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Clyde E. Carpenter Jr.

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CONTINGENT FEE CONTRACT IN PENNSYLVANIA: ATTORNEY'S RIGHT TO COMPENSATION WHEN DISCHARGED WITHOUT CAUSE

Where an attorney has been retained upon a contingent fee contract, and subsequently is discharged without cause before the litigation for which he was employed has been completed, what is the measure of his compensation? The Pennsylvania courts have been inconsistent in their answer to this question. The purpose of this note is to review the Pennsylvania decisions on this point and to analyze the inconsistencies. Before attacking the problem presented above, two questions must be determined: does an attorney have a cause of action against his client for his fees; and, is a contingent fee contract between attorney and client a valid one? These questions will be answered in order.

At an early time in Pennsylvania, the law, as brought over from England, was that an attorney had no cause of action against his client for his fees. In the case of *Mooney v. Lloyd*,[1] the Supreme Court said:

> "The connection between counsel and client, in contemplation of law, is honorable indeed. The counsellor renders his best services, and trusts to the gratitude of his client for reward. In the language of Blackstone, a counsel can maintain no action for his fees, which are given, not as *locatio vel conductio*, but as *quiddam honorarium;* not as a *salary* or *hire*, but as a mere *gratuity*, which the counsellor cannot demand, without doing wrong to his reputation."

A short time later this case was overruled by *Gray v. Brackenridge*,[2] to the expressed satisfaction of Chief Justice Gibson, and since that time there has been little doubt as to the attorney's right to sue his client for fees.[3]

The next question to be determined is the validity of a contingent fee contract between attorney and client. The present view is that a contingent fee contract is not illegal.[4] This, apparently, has always been the view in Pennsylvania, although in the earliest case the author can find, the court seems to have some doubts as to its propriety.[5] The view also has been subject to criticism by some earlier authorities in Pennsylvania. Chief Justice Sterrett, in an address before the class of 1892 of the Dickinson School of Law, commented on the fact that this mode of practicing law had greatly increased within several years prior to that time, and said of such practice:[6]

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1 5 S. & R. 411 (Pa. 1819).
2 2 P. & W. 75 (Pa. 1830).
3 McGahren v. Mosier, 53 Pa. Super. 467 (1913); Sundheim v. Beaver County Bldg. & Loan Assn., 140 Pa. Super. 529 (1940).
4 Klauder v. Creger, 327 Pa. 1 (1937).
5 Clippinger v. Hepbaugh, 5 W. & S. 315 (Pa. 1843).
6 See Murray's Estate, 2 Dist. Rep. 681, 684 (Pa. 1893).

> "He (the attorney) sinks his high position of attorney into that of partisan, and, blinded by his greed, presses for a verdict against the justice of the case."

Chief Justice Sharswood also condemned such agreements in his work on professional ethics.[7] But the rule is that unless such agreements are formed to accomplish a purpose which is illegal or against public policy, they are valid.[8]

The determination of these subordinate questions now brings us to the main problem of this note. Upon an examination of the cases, of which there are few, it appears that there are two views in Pennsylvania. The first is that a client may discharge an attorney at any time and without cause; and, if he does so, the attorney is relegated to a claim for services on a quantum meruit basis. The second view is that if an attorney is discharged without cause by his client, the client commits a breach of contract for which the attorney may recover damages. The difference between the two arises from the interpretation of the character of the attorney's discharge. In the former view, it is a rightful act; in the latter, a breach of contract. For the sake of convenience, the first of the two views will be referred to as the quantum meruit theory, and the second as the breach of contract theory. Let us examine them separately.

Quantum Meruit

The basis of the quantum meruit theory is the rule that an attorney may be discharged at any time without cause. Since an attorney may be discharged without cause, the only remedy open to him is a suit for services actually performed, *i. e.*, a suit on a quantum meruit basis. This remedy should be distinguished from that in the breach of contract theory. Here it is an action in restitution; whereas, in the other theory, it is an action on the contract. The reason usually given for this view is that the relation of attorney and client is one of trust and confidence, and when that confidence ceases, the relation should cease.

This theory originated in Pennsylvania appellate decisions in three cases decided at the end of the nineteenth century.[9] Only in the first of these cases did a contingent fee contract exist, and although in each case an attorney was discharged without cause, the character of such discharge was not in issue. But there arose from statements made in these opinions the rule of law that an attorney may be discharged without cause, and in that event, may sue only for value of services actually rendered.

