RECENT CASES

CONTRACTS

EFFECT OF SELLER'S PRIOR BREACH ON HIS RIGHT TO RESCIND FOR BUYER'S DEFAULT

On March 18, 1947, Robberson Steel Company as seller and Stebbins Construction Company as buyer contracted for installment deliveries of steel to begin June 18, 1947, with payment to be made for each shipment within thirty days of invoice date. Before the first shipment was due, a disagreement arose between the parties concerning another contract and the seller refused to ship any steel until the controversy was settled. On July 1, 1947, the buyer by letter demanded shipment within ten days, threatening to hold the seller liable for a breach of the contract if such shipment was not made. The first shipment was made July 11, 1947, accepted by the buyer and paid for. The second, third, and fourth shipments having been accepted but not paid for, the seller gave notice that it elected to cancel the contract. The buyer replied that it would hold the seller liable for all damages occasioned by the failure to make further deliveries and proceeded to purchase steel elsewhere at a price in excess of that fixed by the contract. The seller brought suit for the price of the steel delivered and the buyer counterclaimed for damages caused by the delay in shipment of the first installment, and for extra expense incurred in purchasing steel elsewhere. The Court of Appeals for the 10th Circuit allowed the seller to recover the contract price of the steel delivered, but allowed the buyer damages on his counterclaim for both the delay in delivery and the extra expense. *Robberson Steel Company v. Harrell,* 177 F. 2d 12 (10th Cir. 1949).

The court in granting recovery on the counterclaim for extra expense in securing steel elsewhere with which to finish the construction project applied the broad doctrine that, "The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of an essential covenant thereof."[1] The court reasoned that since the seller had been first in default by refusing to deliver until the controversy concerning a previous contract was settled, he could not exercise his privilege of rescinding the contract for the buyer's failure to pay, and that in attempting to rescind he breached the contract, giving the buyer a right to damages for a total breach. Apparently this doctrine is widely accepted by the courts and universally applied without distinction between cases where the second default is the natural result of the first

1. Robberson Steel Company v. Harrell, 177 F.2d 12, 17 (10th Cir. 1949).

default[2] and cases where such casual connection is absent.[3] The application of this doctrine to the instant case raises two problems. First, is the doctrine essentially sound as stated? Second, if the doctrine is essentially sound, should it be applied without exception?

In order to answer these questions it is necessary to determine the relative rights of the parties at the end of each phase of the transaction. The first act of consequence was the seller's refusal shortly after June 13, 1947, to ship any steel until the controversy over a previous contract was settled. Conceding that this action was an anticipatory repudiation of the present contract,[4] the buyer had a choice of at least three courses of action. He might have done nothing, using the default as a defense for his own non-action; acted affirmatively to rescind the contract; or sued immediately for a total breach of the contract, recovering as damages the difference between the contract and market price at the date of the breach.[5] Even if this refusal to ship is not considered sufficient to constitute an anticipatory repudiation,[6] the refusal followed by the passage of the shipping date without shipment being made constituted a total breach of the contract giving the buyer the same three courses of action.[7]

The letter of July 1, 1947, urging the seller to make shipment within

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2. When at the time of the buyer's failure to pay, the seller was himself in default in making deliveries, the price of the goods had advanced, and the buyer withheld only enough to protect himself against loss, the seller was not entitled to terminate the contract. North Coast Lumber Co. v. Great Northern Lumber Co., 144 Minn. 304, 175 N. W. 547 (1919). See also, Atlas Brewing Co. v. Hoffman, 217 Iowa 1217, 252 N. W. 133 (1934); Hafner v. A. J. Stuart Land Co., 246 Mich. 465, 224 N. W. 630 (1929); Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488 (1919).

3. White Oak Fuel Co. v. Carter, 257 Fed. 54 (8th Cir. 1919); California Sugar and White Pine Agency v. Penoyer, 1667 Cal. 274, 139 Pac. 671 (1914); Shriver Oil Co. v. Interocean Oil Co., 157 Md. 341, 146 Atl. 223 (1929); Parkhurst v. Lebanon Publishing Co., 356 Mo. 934, 204 S. W.2d 241 (1947); Meyer Milling Co. v. Baker, 328 Mo. 1246, 43 S. W.2d 794 (1931); Stilwell v. McDonald, 100 Ore. 673, 198 Pac. 567 (1921).

4. CORBIN, CASES ON CONTRACTS 738 (3d Ed. 1947); RESTATEMENT, CONTRACTS § 306, § 323 (1932); Limberg, *Anticipatory Repudiation of Contracts,* 10 CORN. L. Q. 135, 165 (1925); *cf.* Associated Cinemas of America v. World Amusement Co., 201 Minn. 94, 276 N. W. 7 (1937).

5. Roehm v. Horst, 178 U. S. 1 (1899); Lagerloef Trading Co. Inc. v. American Paper Products Co., 291 Fed. 947 (7th Cir. 1923); Hochster v. De La Tour, 2 El. & Bl. 678 (1853); 5 WILLISTON, CONTRACTS § 3713, § 3714 (Rev. Ed. 1937); Limberg, *Anticipatory Repudiation of Contracts,* 10 CORN. L. Q. 135, 138 (1925); Vold, *Anticipatory Repudiation of Contracts and Necessity of Election,* 26 MICH. L. R. 502, 506 (1924).

