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Article 8

Restitution - Recovery of Part Payment by a Defaulting Plaintiff

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competent, independent advice to a donor. The court has only required that the donee sustain the burden of proving that there was no undue influence where the parties were in a confidential relation and the donee in a position of dominance. In *Davis v. Dean* the donor, an aged lady, made gifts of real estate constituting the substantial portion of her estate to her grand-daughter and the grand-daughter's husband several days before death. This gift cut off a daughter and several grandchildren. The husband, while in a position of trust and confidence with the donor, showed an effort to keep those most interested in ignorance of the pending gift. The gifts were set aside. Under these circumstances the Court said that the defendant had the burden of proving that there was no undue influence. It suggested that he should have given some of the parties adversely interested an opportunity to be present when the deeds were executed, or to be represented there by some chosen friend or counsel, so that they would be cognizant of the whole transaction. Such evidence would aid in showing that the donee acted honestly and fairly in the matter.[10] Thus the donee in Wisconsin need not affirmatively prove that the donor had the benefit of competent, independent advice. The presence or absence of such advice will be considered as evidence on the general question of undue influence.

An interesting point was raised in *Beilfuss v. Dinnauer*.[11] In this case the defendant, in trying to prove that there was no undue influence, introduced testimony that the donor had conferred with a lawyer as to procedure in making a gift of land to the defendant. This evidence was admitted by the trial court, but rejected by the Supreme Court upon appeal, on the ground that it was a privileged communication between attorney and client. This creates a dilemma in a state following the New Jersey rule as to competent, independent advice—which rule almost demands that a lawyer give the advice.[12]

JAMES W. ANGERMEIER

Restitution — Recovery of Part Payments by a Defaulting Plaintiff — Defendant brewing company contracted to sell beer to plaintiff and his partner as wholsale buyers over a period beginning in 1946 and ending in 1951. Upon execution of the contract, plaintiff and his partner paid $20,000.00 "to secure performance of the contract," which was to be applied to the last shipments of beer under the contract, but if the contract was breached by the buyer, the deposit was to be used to the extent of defendant's actual damages. Plaintiff warranted he was a licensed dealer, but he in fact was not and was denied the neces-

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[10] Davis v. Dean, 66 W. 100, 26 N.W. 737 (1886).
[11] 174 W. 507, 183 N.W. 700 (1921).
[12] Wis. Stat. (1949) Sec. 325.22.

sary license to sell beer. With the consent and approval of plaintiff, defendant refunded $10,000.00 to plaintiff's partner. In 1948, plaintiff brought action to recover the $10,000.00 remaining in defendants' hands alleging a mutual abandonment of the contract due to the refund to his partner, and alleging plaintiff's ownership of the money. Defendant answered that plaintiff had breached the contract thereby forfeiting any money on deposit. *Held:* While the general rule in Oklahoma is that a plaintiff who has advanced money, or done an act in performance of the contract, and then breaches the contract, cannot recover back what has been advanced or done, here the contract provided for its own measure of relief, the retention of the deposit only to the extent of actual damages. The facts as pleaded cannot be construed as an abandonment of the contract by defendant. *Acme Distributing Co. et al. v. Rorie, 183 Fed. (2d) 694 (C.C.A. 10th, 1950).*

The rights of a defaulting plaintiff who has partly performed depend on the nature of his promise. Most business agreements call for the payment of money by one party or the other. This note is limited to those contracts in which the performance of the defaulting plaintiff is to pay money.[1]

The plaintiff cannot sue on the contract, his action must be in quasi-contract. Keener[2] says this:

> "Quasi—contractual in its nature necessarily is the obligation of defendant who, though he has entered into a contract with the plaintiff, and has a perfect defence to any action brought by

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[1] It may be appropriate here to refer briefly to those agreements where the defendant is to pay money. In the cases where plaintiff is to build or construct upon real estate, unless there is an express condition, plaintiff can recover the contract price if he has substantially performed, less damages to defendant. (Dyer v. Lintz, 76 N.J.L. 204, 68 A. 908 (1908); Contra: Bowen V. Kimbell, 203 Mass. 364, 89 N.E. 542 (1909) which rejects the doctrine of substantial performance.) The theory is that a partial breach is not a failure of condition. Where plaintiff has rendered less than substantial performance, he may recover in quantum meruit for benefit conferred at the contract rate if he was in good faith, either regardless of the existence of actual acceptance (Pinches v. Swedish Evangelical Lutheran Church, 55 conn. 193, 10 A. 264 (1887), or only if there has been actual acceptance (Nees et al. v. Weaver, 222 Wis. 492, 296 N.W. 266 (1936). Where an employee plaintiff breaches his contract of employment, recovery in quantum meruit is usually denied (Williston on Contracts (Rev. Ed.) Vol. V, sec. 1477 (1937), but recovery has been allowed (Britton v. Turner, 6 N.H. 481 (1834) and under some theories, only where the breach is not wilfull and deliberate (Rest. of Contracts, sec. 357 (1933); Walsh v. Fisher, 102 Wis. 122, 78 N.W. 437 (1899). Where the seller under a contract for the sale of goods defaults after part delivery and the buyer accepts or retains the goods knowing the seller is not going to perform in full, he must pay at the contract rate, but where he has used or disposed of the goods before he knows the seller is not going to perform in full, the buyer must pay only the fair value to him of the goods so received (Wis. Stats. 121.44 (1949), but the seller is still liable for damages to the buyer (Wis. Stats. 121.49 (1949).