In *Brightly v. McAleer,*[10] the first of the cases mentioned above, an attorney was retained to secure a liquor license for his client, his fee being contingent upon success. Subsequently, the client expressed dissatisfaction with the attorney's

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7 Ibid, note 6.
8 Ibid. See note 4, supra.
9 Brightly v. McAleer, 3 Pa. Super. 442 (1897); Powers v. Rich, 184 Pa. 325 (1898); Commonwealth v. Terry, 11 Pa. Super. 547 (1899).
10 3 Pa. Super. 442 (1897).

conduct and discharged him. The attorney brought this action against the client upon an alleged contract of settlement of his claim for fees. In the meantime, the client had been refused the license and so defended, in part, on the ground that the contingency had not occurred and thus the attorney could recover nothing. The attorney objected to the sufficiency of the defense. Although the case was decided on other grounds, the court stated in the course of its opinion, that there was nothing in the terms of the contract which prevented the client from discharging his attorney, and that the attorney certainly could not recover the whole fee without showing he would have succeeded in obtaining the license. By the very nature of the case this would have been impossible; and therefore the most the attorney could have recovered was reasonable value for services he rendered.

The only portion of the court's opinion which would support the theory under discussion is its statement that "there was nothing in the terms of the contract which prevented the client from discharging his attorneys," which raises the inference that the attorney could be discharged without cause. The other statements of the court can more easily be used to support the breach of contract theory. In the above situation, the only damages which could be proved on the contract would be value of services rendered. It is even questionable whether the above quoted statement can be used as authority for the quantum meruit theory. Was the court talking about the client's power or his right to discharge the attorney? Might not it have been talking about the client's power to discharge as distinguished from a case where the client had no such power, *i. e.*, a power of attorney coupled with an interest?

In *Powers v. Rich*,[11] the second of these cases, the attorney was retained to accomplish a certain result upon an agreement that he should be compensated at a reasonable value for the services he rendered. He was discharged without cause before the result had been accomplished. At the trial the attorney introduced expert testimony as to the reasonable value of services of an attorney, had he been permitted to complete this contract, on the theory that the client was guilty of a breach of contract by the discharge, and that this was the measure of damages. The trial judge admitted this testimony, but later, in his charge instructed the jury that the attorney could collect only the reasonable value of the services he rendered at the time of his discharge. The Supreme Court affirmed the view of the lower court on this matter with little comment, as will appear in the following quotation from that opinion:

> "On this point there are very respectable authorities that put him on the same plane as other agents or employees rendering personal service, and allow him full compensation for what he would have earned had he been permitted to complete his contract. But the learned judge below ruled otherwise and. . .in the charge he ruled directly and em-

[11] 184 Pa. 325 (1898).

phatically that the plaintiff could recover the value of the services he actually performed before his discharge."

Here the attorney had received the verdict and the client had appealed. Since the charge on this point was favorable to the client, it had not been assigned as error, and consequently the lower court's view as to the law applicable was not in issue in the appelate review.

In the third case, *Commonwealth v. Terry,*[12] the client had retained an attorney to prosecute a suit. The attorney did so and recovered judgment. This judgment was assigned to the attorney as security for his fees, the attorney to collect and account to his client any excess over the amount of his fees. The client then disclaimed, to the judgment debtor, any interest he had in the judgment and this action was to have the judgment satisfied as to the amount in excess of the attorney fees. The question of this suit was whether the judgment covered fees of the attorney after the date of assignment as well as before, the questions of the legal character of the attorney's discharge and the basis for measuring the attorney's claim not being in issue. But the court commented on these questions, saying:

"The action of the client put an end to the employment of his attorneys and determined the services and expenses to be considered in fixing the compensation which they were equitably entitled to receive. . . (The attorneys) were at once entitled to be paid for the services which they had rendered."

Thus it may be seen that in none of these cases was the theory of the wrongfulness of the discharge of the attorney in issue in the review by the appelate court, and the views expressed by them may be considered dicta. Nevertheless, the courts in subsequent cases have seized upon one or more of these cases as the basis for the quantum meruit theory of recovery.

In *Shafer's Estate,*[13] the court said that the client "had an undoubted right to discharge (the attorneys) at any time without giving reasons," and cited *Powers v. Rich, supra,* as authority for this proposition. The court went further, though, and for the first time the principal reason for this view was given: that the relation of attorney and client should be one of confidence; and when confidence ceases, the relation should cease.

