Chapter 14: Contracts

William Sherry
CHAPTER 14

Contracts

WILLIAM SHERRY

A. FORMATION

§14.1. Testamentary contracts. There are well-settled legal principles governing cases involving an alleged oral agreement to leave property by will in exchange for services rendered to the decedent during his or her lifetime. An express contract is not required. If the services were rendered with the understanding that they were to be paid for, or if the decedent understood, or should have reasonably understood that such services were not intended as a gift, or if the decedent, although not intending to pay for the services, knew that the claimant expected to be reimbursed, and, nevertheless, accepted them, the claimant is entitled to recover.1 The recovery in these cases is not for breach of contract for such a claim is precluded by the statute of frauds.2 Instead, the claimant may recover in quantum meruit for the fair value of the services rendered.

As one reads these cases he cannot help but suspect that expectations of becoming the object of a testator’s bounty may often develop after the contents of testator’s will are made known rather than at the time the services are actually rendered. Because of the propensity for such a rationalization by an expectant legatee, one would imagine that the courts would require very substantial proof of an oral promise to leave property by will. However, this has not been the case with the Supreme Judicial Court.

In Heil v. McCann,3 the original plaintiff, Herman L. Heil,4 brought an action to recover for personal services rendered to the defendant’s testatrix, Delia J. King, from 1954 until she was placed in a nursing home in 1965. Mr. Heil alleged that the defendant’s testatrix requested

2 See G.L., c. 259, §§5, 5A, which provide that no agreement to make a will of real or personal property, or to give a legacy or make a devise, shall be valid unless executed with the requisite formalities.
4 Mr. Heil died after the action was brought. The administrator of his estate thereafter appeared to prosecute the action.
him to perform personal services for her and promised to make provision for him in her will. It was further alleged that he did perform the requested service and that, notwithstanding the fact that the agreement was unenforceable, he was entitled to recover in equity for the fair value of the services rendered.

The facts adduced in the lower court established that in about 1954 Delia King began living with Mr. Heil and his wife. She became a full-time boarder in 1957, and remained so until she was placed in a nursing home in 1965. Miss King paid room rent of $20 a month from 1954 to 1957, $28 a month from 1958 to 1962, and $38 a month from 1963 to 1965. Additionally, her nephew and executor, Mr. McCann, paid $40 a month for Miss King’s rent and food from February through December, 1965.

The municipal court judge found that Miss King, “in consideration of the services rendered[,] ... promised to make provisions for [Mr. Heil] in her will.” This finding was based on two evidentiary sources. First, there was testimony by Mr. Heil’s son, the administrator of his estate, that “about 1957, his father told him that Delia King said she would take care of [Mr. and Mrs. Heil] in her will.” Second, in answer to interrogatories given before his death, Mr. Heil stated that his conversations with Miss King concerning his services or payment for his services took place in his home, in the presence of his wife, “‘starting in January 1954, at meal times when we ate our meals together or when we were in my apartment from time to time. I cannot remember the exact dates, but every few weeks and when she was confined to her bed in 1965 almost every day. . . . She told us that she would make it up to us by taking good care of us in her will.’”

The Appellate Division concluded that the reported evidence of any “promise” or “contract” was far less than the evidence in *Hurl v. Merriam*, and held that the Municipal Court’s finding for plaintiff was not warranted. The Supreme Judicial Court reversed on the grounds that the evidence of repeated statements by Mrs. King “that she would make it up to us by taking good care of us in her will” went beyond the general expressions of intent in *Hurl v. Merriam*.

