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TENDER, PAYMENT OF INTO COURT

In the numerous decisions wherein the term "tender" is defined and construed, the many phases of the subject are amply dealt with, such as form, necessity, effect and manner of pleading, etc. The particular aspect of the subject of tender with which this article will deal, will be with relation to the payment of money into court.

Payment implies an acceptance and appropriation of that which is offered by one party to another, whereas tender is the act of offering that which is admitted to be due and owing, but which is not accepted by the creditor.¹ The tender does not discharge the debt whereas payment does. The payment of money into court is more than a simple tender. It is purely *ex parte*; if not accepted, the debtor must keep his money, and if established on plea the only effect is to stop interest on the amount tendered. The rule of keeping tender good applies to justices' courts, courts of admiralty, and to all courts of inferior civil jurisdiction. The practice extends to the recovery of an unliquidated sum in cases where the statute permits a tender to be made. Where the offer and refusal are made the basis of an action, where but for such offer and refusal no right of action would have existed, the tender must be brought into court.² This is not the case, however, where the right of relief is not dependant upon tender and refusal.

It is also the rule at common law that in order to render a plea of tender available, the money must have been paid into court. Sureties, however, are discharged by a valid tender although not paid into court. 32 Cyc. 172.

NECESSITY AND EFFECT

Bringing the money into court being a requirement for plaintiff's benefit, he is entitled to have it brought in before he takes issue on the plea. A plea of profert in curia with the profert not being made good by the actual deposit of the money in court is bad, and plaintiff is entitled to judgment on the plea.³

¹ *Barker v. Brink*, 5 Iowa 481; *Hunter v. Warner*, 1 Wis. 141; *Babcock v. Perry*, 8 Wis. 277.

² *Musgat v. Pumpelly*, 46 Wis. 660, 1 N. W. 196; *Newton v. Allis*, 16 Wis. 197.

³ *Alexander v. Oneida County*, 76 Wis. 56, 45 N. W. 21; *Breitenbach v. Turner*, 18 Wis. 140; *Werner v. Tuck*, 24 Am. St. Rep. 443, and notes.

Payment being a requirement for plaintiff's benefit it is waived by neglecting to bring any irregularity to the attention of the court and taking issue on the plea of tender. On this point see the case of *Wetherbee v. Kusterer*, 41 Mich. 359, 2 N. W. 45, holding that while ordinarily upon tender the money should be brought into court, still a party may waive the necessity for doing so. And since the notice setting up tender stated that the money was deposited in a certain bank subject to plaintiff's order, plaintiff should have made his objection to the sufficiency of the tender in the court below. Under the California Code of deposit in a bank to the credit of a creditor after a tender extinguishes an obligation for the payment of money. This is not the case in most jurisdictions however, the obligation to pay remaining good and in force until the cause has been decided by the court.

Under the common law the lien of a mortgage was not discharged by a tender whether the money was paid into court or not. In order to discharge the lien it was necessary to bring suit for redemption and pay the money into court. The rule which prevails under the codes differs in different states, and the question upon which this difference of opinion develops is principally as to the necessity of paying the money into court to discharge a lien, in the case of tender after maturity.⁴ In some states a proper tender is all that is necessary; in others the tender must be kept good by a payment of the money into court. A further distinction is sometimes made in the case of chattel mortgages.⁵ In this respect Wisconsin holds that a proper tender discharges the lien.⁶ Where the tender is to be made the basis of an action for affirmative relief the same rule applies.⁷

In many states the effect of a tender and consequent keeping good or failure to keep good is dealt with by statute and in that event of course the rule there laid down applies; but in most of these states the statute is not a radical departure from the general principles announced by the courts in long lines of decisions on the subject, but is more in the nature of a legislative sanction of

⁴ *Kortwright v. Cody*, 21 N. Y. 343, 78 Am. Dec. 145, need not be kept good to discharge lien. (See *Breitenbach v. Turner*, ante.) *Contra*, *Crasin v. McGoon*, 86 Ill. 421, 29 Am. Rep. 37.

⁵ Notes in 33 L. R. A. 238. See notes to *Moynahan v. Moore*, 9 Mich. 77 Am. Dec. 468.

⁶ *Rice v. Kahn*, 70 Wis. 323, 35 N. W. 465; *Smith v. Phillips*, 47 Wis. 202, 2 N. W. 285; *Musgat v. Pumphelly*, ante.

⁷ *Smith v. Phillips*, ante.

those principles. See Circuit Court Rule 15; Sect. 4267, Wis. Stats. Cf. sect. 2789.