[2] Keener, William A., *"Quasi-Contract, Its Nature and Scope,"* 7 Harv. L. Rev. 57, 75 (1893).

> the plaintiff on the contract, is yet held liable in assumpsit to the plaintiff for value received under the contract."

Plaintiff's right to recover ". . . rests upon the doctrine that a man shall not be allowed to enrich himself unlawfully at the expense of another."[3] The actual intention of the parties, especially that of the defendant, is entirely disregarded,[4] proof of the contract is merely to show that plaintiff is not an intermeddler.[5] The application of this doctrine to a defaulting plaintiff, however, is in conflict with another fundamental principle in our law, that a man should not lightly break his promise and should not have any standing in court as against the innocent party who has bargained for full performance.[6] Text writers seem to favor the former doctrine. Corbin[7] maintains that restitution should be denied only in the following cases: 1) where defendant has not rescinded and remains ready and willing to perform and has a right to specific performance against plaintiff; 2) where plaintiff has not shown that defendant's damages are less than installments paid; 3) where an express provision permits defendant to keep the money and it is not a penalty. Apparently Woodward[8] would have the right to recover rest on the good faith of plaintiff, but most of the cases rightly ignore this circumstance.[9]

At this point this question suggests itself: what happens when a party breaches his promise? In most bilateral contracts, one promise is given in exchange for the other, but the order of performance of the promises is determined by the contract, business custom, and the law, thereby making one promise conditional and one unconditional. Performance by the party to go first is a condition precedent to the existence of the duty of the second party to perform. If the first party does not perform, the duty of the second party never arises, the failure of condition discharges the second party's promise, and he has a cause of action for breach. Along the same line, if either party repudiates his promise before performance date, the other party is discharged.

The cases finding a mutual rescission seem to ignore these principles. Rescission is available against a defaulting defendant and involves a return to the *status quo* for both parties.[10] Its usual purpose is to furnish an alternative remedy for restitution against a defendant who has breached or repudiated, in favor of a plaintiff who has partially

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[3] *Ibid.*
[4] Kellum v. Browning's Adm'r., 231 Ky. 308, 21 S.W. (2d) 459 (1929).
[5] Rest. of Restitution, secs. 2, 107 (1937).
[6] Williston on Contracts (Rev. Ed.) Vol. V, sec. 1473 (1937).
[7] Corbin, *"The Right of a Defaulting Vendee to the Restitution of Installments Paid,"* 40 Yale L. J. 1013 (1931).
[8] Woodward, Frederick C., The Law of Quasi Contracts, sec. 177 (1913).
[9] *Supra,* note 8.
[10] Ballou v. Billings, 136 Mass. 307 (1884).

performed.[11] A defaulting plaintiff can only offer to rescind and such offer must be accepted in much the same manner as is necessary in the formation of a contract, and to say that an attempt to mitigate damages is an acceptance is a mere fiction.[12] Defendant's duty to perform never came into existence, his promise is discharged.

The majority rule[13] recognizes the business principles involved. When the seller commits himself, he wants assurance that the buyer will perform, and to permit recovery of the part payment defeats the purpose of the contract. The majority rule denies recovery regardless of the extent of damages as compared to the amount of the payment. The basis is that defendant has not been enriched unjustly. There need not be an express provision to that effect.

Where there is no express provision for retention of the payment, recovery has been allowed on the ground that retention would impose punitive damages,[14] or simply that retention would be unjust.[15] Where there is such express provision, it has been avoided as a penalty.[16] In both cases, the advance payment has usually been greatly in excess of actual damages.