In *Hurl v. Merriam*, the intestate, Mr. Carey, lived with the plaintiff from 1914 to 1917 and from 1919 to 1920 until his (Carey’s) death and paid the plaintiff $3 a week for board and $2 a month for room. During these years, the plaintiff rendered additional services by nursing and caring for Mr. Carey. The plaintiff testified that in 1914 Carey asked if he could live with him, and the plaintiff said he would ask his wife; that he later informed Carey that Mrs. Hurl would not object to Carey’s coming to live with them. Mr. Hurl further testified that after

---

6 Id. at 1676, 275 N.E.2d at 891.
7 Id. at 1677, 275 N.E.2d at 891.
§14.2

CONTRACTS

being informed of Mrs. Hurl's response, Carey then said, "Now that I am going to make my home with you I am going to deed my property to you." At another time, when Carey was not living with the plaintiff, he said in the presence of his lawyer, "I want you to deed . . . my property to [the plaintiff]." (Court's brackets). The plaintiff further testified that he had an agreement to this effect with Mr. Carey, and that this agreement was brought up several times in the presence of others. There was also additional evidence tending to show that Carey stated he was going to convey the real estate in question to the plaintiff. The Court found on the above evidence that:

[T]here is nothing to show that the plaintiff and the intestate entered into a contract, by which the intestate agreed to convey his property to the plaintiff. At most the statements of Carey were mere expressions of his intention and his appreciation of the services rendered by the plaintiff. But there was no promise to make this conveyance in consideration of the plaintiff's agreement to care for him and to provide him food and lodging; and the plaintiff made no promise to care for him and give him a home while he lived. There was no meeting of minds.

It seems clear that the evidence of a contract in *Heil v. McCann* was, if anything, less substantial than the evidence in *Hurl v. Merriam*. Additionally, the Court's reliance on *Cassell v. Traverso* was unwarranted. In *Cassell*, the Court found on very insubstantial evidence that there was not sufficient evidence of an oral contract to devise property. That decision provides little, if any, authority for the Court's decision in *Heil*.12

It is suggested that decisions such as *Heil*, which do not require substantial proof of an oral contract to leave property by will, greatly encourage plaintiffs to do for the deceased, by proof of his casual "admissions" in conversations over a period of years, that which the law would only have permitted the deceased to do by the jealously guarded formalities required by the statute of wills.

§14.2. Husband's liability for loan to wife where proceeds are used for their mutual benefit. In *Nelson v. Pedersen*,1 the Supreme Judicial Court held that where a husband benefits equally with his wife from a loan, and there is a clear indication by the conduct of all the parties

9 Id. at 413, 148 N.E. at 673.
10 Id.
11 Id. at 414, 148 N.E. at 673.
12 See also, *Boston Camping Distributor Co. v. Lumbermans Mutual Casualty Co.*, 1972 Mass. Adv. Sh. 973, 282 N.E.2d 374 (1972), where the Supreme Judicial Court held that a statement by the president of a company that he wanted "insurance coverage from A to Z, second to none" to which the defendant replied that "he would definitely comply," did not constitute a contract, but was only "expressive of present intention."

It is difficult to justify *Heil* in light of *Boston Camping*.

that the loan was made for the benefit of both the husband and wife, the husband may be held liable for the money loaned, notwithstanding the fact that the loan agreement was not signed by him, and the money was initially turned over to the wife.

The decision reached by the Court in Nelson is justifiable on either of two theories: that the wife signed the note agreement on her own behalf and as agent for her husband, or that the loan was in actuality made to both the husband and wife. It appears that the Court's decision was based on the latter theory, and Nelson should not be read as an indication that the common law rule of a husband being responsible for the debts of his wife has been revived.

B. PERFORMANCE AND BREACH

§14.3. Performance of brokerage contract. An issue frequently litigated is the right of a real estate broker to receive a commission. The question usually arises when the broker, who has been engaged by a seller to find a buyer for his property, procures a purchaser for the property but the sale, for various reasons, is never consummated. As a result, the seller is unwilling to pay the broker his commission. Although the factual situations may vary from case to case, it is the general rule in the Commonwealth that a real estate broker, in the absence of special circumstances, is entitled to a commission if he produces a buyer who is "ready, willing, and able" to purchase upon the terms stated by the owner to the broker.1 While the rule thus stated appears to be a relatively simple one, the uncertainties in applying it to a given set of facts seem to be never-ending. During this Survey year, the question of whether a prospective buyer was "ready, willing, and able" was again presented to the Supreme Judicial Court.