In the case of *Thole v. Martino,*[14] the client rendered performance by the attorney impossible. The attorney had been retained on a contingent fee contract but, in this suit, was suing on quantum meruit. The client's defense was that the contingency had not occurred and therefore the attorney could recover nothing. In substantiating the attorney's remedy, the court said:

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12 11 Pa. Super. 547 (1899).
13 39 Pa. Super. 384 (1909).
14 56 Pa. Super. 371 (1914).

"Having made the performance of the contract impossible by his own act, in rescinding that contract, he did not leave the plaintiff without an effective remedy.

"There is no suggestion that services were not rendered, nor that they were not of advantage to the client. . .nor that the amount claimed was excessive or unreasonable: Commonwealth v. Terry. . . ."

It may be noted that the question of whether or not the discharge of an attorney on a contingent fee contract is a breach of contract has not been directly in issue in the cases so far reviewed. The first case on record which dealt directly with this problem using the quantum meruit theory is *Sundheim v. Beaver County Building and Loan Association.*[15] This case was decided in 1940 and may be considered to be the principal case on this view.

Here an attorney was retained as an associate defense counsel in a pending case. He was to attend the trial, prepare a paper book, and argue the case if appealed. The agreement was for a contingent fee. In the event of a successful termination of the case, he would receive thirty per cent of the amount for which the client would be liable. He was later discharged by the client who had informed him that the case had been discontinued and that he (the client) felt that the attorney was not entitled to a fee. The attorney brought this action on the contract for the full contract price, claiming full performance of the contract and a successful conclusion of the litigation. The case for which he had been retained was, in fact, still pending. The court held that the attorney was not entitled to the full contract price, saying:

"The contingency stipulated, namely, a 'successful termination' being a condition precedent, the event it had contemplated must happen:. . .

"Moreover, there was nothing in this contract that prevented the Association's discharging the appellant. A client may terminate his relation with an attorney at any time, notwithstanding a contract for fees, but if he does so, thus making the performance of the contract impossible, the attorney is not deprived of his right to recover on a quantum meruit a proper amount for services which he has rendered: *Powers v. Rich,* 184 Pa. 325, . . . ;*Brightly v. McAleer,* 3 Pa. Sup. Ct. 442; *Thole v. Martino,* 56 Pa. Sup. Ct. 371; . . ."

One basis for this decision was that the contingency stipulated had not occurred. But the court ignores the rule that where there is a contract to perform something in the future and performance is wrongfully prevented by the other party, all that can reasonably be required of a plaintiff is to produce sufficient evidence, of the best character attainable, of a fair prospect of success.[16]

The court, in this case, apparently decided, by the second paragraph of the above quoted portion of the opinion, that the discharge of the attorney was not

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15 140 Pa. Super. 529 (1940).
16 Jaffe v. Alliance Metal Co., Inc., 337 Pa. 449 (1940).

a breach of contract. But this decision was based upon three cases which have been reviewed above. It has been shown that not one of these is very strong authority for the point in question. In the *Powers* case, *supra,* this view was that of the lower court and, because it was favorable to the appellant, was accepted by the appellate court in considering the appellant's argument. As mentioned before, there is only one statement in the *Brightly* case, *supra,* which supports this view, and that statement might easily be construed differently. In *Thole v. Martino, supra,* the attorney was suing on quantum meruit, and so the question of whether his discharge was wrongful was not in issue.

In the last statement of the opinion, the summation or conclusion of the decision, the court states: "The plaintiff, in our judgment was not entitled to recover on his contract, the basis of this suit, but he may have an action on quantum meruit for damages as a result of a breach of contract." This statement raises some doubt as to what really is the basis of the attorney's action, and also whether or not the discharge was a breach of contract. If the discharge was a breach of contract the attorney could certainly maintain an action on the contract. Therefore, since this was not allowed, the court must have meant an action on quantum meruit for value of services and not for damages as a result of a breach of contract.