AS AN ADMISSION OF PLAINTIFF'S CAUSE OF ACTION

It is the general rule upheld by authorities with but few exceptions that a tender and payment into court admits liability to the amount tendered.⁸ But there is considerable conflict of authority as to the effect of a tender on the right of a defendant to avail himself of defenses to prevent further recovery, or by means of a counterclaim to defeat a recovery even to the extent of the tender. The question is whether the effect of tender is to limit the issue to the amount of damages recoverable, the tender being admittedly due; or whether a tender admits only that amount as due, and leaves available all defenses and counterclaims. This question is further complicated by the fact that a distinction is sometimes made in actions on contract and actions on tort; frequently these distinctions are overlooked by the courts. The rule laid down in *Palmer v. La Rault*, 99 Pac. 1036, that the effect of a tender of the amount claimed under a contract does not preclude defendant from asserting a counterclaim for damages under the contract, is fairly illustrative of this line of authority. The other line of cases may be said to be represented by the case of *La Salle County v. Hathway*, 78 Ill. App. 95, holding that upon tender by defendant the trial court may properly give a peremptory instruction to find the issues for plaintiff. The question of damages alone remaining for the consideration of the jury.⁹ But it is stated in *Fox v. Williams*, 92 Wis. 320, that judgment cannot be rendered for a less amount than is tendered or paid in.

Where tender is made by defendant of the difference between plaintiff's demand and defendant's set-off it admits plaintiff's entire debt is due.¹⁰ But payment into court never admits liability for more than the amount tendered, and defendant may interpose any consistent defense to show that he is not liable for a greater sum. Tender is usually understood to be on the implied condition that it is made as a complete satisfaction for the debt defendant owes. So where defendant elects to take on the plea of tender before suit commenced, money that is paid into

⁸ *Schmur v. Hickcox*, 45 Wis. 200.

⁹ *Palatine Ins. Co. v. O'Brien*, 68 Atl. 484, 16 L. R. A. (N. S.) 1055.

See notes in 77 Am. Dec. pa. 483.

¹⁰ *Barker v. Gray*, 112 Wis. 487, 88 N. W. 307.

court is received in full satisfaction of plaintiff's claim against defendant. Plaintiff can have no further claim against him.¹¹

THE TIME AND MANNER OF PAYMENT

As to the amount and kind to be paid in to make a tender effectual the general rule may be briefly summed up. If tender is made before suit commenced the same amount must be paid in as tendered. If tender is made after suit commenced it must include interest and costs accrued up to that time.¹² If the tender be of money or stocks, bonds or such articles as a person usually carries about his person, it must be brought into court.¹³ If it be the tender of a ponderous specific article it need not be brought into court.

A tender is not objectionable because made for a larger amount than is due. But a creditor cannot be required to accept part of a debt which has not become due. In *Smith v. Curtiss*, 38 Mich. 393, defendant deducted from a claim against him a set-off due to him and the tender was kept good and a judgment deducting all costs was rendered.

Where money is tendered a certificate of deposit payable to the clerk of the court or creditor is good. The plaintiff may object to the tender on the ground that it is not legal money as stipulated for although made in good bank notes, and even though that be not the real reason for the objection. 38 Cyc. 146. A payment into court of a check is not good,¹⁴ but a tender of a check may be kept good by a payment into court of the money.

The payment into court should generally be made at the time when tender is pleaded.¹⁵ In some states the matter is regulated by statute prescribing the time for payment into court, in which case a substantial compliance with the statute is sufficient. In other jurisdictions notice of payment into court must be given to plaintiff's attorney; but proceeding without objection waives notice. In equity the weight of authority is to the effect that it is unnecessary to pay the money into court at the time of the commencement of the suit; it is sufficient to offer by the bill to bring

¹¹ *Turner v. Lee Mach. Co.*, 41 S. W. 57; see notes in 38 L. R. A. 549.

¹² *Warrington v. Pollard*, 24 Iowa, 281, 95 Am. Dec. 727; 38 Cyc. 149. *Chalutz v. Wis. Central R. Co.*, 143 Wis. 623.

¹³ *Mitchell v. Menill*, 2 Blackford, 87 (Ind.), 18 Am. Dec. 128.

¹⁴ *Lewis v. Larsen*, 45 Wis. 353, 36 L. R. A. (N. S.) 332. But see *Kiefert v. Maple Valley Ins. Co.*, 158 Wis. 340, 148 N. W. 864.

¹⁵ *Heywood Boat Co. v. Ralph*, 82 Hun. 418, 31 N. Y. Supp. 263.

the amount in whenever the same is liquidated and a decree is had for performance.^{15a} With what has been said on this point it may be sufficient to repeat, that tender to be effective must as a general rule be supported by paying into court at the time of pleading. *Rice v. Kahn*, 70 Wis. 323.

TO WHOM PAID

When tender is pleaded and money is to be paid into court, the clerk of the court is the proper person to receive the money and his custody is the custody of the court. The payment to the clerk is for the plaintiff. He is custodian for the plaintiff, and any loss of money paid to the clerk for the plaintiff is the loss of the plaintiff. *Mann v. Sprout*, 185 N. Y. 109. A payment to the referee upon a trial before him, is not payment to the court; he is not the court for that purpose. *Becher v. Boon*, 61 N. Y. 217.