In Cisco v. Zussman,2 the plaintiff, a licensed real estate broker, brought an action to recover a commission from the defendant, claiming that he produced a customer ready, willing, and able to purchase the defendant's real estate. The defendant contended that no commission was due because the buyer had conditioned his obligation to purchase on an approval of credit.3 The Court agreed with the defendant's contention and held that:

If [the prospective purchaser] attached conditions to his acceptance not within defendant's terms then [he] was not ready, willing and able to purchase on defendant's terms. . . . Until he acquired [ap-


3 The prospective buyer conditioned his obligation to purchase on his obtaining approval of credit for conventional bank financing, clear record title, and obtaining possession of the building free of all tenants and "according to such other terms and conditions as are customary in the Greater Boston Purchase and Sale Agreement for Real Estate." Id. at 1090, 283 N.E.2d at 8. However, the Court in Cisco considered only the first condition.
proval for credit] he was not a ready, willing and able buyer but one qualifying his acceptance.4

Based upon the facts in Cisco, the result reached by the Court appears to be unwarranted and unfair. The reported evidence shows that at a meeting with the broker and buyer in July, 1969, the defendant-owner priced his property at $50,000. Later that month the buyer sent the plaintiff-broker a $5,000 down payment accompanied by a letter conditioning his obligation to purchase on the approval of bank credit. Upon advising the defendant of the receipt of the down payment, the plaintiff was told by the defendant that the price for the property was now $55,000—a price in which the buyer was not interested. The defendant then informed the plaintiff that he had changed his mind about selling the property. From these facts it is clear that, prior to the defendant's changing the selling price, the customer was ready and willing to purchase the property in question. Though the Court framed the issue in a more general way, the true question to be confronted was whether the buyer was financially able to buy the property.

The facts reported do not indicate whether the defendant had originally objected to the buyer's "conditional" acceptance, or questioned his ability to pay for the property. Since the defendant raised the selling price rather than revoking his original offer, it may be assumed that no such objection was made until the dispute regarding the broker's commission arose. Yet it is unnecessary to decide whether the defendant waived an objection to the buyer's conditional acceptance or was estopped to assert the issue of the buyer's ability to pay as a defense to the broker's claim for compensation if it can be determined that there were no reasonable grounds for objecting to the buyer's ability to perform. It is suggested that the Court's determination with respect to this latter issued failed to account for practical considerations and was, therefore, unwarranted.

In 1948 the Supreme Court of New Hampshire was faced with a similar question in the case of Philbrick v. Chase.5 It would appear that that court's conclusion was more reasonable and better reasoned. Philbrick was an action for a broker's commission. The defendant argued that the buyer produced by the broker to purchase his property was not "able" to perform because a bank had not yet approved the buyer's loan. The court held for the plaintiff-broker and responded:

Ability to buy means simply the power to effect that at the time of payment there shall be available to the buyer the necessary funds. Where the agreement does not fix the time for payment, a reasonable time for payment, a reasonable time is allowed. "The purchaser must be able to buy; and the word 'able' means financially able. This does not mean, however, that such purchaser must have all the money in his immediate possession or to his credit at a bank, but only

4 Id. at 1091, 283 N.E.2d at 8.
5 95 N.H. 82, 58 A.2d 317 (1948).
that he must be able to command the necessary funds to close the deal within the time required." (Emphasis added).

In contrast to Philbrick, the Supreme Judicial Court's decision in Cisco would seem to hold that a prospective buyer is, per se, not ready, willing, and able to purchase property if his obligation to purchase is subject to his obtaining bank financing. The rule thus established should be seriously questioned.

§14.4. Breach of confidential fiduciary relationship. In Broomfield v. Kosow, it was held that a fiduciary relationship may be created in a business transaction where there is (1) an intimate relationship between the parties to the transaction, (2) reliance by one party upon the advice and guidance of the other, and (3) knowledge of such reliance by the party relied upon. Generally, in determining whether a business confidence or trust has been abused, a court exercising its powers of equity will review such factors as the relation of the parties prior to the incidents complained of, the plaintiff's business capacity, or lack of it, contrasted with that of the defendant, and the readiness of the plaintiff to follow the defendant's guidance in complicated transactions whenever the defendant has specialized knowledge. Where such a fiduciary relationship exists, the person trusted is liable for expressing dishonest opinions upon which the other party relies to his detriment. The status of a defendant as a fiduciary can be a critical factor to recovery of damages by a plaintiff. Notwithstanding this fact the Supreme Judicial Court has concluded that it would be "unwise to attempt the formulation of any comprehensive definition that could be uniformly applied in every case."