Most of the present day cases arise under an express provision. Whether or not it is a penalty or liquidated damages may turn on the amount in excess of damage,[17] or the language of the provision.[18] The Wisconsin court has recognized the difference between a penalty and a provision providing for retention of part payments. In *Seeman v. Biemann*,[19] where the contract provided for the payment of liquidated

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[11] Williston on Contracts (Rev. Ed.) Vol. V, sec. 1455 (1933).

[12] Malmberg V. Baugh, 62 Utah 331, 218 P. 975 (1923).

[13] Kaufmann v. Baldridge, 162 F. (2d) 793 (C.C.A. 10th, 1947); Ketchum & Sweet v. Evertson, 13 Johns 359 (N.Y., 1916). The Rest. of Contracts, sec. 1, 357 (1933) says that plaintiff can recover if his breach was not wilful and deliberate, and in sec. 2, that he cannot recover if it was payment of earnest money or the contract provides for retention and is not so in excess of defendant's harm as to be a penalty. Sec. 2 is apparently in accord with the majority rule in view of the fact that earnest money is now universally regarded as equivalent to part payment (Charles R. Ablett Co. v. Sencer, 130 Misc. 416, 224 N.Y.S. 251 (1921); Weidner v. Hyland, 216 Wis. 12, 225 N.W. 134 (1934).

[14] *Supra*, note 14. Punitive damages are intended to mend an aggravated wrong, or punish the defendant for evil behavior.

[15] Michigan Yacht & Power Co. v. Busch, 143 F. 929 (C.C.A. 6th, 1906).

[16] Biddle v. Biddle, 202 Mich. 160, 168 N.W. 92 (1918). A penalty, properly speaking, is an agreement founded in contract.

[17] Rest. of Contracts, sec. 339 (1933) holds that it is a penalty unless it is a reasonable forecast of just compensation for the harm caused, and the harm is incapable or very difficult of accurate estimation. Sec. 340 holds that money deposits are judged by the same standard, except (comment a) where they are a part of the agreed exchange for the consideration given by the promisee, they are neither liquidated damages nor penalties.

[18] 17 C.J. 948, sec. 242 (1919), a deposit or part payment under a provision providing for retention in case of default is regarded as liquidated damages, but it has been held to be a penalty when the contract says it is to secure performance. See the language of the principal case.

damages of $10.00 per day for delay in the completion of a building, the court said that if the purpose of the provision is merely to secure performance, and damages can be readily computed and the amount in excess of the damage is unreasonable, it is a penalty regardless of the language used. But a penalty is defined as a promise to pay a larger sum on default of a promise to pay a lesser sum, or, where the sum to be paid on default is greater than the defaulted sum or the entire debt.[20] Thus the result in *Schneider v. Allis-Chalmers Manufacturing Company*[21] where the contract called for part payment and retention in case of default. After plaintiff paid $24,400.00 on the contract price of $89,600.00, he defaulted. Notwithstanding that defendant had no actual damages, plaintiff could not recover. The court said:

> "We see no theory, however, upon which a written contract . . . can be set so aside and disregarded on behalf of one admittedly in default thereunder and such defaulting party nevertheless be permitted to assert an independent right to all or part of that which was paid under and pursuant to the terms of such contract, and especially so when such payment, as it was here distinctly and expressly agreed to by the parties, should be forfeited as liquidated damages in case of just such a default as it is here conceded existed."

It is the opinion of the writer that the court in that case stated the logical and reasonable rule that should be applied in these cases.

KENNETH H. HAYES

Sales-Implied Warranties in the Sale of Secondhand Goods — Plaintiff, a Deleware Corporation, entered into a contract to sell a cheese manufacturing plant including all equipment to the defendant, a Wisconsin cooperative. A used boiler was included as part of the equipment but conveyed on a separate bill of sale. In an action to recover the balance of the purchase price the defendant claimed a set-off for expenses incurred in repairing the boiler. Defendant alleged that the plaintiff's agent orally warranted the fitness of the boiler for the purposes to which the plaintiff knew it would be put. Prevented from showing any express warranty by the parol evidence rule, defendant sought to establish implied warranties on the basis that plaintiff knew the intended use of the boiler and the defendant relied on the plaintiff's skill and judgment as to its suitability for such use. *Held*: Secondhand goods are not excluded as a matter of law from the operation of the Uniform Sales Act. § 15 (1).[1] *Standard Brands v. Consolidated Badger, 89 F.Supp. 5 (D.C., E.D., Wis. 1950).*

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[19] 108 Wis. 365, 84 N.W. 490 (1900).
[20] Minn Billiard Company v. Schwab, 179 Wis. 129, 190 N.W. 836 (1922).
[21] 196 Wis. 56, 219 N.W. 370 (1928).
[1] Wis. Stats., 121.15 (1949), "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the