The next and most recent case on this point is *Christman Estate,*[17] wherein two attorneys were retained by the client on a contingent fee contract to recover damages which the client incurred during an automobile accident, and proceedings were instituted toward that end. The client subsequently died and his widow, the administratrix of his estate, settled the claim without the attorneys. The final account showed a small balance remaining in the decedent's estate, against which the attorneys claimed for fees. The basis of their claim does not appear, but the amount of attorney fees on a quantum meruit basis was equal to or more than the balance remaining in the estate. The court said in regard to the attorneys' claim:

> "That settlement terminated (the attorneys') contingent fee agreement and relegated them to a claim for services on quantum meruit. cf. Annotation, L. R. A. 1917 F, 402, et seq."

Upon an examination of the Annotations of L. R. A. 1917 F, 402, on page 408, the following is stated:

> "The majority of courts. . . .hold that the discharge of an attorney employed for a specific purpose, before the purpose has been accomplished, is a breach of contract, at least if the services have been substantially rendered, only a small residue remaining to be performed."

Thus it may be seen that these two recent cases, dealing directly with the problem under consideration, rely upon authorities which, at the most, are not very substantial. Nevertheless, these cases are the latest appellate court decisions on this matter and represent the law in Pennsylvania as it stands today.

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17 165 Pa. Super. 45 (1949).

Although the view expressed in these cases is not supported by very strong authority, as cited therein, there is, however, much merit in it. The relationship between an attorney and his client is one of a high degree of confidence. It is a relation at once personal, reciprocal, and confidential.[18] If the client loses his confidence in the attorney, he should not be required to retain that attorney until the termination of the litigation. Once the confidence is gone, the qualities of this relation, as it should be, are also gone. The attorney would not be placed in an inequitable position. He would be reimbursed for labor and expense. Thus, this remedy is just and fair to both parties.

Breach of Contract

The basis of the breach of contract theory, as mentioned before, is that the discharge of the attorney without cause is a breach of contract by the client. Because the client has breached the contract, the attorney may recover any damages which he has suffered as a result of that breach. If he can show that he would have been successful, had he been permitted to complete his contract, the damages would be the agreed fee. If he cannot show this, the damages would be equal to the value of services rendered.

This theory was first enunciated in Pennsylvania in *Williams v. Philadelphia,*[19] decided in 1904. In this case an attorney discovered, while checking over some public records, that the city of Philadelphia was making overpayments in its settlement with the state for taxes. Upon inquiring further, the attorney discovered that credit could be procured from the state in the amount of such overpayments. He approached the city's officials and offered his services to procure said credit on a contingent fee of 10% of that obtained. The officials agreed to the offer. He then secured credit in the amount of $32,000, whereupon the city's officials, deciding that this litigation was against the better interests of the city, prevented him from proceeding further. At the trial the attorney submitted evidence to show that he could have recovered an additional $84,000. The verdict was for the attorney in the amount of $8,400. The Supreme Court in its opinion said that the right of a city as a client to discontinue the litigation was not in question, but its obligation to the attorney was a different matter. That depended on the contract. The court treated this as any other contract, and thus the client's action was a breach. As to damages, the court said that here there was no positive evidence available, but since performance had been prevented by the client, "all that can be reasonably required of a plaintiff is to produce to the jury sufficient evidence of the best character attainable, of a fair prospect of success, and the compensation which would have followed." The court went on to affirm a charge given to the jury by the lower court which stated that if the claim were so based on conjecture and speculation as not to afford a sufficient certainty to the jury's

[18] Felix's Estate, 52 D. & C. 37 (Pa. 1945).
[19] 208 Pa. 282 (1904).

mind to reach a conclusion, then the jury should resort to the value of the services rendered, disregarding the contingent fee. The judgment was sustained.

The opinion in this case was written by Chief Justice Mitchell. It is very interesting to note that this jurist also wrote the opinion in *Powers v. Rich, supra,* a case used to support the quantum meruit theory. The *Powers* case is not mentioned in his opinion in the *Williams* case, *supra.* This fact strengthens the author's opinion, set forth previously in this note, that Mitchell did not intend to enunciate a rule of law by his statements in the *Powers* case. Another interesting note is that the attorneys, in their argument before the Supreme Court in the *Williams* case, cited many cases from foreign jurisdictions to support their respective theories, but they did not cite any Pennsylvania cases. Apparently they did not consider any prior Pennsylvania cases (including the three cases from which the quantum meruit theory arose[20]) applicable to this situation.