In Shinberg v. Garfinkle, decided during the 1972 Survey year, the Supreme Judicial Court liberally applied the rule set forth in Broomfield. In Shinberg, the plaintiff, an attorney, sought an accounting from Mr. Garfinkle, an architect, with respect to a transaction involving the construction of a nursing home.

In 1965, Garfinkle, a friend of Shinberg for several years, told Shinberg of "an opportunity to participate in a Cambridge [n]ursing [h]ome venture." (Court's brackets). Garfinkle needed $25,000, and he requested Shinberg to advance him that sum. Garfinkle subsequently outlined the business venture, and said that "if he received $25,000, he

2 349 Mass. at 755, 212 N.E.2d at 560.
3 See Reed v. A. E. Little Co., 256 Mass. 442, 152 N.E. 918 (1926) (misrepresentation in advice to sell patent rights).
6 Id. at 239-40, 278 N.E.2d at 739.
§14.4 CONTRACTS

would . . . share his interest with [Mr.] Shinberg on a 50-50 basis."

Garfinkle was to use the $25,000 to purchase a one-third interest in this venture, which was set up in the form of a real estate investment trust.

Mr. Shinberg, from time to time, asked Garfinkle certain questions about the status of the venture, and by December, 1966, Shinberg became "fed up" with the transaction. Mr. Garfinkle then offered Shinberg, apparently in settlement of all claims, a total of $30,500, payable $15,000 in cash, and the rest in notes. On December 22, 1966, Mr. Shinberg executed a release to Garfinkle and delivered it, subject to an escrow agreement that it would be delivered when full payment was made, either on the due date of the notes, or when the nursing home was sold, whichever date occurred first.

In August, 1967, Mr. Shinberg learned that the nursing home had been sold in April of that year. He asked Garfinkle why the terms of the escrow agreement had not been carried out at the time of the sale. He was told by Garfinkle that "no sale had been made because he had purchased the nursing home." Mr. Shinberg later informed Garfinkle that he felt there had been a breach of the escrow agreement, then Shinberg filed suit for damages based on the agreement of May 7, 1965. Without consulting Garfinkle, the escrow agent returned the release executed by Shinberg and held under the terms of the escrow agreement. The case was referred to a master who found that

Garfinkle made false statements to Mr. Shinberg (a) that the nursing home was not for sale at a reasonable price (whereas it was for sale and, indeed, was sold in April, 1967); (b) that he (Garfinkle) had not received funds from the trust (whereas $26,600 had been paid to him on or before January 10, 1966); and (c) that no trust certificates had been issued to him (Garfinkle), when, in fact, such certificates had been issued in June, 1965. The master found that Mr. Shinberg, in December, 1966, ‘felt he had made a bad deal’ and was relying exclusively upon Garfinkle’s representations as to the [real estate investment] trust because he was not a trustee or a certificate holder. He relied fully, the master found, upon Garfinkle for all information.

7 Id. at 240, 278 N.E.2d at 739.
8 A memorandum of this Agreement, dated May 7, 1965, was later prepared by Mr. Shinberg. This recited, among other matters, (a) that $25,000, had been advanced by Mr. Shinberg to Garfinkle; (b) that a building permit for the project had been granted; (c) that Shinberg and Garfinkle would share equally all profits or funds to be paid from the trust; (d) that there had been approaches from prospective purchasers; (e) and that Garfinkle shall turn over to Mr. Shinberg, all copies of the records of the real estate trust. In addition, the master found that Garfinkle had agreed to turn over one-half of his own shares in the real estate investment trust, thus giving each of the parties a one-sixth interest. Id. at 240 n.3, 278 N.E.2d at 739 n.3.
9 Id. at 242, 278 N.E.2d at 740.
10 Id. at 242, 278 N.E.2d at 741.
The Supreme Judicial Court held that the master's findings sufficiently established a misrepresentation by Mr. Garfinkle to Mr. Shinberg, and that these misrepresentations were relevant to Mr. Shinberg's decision in making a settlement with Garfinkle. The Court concluded that Garfinkle had a duty of truthful disclosure under Broomfield v. Koslow, supra, and that Shinberg could thus enforce his original agreement.

