Restitution: Right of Purchaser in Default Under Sale of Goods Contract to Recover Down Payment

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Restitution—Right of Purchaser in Default Under Sale of Goods Contract to Recover Down Payment.—Desiring to purchase a number of steers, the purchaser entered into two separate written contracts with the respective defendants. Both contracts were similar. Each called for a down payment, delivery of steers, and, after acceptance, payment of the balance of the purchase price. Pursuant to the terms of the contracts, the purchaser made the respective down payments and accepted delivery of a number of the steers. Thereafter, he refused to accept further deliveries and instituted the present suit to recover the balance of the down payments. In the trial court, the jury found that the defendants were ready, able, and willing to perform the contract and that the plaintiff breached it. The defendant sellers upon the breach sold the cattle without damage or loss to themselves. Held: Under the law of New Mexico, where the purchaser, under an executory contract to sell, having made a down payment on the purchase price, refuses, without justification, to accept delivery of the subject matter of sale, and the seller is ready, able, and willing to perform in accordance with the terms of the contract, the purchaser will not be permitted to recover back such down payment. Kaufmann vs. Baldrige, 162 Fed (2nd) 793 (1947).

In deciding this case, two distinct propositions were presented to the court. In the first place, it would appear to be a violation of the terms of the contract to permit a plaintiff in default to recover. In effect the court would be rewriting the contract the parties entered into and inserting terms they omitted. In the second place, to deny recovery often would give the defendant more than a fair compensation for the injury he sustained and would impose a forfeiture on the plaintiff.

In arriving at its decision, this court used as a basis the New Mexico supreme court holding in the case of Dunken v. Guess1 which was followed in Bell v. Lammon.2 It is interesting to note in this connection that not only these cases but also those which served as a basis for these decisions involved land contracts.3 One might question whether the same principles should apply in sales of ordinary chattels as apply in the sale of interests in land.

When a vendee has defaulted upon his contract, in absence of express terms to the contrary, his rights under the contract to recover prior down payment cease. However, because of the dislike felt toward forfeitures, the defaulting vendee may have a right of action in quasi-

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1 Dunken v. Guess, 40 N.M. 156, 56 P. (2nd) 1123 (1936).
contract. In general, it may be said that the courts are split between two different approaches. Some courts are inclined to grant relief where the defaulting plaintiff has by his part performance conferred a benefit upon the defendant, and regard the character of the breach or the intention of the party in default as immaterial. The reason for such a policy is brought out by Williston:

"... To hold otherwise may involve serious forfeiture, and where this is clearly established, the application of equitable principles should require an accounting for the excess of what was received by the seller above the damages which the injured party has suffered."

Under such a policy, the defaulting purchaser would have a cause of action only in the event that he could show that the down payment retained by the seller was clearly in excess of any damage suffered by him. However, where the down payment approximated the damage, even though there might be some excess, a cause of action would not lie.

Other courts consider the nature of the breach on the part of the plaintiff. Where the default is not due to his own willful or deliberate choice, there is a strong tendency to grant relief, but where the default is the result of his willful or deliberate choice, relief is generally denied. The approach adopted by these courts seems well expressed in a California supreme court ruling which stated:

"If a vendee does not complete his payments as stipulated in his contract to purchase, the vendor may always retain the moneys received by him, unless the vendee shows some equitable ground for relief, and it is not material whether or not the contract stipulated that the vendor might retain such money... When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always had in law, to retain the moneys paid by the vendee."

The equitable showing required by courts adopting this approach appears to be something more than the mere retention of money in excess of the actual damage suffered. Although there is no Wisconsin case directly in point involving forfeiture by a defaulting purchaser of

4 55 Corpus Juris 1084 (1931); Page, Law of Contracts (2nd Edition), Sec. 3261 (1920); Williston, Sales (2nd Edition), Sec. 599j (1924); Williston, Contracts (Rev. Ed.), Sec. 1473 (1937).
5 Ibid., Page, Sec. 3266; Ibid., Williston, Contracts, Sec. 1476; Cherry Valley Iron Works v. Florence Iron Co., 64 F. 509 (1894); Michigan Yacht Co. v. Busch, 143 F. 929 (1906); Sabas v. Gregory, 91 Conn. 26, 98 A. 293 (1916).
6 Ibid., Williston, Contracts, Sec. 1476.
7 Ibid.
8 55 Corpus Juris 1065-1067 (1931); 55 Amer. Jur. 927 (1943); Page, Law of Contracts (2nd Ed.) Sec. 3261 (1920); Williston, Sales (2nd Ed.), Sec. 599j (1924) involving conditional sales.
9 Glock v. Howard and Wilson Colony Co., 123 Calif. 1, 55 P. 713, 43 L.R.A. 199 (1898); See also 24 R.C.L. 67-68; 27 R.C.L. 624.
chattels, it would appear that Wisconsin courts would follow this second approach. However, it is well to point out, as noted by Williston, that this approach which emphasizes the nature of the breach is giving way in favor of one which stresses the benefit actually conferred by the defaulting purchaser upon the seller.

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10 Walsh v. Fisher, 102 Wis. 172, 78 N.W. 437 (1899); Manitowoc Steam and Boiler Works v. Manitowoc Glue Co., 120 Wis. 1, 97 N.W. 515 (1904); Manning v. Fort Atkinson School District, 124 Wis. 84, 102 N.W. 356 (1905); Manthey v. Stock, 133 Wis. 107, 113 N.W. 443 (1907); Oconto Co. v. Bacon, 181 Wis. 538, 195 N.W. 412 (1923).