WITHDRAWAL OF MONEY PAID IN

After money has once been paid into court as tender there is a substantial uniformity in the rule holding that the title to it is absolutely vested in the plaintiff or tenderee.¹⁶ It may be withdrawn by him at any time. In such case if he withdraws the money he waives all objections to the money. But if tender is made as a condition to the enforcement of a right, title does not pass to the opposite party and the court may permit a withdrawal by defendant. In the case of *Fox v. Williams*, 92 Wis. 320, the fact that payment into court was not essential to plaintiff's right of action, but nevertheless plaintiff was not allowed to withdraw the money does not make the case an exception to the rule.

The tender into court being an admission in plaintiff's favor to that amount, judgment cannot be rendered for a less amount.¹⁷ Where, however, defendant has a greater sum due him such payment will not affect his right to recover for that amount in the same action. In an action on a contract defendant claimed that a smaller sum was due plaintiff and secured an order to pay the money into court and plaintiff to have leave to withdraw the money at any time. Defendant later moved to amend his answer, withdraw the money paid in, and set up a counterclaim. The

^{15a} *Bateman v. Hopkins*, 73 S. E. 133, 28 Ann. Cas. 642.

¹⁶ *Stolze v. Milwaukee, etc., R. Co.*, 113 Wis. 44, 88 N. W. 919. *Newton v. Allis*, 16 Wis. 197.

¹⁷ *Schnur v. Hickcox*, ante.

motion was granted and plaintiff appealed. The supreme court held that the power to authorize an amendment so as to change the issues did not authorize the court to permit a defendant upon amending his answer, to withdraw money which has been paid into court in satisfaction of a debt due to plaintiff.¹⁸

Where on a finding of the jury the amount due defendant on his counterclaim was greater than the amount of plaintiff's demand, plaintiff's right of action was extinguished and defendant was allowed to withdraw the money paid in as a tender.¹⁹

If a statute authorizes a payment into court under eminent domain proceedings, of the amount awarded by the commissioners, and the railway corporation or whatever the use for which the land is condemned be, is entitled to go into possession thereupon the corporation can not reclaim any such money. Though if the corporation appeals, the statute further provides that the land owner cannot withdraw the money without first giving a bond to protect the corporation from loss in the event of a final reduction of the award.²⁰

A deposit with a bank or third person does not prevent a withdrawal if there has been no acceptance. In other instances it has been held that money paid into court might be withdrawn before the court has treated the money as a fund under its control, and before plaintiff has accepted it.²¹ But the case often cited on this point is *Mann v. Sprout*, 185 N. Y. 109, which holds that the effect of such a payment into court is to transfer the title to the creditor, although he does not signify his acceptance, and it cannot be withdrawn by the debtor even with the consent of the court.

The law as it exists in Wisconsin on this subject exhibits a marked conformity to the better reasoned decisions of the majority. In the case of equitable actions it is not necessary in Wisconsin to support the plea of tender by payment into court. It is sufficient that the tenderer offer to bring the money in, and be ready to do so as the court may direct.²²

As to the admission of plaintiff's cause of action by tender into

¹⁸ *Mann v. Sprout*, 185 N. Y. 109.

¹⁹ *Ahrens v. Fenton*, 138 Iowa 559 115 N. W. 233.

²⁰ *Stolze v. Milwaukee, etc., R. Co.*, ante, Notes in 16 L. R. A. 1055.

²¹ *Wright v. Young*, 6 Wis. 127; Note in 5 L. R. A. (N. S.) 561.

²² *Breitenbach v. Turner*, 18 Wis. 140.

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court by defendant, some courts hold that everything which plaintiff is required to prove is admitted, only the costs and amount of damages remaining to be determined. Wisconsin holds that as to the amount so paid in it is a conclusive admission that as to that sum it belongs to the plaintiff absolutely whether the proof shows plaintiff to be entitled to more or less.²³ As to whether or not defendant may assert a counterclaim and thus defeat plaintiff's right to the money paid into court there seems to be no case in point in Wisconsin. However, it is probable that defendant cannot by counterclaim defeat plaintiff's rights to the money paid in to support a tender.

The manner of paying money into court in Wisconsin is governed by Circuit Court Rule No. 15.²⁴

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²³ *Fox v. Williams*, 92 Wis. 320, 66 N. W. 357.

²⁴ See *Tollefson v. Tollefson*, 171 Wis. 149, 176 N. W. 879; *Frank v. Frost*, 170 Wis. 353, 174 N. W. 911.

Weigell v. Gregg, 161 Wis. 413, 154 N. W. 645.

Mankell v. Belscamper, 84 Wis. 218, 225, 54 N. W. 500.

See also Secs. 4265, 4266, 4267, Wis. Stats.