C. DEFENSES

§14.5. Defenses to testamentary contracts. In view of the relative ease with which a plaintiff can, under Massachusetts law, prove a prima facie case for quantum meruit recovery for breach of an oral contract to devise property, the question of what defenses can and cannot be successfully raised is extremely important. During the Survey year, the Supreme Judicial Court provided a good summary of the relevant law in this area, and answered for the first time the question of whether an action in contract which did not ripen until after decedent's death can be enforced by the administrator of his estate.

In Sliski v. Krol, a son's administrator brought an action against the administratrix of the estate of the son's father for the value of services rendered by the son pursuant to an oral agreement whereby certain services rendered by the son for the father would be compensated by provision in the will of the father. The jury returned a verdict for the plaintiff, but the superior court judge allowed a defense motion for the entry of a verdict in favor of the defendant. The plaintiff then brought the instant appeal.

The defendant's principal contentions on appeal were (1) that the action was barred by the statute of frauds; (2) that the son breached the oral agreement when he discontinued his services to his father on May 1, 1950; (3) that the suit was barred by the statute of limitations; and (4) that any cause of action terminated when the son pre-deceased his father. The Supreme Judicial Court, reversing the trial judge, provided the following summary of the law applicable to the various defenses raised by the defendant:

Statute of frauds. Generally, the statute will operate to bar actions based on alleged oral contracts to devise property, but equity can intervene to permit recovery based on the value of the services rendered or of the benefit conferred under the rule set forth in Shopneck v. Rosen-

11 Id. at 245, 278 N.E.2d at 742.
12 Id. at 244, 278 N.E.2d at 742. Mr. Shinberg contended that the transaction in question was a partnership or joint venture between himself and Garfinkle, and that a fiduciary relationship arose out of such transaction. The Court dismissed these arguments and held that the agreement was contractual in nature, and that a fiduciary duty was owed under Broomfield. For a more detailed discussion of the partnership issue in Shinberg, see §4.1 supra.

§14.5. 1 See the discussion of Heil v. McCann at §14.1 supra.
bloom.³ In Shopneck, the Court held that recovery under such oral contracts are precluded by the statute of frauds,⁴ but "if a plaintiff has paid money, conveyed property, or rendered services under an oral agreement within the statute of frauds . . . he can recover the money paid, or the value of the property conveyed, or of the services rendered."⁵

Breach by plaintiff. A person promising to perform services under an oral agreement for the devise of property is precluded from recovery only when he "wilfully and unjustifiably" departs from the terms of the agreement.⁶

Statute of limitations. The cause of action in cases involving promises to devise property does not accrue until the oral agreement is broken, that is, on the date of promisor’s death.⁷

Survival of cause of action. The general rule in the Commonwealth is that a right of action founded upon a contract passes upon the death of the person entitled to sue to his personal representative.⁸ The Court held that this rule is applicable even where the right to sue does not fully ripen until after the death of the promisee.⁹

§14.6. Municipal contracts for legal services. The legal status in the Commonwealth of long-term contracts between a municipality and an attorney was clarified by the Supreme Judicial Court during the