The *Williams* case was followed shortly by *Kent v. Fishblate.*[21] In this case a husband and wife had become estranged and separated. The wife retained an attorney to recover from her husband certain property in the amount of $46,000 on a contingent fee agreement of 10% of the amount involved. The wife later unjustifiedly discharged the attorney who was here suing on the contract. The verdict was in favor of the attorney. The Supreme Court stated that they were dealing at arm's length with each other and that, in the absence of fraud, this contract was "as binding upon the appellant as if it had been between her and a tradesman. . . .(and) has been the settled rule with us. . ." The court also cited the *Williams* case, supra, to support its decision. In the last paragraph of the opinion, the court said:

> "It may be proper to note that it appeared from the testimony that, before the appellant discharged the appellee, he had procured an offer of settlement which would practically have given her all she claimed."

These words have sometimes been used to limit the rule of this case to apply only where the attorney has substantially procured the claim. This factor probably influenced the court's decision, but was by no means the controlling feature. This conclusion is drawn from the position of these words in this opinion, *i. e.,* after the argument supporting the court's conclusion, and the opening words of this phrase, "It may be proper to note."

The last case which has supported the rule as enunciated in the *Williams* case was one decided about the same time as the *Sundhiem* case, *supra,* in the Federal District Court for the Eastern District of Pennsylvania.[22] This case was not one between an attorney and his client, but by an attorney against a third person for malicious interference with the contract between the attorney and his

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20 See note 9, supra.
21 247 Pa. 361 (1915).
22 Bennett v. Sinclair Nav. Co., 33 F. Supp. 14 (1940).

client by inducing the client to settle the case. In laying the grounds for its decision, the court held that a contingent fee contract was a valid one, and said of such contract:

> "Under the laws of Pennsylvania, an attorney retained on a contingent fee basis has an interest in the contract apart from his mere employment as an attorney. For a breach of such contract the attorney has a cause of action against his client and may recover the full contingent fee."

The court cited *Williams v. Philadelphia, supra,* to support this conclusion.

This, then, represents the second theory in Pennsylvania as to the attorney's right to compensation in the situation under discussion.

Other Considerations

There are two distinctions which may be drawn in this problem, which the Pennsylvania courts apparently have not considered. One is the difference between an attorney retained on a general retainer and one under a contract to accomplish a specific result. The office of a general retainer is to authorize the attorney to care for the interests of his client in any litigation which may arise, and to take all steps necessary to protect these interests.[23] In such a case there can be no doubt that the client may here discharge his attorney at any time and without cause.[24] But where the attorney is retained upon a contract to produce a certain result, it may imply a condition to continue the employment until the termination of such proceedings.[25] In this case there is a specific, terminable contract fairly entered into by the attorney and the client. Might it not be reasonable to protect the attorney as any other person in such a situation?

Another distinction which may be drawn is that between the power of a client to discharge his attorney and his right to do so. In law of agency, the principal may have the power but not the right to discharge his agent, and if he exercises this power he will be liable to the agent for breach of the contract of agency.[26] In the case of a general retainer of an attorney, this power and right seem to coincide.[27] But where there is a specific contract of retainer, do they coincide? Under the quantum meruit theory they apparently do, although the court makes no mention of this. Under the breach of contract theory, they apparently do not; no mention of this proposition is made here either.

Conclusion

It is extremely difficult, if not impossible, to reconcile these two views. They are mutually exclusive. Though the two latest cases[28] have held to the quantum meruit theory, they have not attempted to distinguish, in fact, have not even con-

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[23] Kissick v. Hunter, 184 Pa. 174 (1897).
[24] MECHEM ON AGENCY, Second Edition, § 2255.
[25] Ibid at § 2256.
[26] RESTATEMENT OF AGENCY, § 450.
[27] Annotations, L. R. A. 1917 F, p. 406.
[28] Sundheim case, supra; and Cristman case, supra.

sidered, the cases[29] holding the breach of contract theory. The two views stand unrepudiated in Pennsylvania law. The quantum meruit theory may be considered the law at the present time because this is the latest view propounded.

The one consideration which the breach of contract theory does not contemplate is that the relation of an attorney and client is one of confidence, and when that confidence ceases, the relationship should cease. Instead, the courts here proceed with the idea that a contract fairly made between the attorney and his client dealing at arm's length is as valid and as enforceable as any other contract. Herein lies the essence of the difference between the two views. Which is more worthy of recognition is a matter to be decided by our courts in the future.

Clyde E. Carpenter, Jr.

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29 Williams case, supra, and Kent case, supra.