right to discharge for the incompetency of the servant; and so, I think, the right to discharge for incapacity arising from illness would be waived and lost by conduct shewing a continuance of the employment.

I am, however, of opinion that the answer to the second question was against the weight of evidence. It was a double question:

Did the said John H. Marks continue in the employ of the defendant commission after notice of this resolution and acquiesce in said employment under the terms of said resolution?

The resolution referred to was adopted by the commission on the 8th January, 1900, and was as follows:

That after this date no employee will be paid for any time he or she be absent from duty.

Marks did remain in the employment of the commission after the passing of the resolution. There is no question about that. In accordance with the resolution, deductions were made from his wages for time lost. He accepted the payments and receipted for them. He is dead and the secretary whose duty it would be to give him formal notice of the resolution is dead. The proper inference from the circumstances is that Marks had notice of the resolution. Witnesses testified orally to conversations with Marks which, if believed, shewed that he both knew of and had assented, though unwillingly, to the modification of his contract proposed by the resolution. No evidence

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was given of any refusal by him to accept the terms of the commission or of any claim by him to the wages deducted or to wages for any period of his illness. There was no contradictory testimony.

The evidence appears to me overwhelmingly in favour of the view that Marks, by his conduct, if not in words, expressed to the commission his assent to the modification proposed, and that the commission was thereby induced to continue him in its service. If he had not led them to believe in his assent, they would, no doubt, have long ago discharged him.

I cannot help thinking that the jury failed to fully comprehend the question. They may have thought that formal notice was intended, or that the acquiescence must be willing and with approbation.

It does not appear to me that the corporate seal raises any difficulty. The commission did not agree to retain Marks in its service or to pay him for a definite period. The contract was determinable on either side by the giving of a month's notice, or by payment or loss of a month's wages. It was quite competent for the parties to take notice of the resolution as a notice of intention to discharge from the former contract and to agree upon a continuance of the service only upon special terms. It was quite competent for Marks to waive formal or more definite notice or to accept employment on the new terms in lieu of the monthly wages.

Upon the ground that the answer to the second question was against the weight of evidence, I assent to the allowance of the appeal and the granting of a new trial.

Appeal allowed with costs.

Solicitors for the appellants: F. W. Russell.

Solicitors for the respondent: R. E. Finn.

1. 36 N. S. Rep. 158. [↑](#footnote-ref-2)
2. 155 Mass. 253. [↑](#footnote-ref-3)
3. L. R. 6 Ex. 269. [↑](#footnote-ref-4)
4. L. R. 4 C. P. 1 [↑](#footnote-ref-5)
5. 23 Can. S. C. R. 26. [↑](#footnote-ref-6)
6. [1903] 2 K. B. 331. [↑](#footnote-ref-7)
7. 1 E. & E. 248. [↑](#footnote-ref-8)
8. 38 L. T. 38. [↑](#footnote-ref-9)
9. 8 Ch. D. 286. [↑](#footnote-ref-10)
10. 36 Ch. D. 740. [↑](#footnote-ref-11)
11. L. R. 4 C. P. 1. [↑](#footnote-ref-12)
12. L. R. 6 Ex. 269. [↑](#footnote-ref-13)
13. 1 Q. B. D. 410. [↑](#footnote-ref-14)
14. 155 Mass. 253. [↑](#footnote-ref-15)
15. 33 Can. S. C. R. 193. [↑](#footnote-ref-16)
16. 2 H. Bl. 606n. [↑](#footnote-ref-17)
17. 3 B. & P. 405. [↑](#footnote-ref-18)
18. 2 H. Bl. 606*n*. [↑](#footnote-ref-19)
19. 1 E. & E. 248. [↑](#footnote-ref-20)
20. 5 C. B. N. S. 236. [↑](#footnote-ref-21)
21. 38 L. T.38. [↑](#footnote-ref-22)
22. [1902] 2 K. B. 84. [↑](#footnote-ref-23)
23. L. R. 4 C. P. 1. [↑](#footnote-ref-24)
24. L. R. 6 Ex. 269. [↑](#footnote-ref-25)
25. 1 Q. B. D. 410. [↑](#footnote-ref-26)
26. 71 N. Y. 40. [↑](#footnote-ref-27)
27. 20 Me. 453. [↑](#footnote-ref-28)
28. 2 H. Bl. 606 n. [↑](#footnote-ref-29)
29. Hob. K. B. 105. [↑](#footnote-ref-30)
30. 12 Mod. 455. [↑](#footnote-ref-31)
31. 33 L. T. 38. [↑](#footnote-ref-32)
32. 3 B. & P. 405. [↑](#footnote-ref-33)
33. 3B. & P. 405. [↑](#footnote-ref-34)
34. 1 E. & E. 248. [↑](#footnote-ref-35)