⁴ G.L., c. 259, §5.
⁵ 326 Mass. at 84, 93 N.E.2d at 228. The Court added: "Recovery in such a case is allowed not as a means of circumventing the statute but because in fairness the defendant ought to make the plaintiff whole for what he has got from him." 326 Mass. at 84, 93 N.E.2d at 229.
⁶ 1972 Mass. Adv. Sh. at 466, 279 N.E.2d at 926. See also, Jackson v. Boston Safe Deposit and Trust Co., 310 Mass. 593, 39 N.E.2d 85 (1941). Since recovery for these cases is based on quantum meruit, the amount of plaintiff's recovery will automatically be adjusted to reflect the value of the services actually performed.
⁷ Shopneck v. Rosenbloom, note 3 supra.
⁸ G.L., c. 228, §1 provides for survival of "actions which survive by the common law." In Mellen v. Baldwin, 4 Mass. (4 Tyng.) 480, 481 (1808), the Court said "actions on contracts may be maintained by and against the executors and administrators of the original contractors." In Treasurer & Receiver Gen. v. Sheehan, 288 Mass. 468, 471, 193 N.E. 46, 47 (1934) it was held: "A cause of action in contract survives when founded upon an implied or quasi contract, as well as when founded upon an express agreement."
⁹ In Sliski the son predeceased his father so that it was not until after the death of the son that the cause of action ripened. In holding that the cause of action nonetheless survived, the Court relied on a New Jersey decision, Drewen v. Bank of Manhattan Co., 31 N.J. 110, 121-22, 155 A.2d 529, 535 (1959), which contained the following language. "'It is not unusual that at death a decedent owns contract rights that he could not have enforced while alive. . . . If the note falls due or the account becomes payable during the administration of the estate . . . an action may be prosecuted by his personal representative despite the fact that during the life of the decedent it could not have been.'" 1972 Mass. Adv. Sh. 465, 467, 279 N.E.2d 924, 927.
Survey year in *Duggan v. City of Taunton.*

The plaintiffs in *Duggan* were two attorneys who had been acting as counsel for the Taunton Municipal Light Plant Commission without written contracts. On December 14, 1965, the commission voted by a vote of two to one to retain the plaintiffs by written contract, at a fixed salary, for a term of three years. In January, 1966, the Mayor of Taunton appointed two additional members to the Commission. On February 1, 1966, the plaintiffs appeared before the newly constituted five-member Commission and refused to comply with a request that they submit their resignations. The Commission then discharged the attorneys by a three to two vote. The attorneys filed suit to recover the amounts due under their respective contracts, and the superior court judge directed verdicts for the plaintiffs. The City of Taunton appealed, and the Supreme Judicial Court reversed the decision.

The plaintiffs contended that the contract should be treated as an exercise of the city's "proprietary powers" rather than its "governmental powers." Accordingly, they argued that their contract should stand on the same footing as contracts for supplies or non-legal services, that is, contracts which are governed by ordinary contract law and which are enforceable beyond the terms of the contracting municipal officials. The Court rejected this analogy as inappropriate in cases "where a relationship of mutual trust and confidence should exist between the attorneys and the public officers who in fact are to be served." With the basic contracts principles deemed unsuitable, the Court noted that there were no precisely applicable Massachusetts decisions governing the questions presented in *Duggan.* However, the Court stated that the result was based on the trend in other jurisdictions distinguishing contracts for specific legal services from general retainers.

Contracts made with attorneys in good faith by one board to handle (during a period extending beyond the board's term in office) a particular piece of litigation or other legal matter are much more likely to be sustained against attack (on grounds of public policy) by a successor board than arrangements for a more general representation.

The Court emphasized that it was not adopting an inflexible rule

---

2 The Taunton Municipal Light Plant Commission exists by virtue of Spec. St. 1919, c. 150, pursuant to which the Mayor of the City of Taunton was required to appoint a Municipal Light Commission to consist of three members with six year terms, the term expiring at two year intervals. After January 1, 1966, as a consequence of Acts of 1965, c. 289, the membership of the commission was increased to five. Pursuant to this enactment, the members were to be appointed for terms of five years.
3 The plaintiffs were paid for all services rendered through January, 1966.
5 Id. at 1848, 277 N.E.2d at 272.
about contracts for attorneys' services made by municipal or other public commissions:

Some such contracts made, pursuant to specific statutory or other authority, or made in good faith for particular and necessary services at an appropriate time and for reasonable compensation, may involve no substantial question of public policy and should be enforced. On the other hand, grounds of public policy may invalidate a contract for legal services made for an unduly long period, or to commence or to be in effect at a date unreasonably after the contracting body will cease to control the choice of counsel, ... or in circumstances which indicate either an unconscionable effort to bind a successor board or officers or lack of good faith. Much will depend upon the particular facts and circumstances. We conclude that this record squarely presents the issue whether these contracts were against public policy and should be denied enforcement on that ground.6

The Supreme Judicial Court specifically cited Prima County v. Grossetta7 in the opinion, and it appears to have adopted the rationale which the Arizona Supreme Court expressed in that case.8

D. Remedies

§14.7. Builder's remedies for buyer's breach of construction contract: Contract price or quantum meruit. The law in Massachusetts with respect to recovery under a building contract is well settled: a contractor cannot recover on the contract itself without showing complete and strict performance of all its terms. However, if the builder fails in such complete performance of the contract, he may still recover in quantum meruit if he can prove both substantial performance of the contract, and a good faith endeavor on his part to fully perform.1 It is equally

6 Id. at 1850, 277 N.E.2d at 273.
7 54 Ariz. 530, 97 P.2d 538 (1939).
8 The Arizona court said: "Where the contract in question is a unitary one for the doing of a particular and specified act, but its performance may extend beyond the term of the officers making it, if it appears that the contract was made in good faith and in the public interest it is not void because it will not be completed during the term of those officers. If, on the other hand, the contract is for the performance of personal or professional services for the employing officers, their successors must be allowed to choose for themselves those persons on whose honesty, skill and ability they must rely. The contracts in question were not for the employment of the various attorneys as general advisers to the board of supervisors, but were unitary contracts to handle certain specified matters for a fixed compensation and not on a time basis. We think, therefore, they fall within the class of contracts which may extend beyond the term of the contracting officers." Id. at 538, 87 P.2d at 541.

well established that an intentional departure from the prescribed performance, other than one which is de minimis, will bar all recovery for materials supplied and work performed.\(^2\) During the Survey year, the Supreme Judicial Court in \textit{Kass v. Todd}\(^3\) resolved the interesting question of the proper measure of damages when, after the owner breached a contract for construction of a house, the builder continued to work until he substantially completed the work under the contract.

Generally, when one party to a contract acts in total breach of his obligation, the other may cease performance; rather than sue for his expenses to the date of the breach plus lost profits,\(^4\) he may rescind the contract and recover the value of his services not limited by the contract price.\(^5\) However, the Court in \textit{Kass} chose not to apply the latter rule to a situation where the builder chose to complete his performance in spite of the owner's breach, and continued to bill the owner under the terms of the contract. Such conduct was held to preclude recovery by the builder because the contract was terminated by the owner's breach.

The facts of the instant case closely resemble the situation facing the court in \textit{United States v. Americo Constr. Co. Inc.}\(^6\) where it was held that a subcontractor could not recover on a quantum meruit but was restricted to the contract price. The court there rejected the plaintiff subcontractor's theory of recovery because "it did not abandon performance, nor did it enter into a new contract or implied contract for the fair value of its services as the price of not treating defendant's breach as total. . . . Even after the job was completed plaintiff recognized the contract, and sought payment thereunder."

The holding of the Court in \textit{Kass} is extremely relevant to a builder's decision whether to complete construction after a substantial breach of contract by the owner. The damages under quantum meruit in \textit{Kass}, for example, were $15,500, while the damages under the contract would have been only $6,800. Admittedly, the holding shifts the burden of cost over-runs from the builder to the buyer, since it allows the builder


\(^5\) Connolly v. Sullivan, 173 Mass. 1, 53 N.E. 143 (1899). See also, Fitzgerald v. Allen, 128 Mass. 232, 234 (1880), where it was stated that: "[I]f the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform . . . and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon a court upon a quantum meruit, in which case the actual benefit which the defendant receives from the plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed."

to rescind and recover without reference to the contract price. However, the shifting is occasioned by the breach of the buyer and the Court therefore did not consider that result to be unjust.

Where, however, the person who has made the favorable contract has defaulted, and rescission by the other party is warranted, ordinarily recovery can be had for the fair and reasonable value of labor and materials. The party at fault should not be permitted to break the contract and yet retain the benefit of the contract by way of limiting his damages to the contract price. 7

7 Id. at 1250, 284 N.E.2d at 593-94.