6. The general statement is that to constitute a breach the repudiation must be "positive, absolute, and total, or at least go to the essence." *See* Dingley v. Oler, 117 U. S. 490, 504 (1886); Roehm v. Horst, 178 U. S. 1, 10 (1899).

7. Pierce v. Tennessee Coal, Iron & Railroad Co., 173 U. S. 1 (1898); *In re* Manhattan Ice Co. 114 Fed. 399 (S. D. N. Y. 1901); Strauss v. Meertief, 64 Ala. 299 (1879); Aetna Life Insurance Co. v. Nexsen, 84 Ind. 347 (1882); St. John v. St. John, 223 Mass. 137, 111 N. E. 719 (1916); Chamberlin v. Morgan, 68 Pa. 168 (1871); Husting Co. v. Coca Cola Co., 205 Wis. 356, 237 N. W. 85 (1931); 5 WILLISTON, CONTRACTS § 1317, § 1455 *et seq.* (Rev. Ed. 1937); RESTATEMENT, CONTRACTS § 314 (1932).

ten days cannot be considered as a waiver of the buyer's right to damages.[8] Nor can the buyer be considered to have rescinded the contract since recission demands affirmative action, and he took no such action.[9] It must follow, then, since the buyer acquired at the time of the breach the privilege of rescinding or of suing for total breach, and neither waived any of his privileges nor acted to rescind, that at the time of the initial shipment the contract was in full force and effect, and the buyer retained all of its previously acquired rights.

The shipment of July 11, 1947, was a withdrawal of the seller's repudiation and an offer of performance after breach. As to the repudiation it is clear that since the buyer had not rescinded the contract, brought an action, or changed his position, the withdrawal was effective.[10] As to the offer of performance after breach, the prevailing view is that acceptance of the goods by the buyer after the time fixed for the shipment precludes a rescission of the contract; results in a waiver by the buyer of the stipulation as to time in so far as the seller's right to recover the agreed price is concerned; but the buyer is entitled to recoup the damages incurred by reason of the *delay in delivery*.[11]

The next act of significance was the failure of the buyer to pay for the second, third, and fourth deliveries. The court stated the general rule to be that where the contract provides for deliveries in installments, with separate payment to be made for each installment delivered, the failure to make a

8. United Press Ass'n. v. National Newspaper Ass'n., 237 Fed. 547 (8th Cir. 1916); Tri-Bullion Smelting Co. v. Jacobsen, 233 Fed. 646 (2d Cir. 1916); Donati v. Cleveland Grain Co., 221 Fed. 168 (4th Cir. 1915); Alpena Portland Cement Co. v. Backus, 156 Fed. 944 (4th Cir. 1907); Reindeau v. Bullock, 147 N. Y. 267, 275 (1895); Canda v. Wick, 100 N. Y. 127 (1885); Brown v. Muller, 7 Exch. 319 (1872); Limberg, *Anticipatory Repudiation of Contracts*, 10 CORN. L. Q. 135, 153 (1925).

9. Anvil Mining Co. v. Humble, 153 U. S. 540, 551 (1894); Remington Arms Union Metallic Cartridge Co. v. Gaynor Mfg. Co., 98 Conn. 721, 120 Atl. 572 (1923); Stuffer v. Carbondale Mills, Inc., 196 N. Y. Supp. 266, 119 Misc. 374 (1922); Elterman v. Hyman, 192 N. Y. 113, 126 (1908).

10. Rederiaktiebolaget Amie v. Universal Transp. Co., 250 Fed. 400 (2d Cir. 1918); Kadish v. Young, 108 Ill. 170 (1893); Iowa Mausoleum Co. v. Wright, 170 Iowa 546, 153 N. W. 94 (1915); Carolisle v. Green, 131 S. W. 1140 (Texas 1910).

11. Purington Paving Brick Co. v. Metropolitan Paving Co., 4 F.2d 676 (8th Cir. 1925); Frankfurt-Barnett Co. v. William Prym Co., 237 Fed. 21 (2d Cir. 1916); Steininger Construction Co. v. Bates, 159 Ark. 416, 252 S. W. 618 (1923); Stephens v. Weyl-Zuckerman & Co., 33 Cal. App. 566, 165 Pac. 975 (1917); Medart Patent Pulley Co. v. Dubuque Turbine & Roller Mill Co., 121 Iowa 244, 96 N. W. 770 (1903); Nichols & Shepard Co. v. Parker, 133 Kan. 709, 3 P.2d 462 (1931); Johnson v. North Baltimore Bottle Glass Co., 74 Kan. 762, 88 Pac. 52 (1906); Howard v. Thompson Lumber Co., 106 Ky. 566, 50 S. W. 1092 (1899); Bagby v. Walker, 78 Md. 239, 27 Atl. 1033 (1893); Buick Motor Co. v. Reid Manufacturing Co., 150 Mich. 118, 113 N. W. 591 (1907); Redlands Orange Grower's Association v. Gorman, 161 Mo. 203, 61 S. W. 820 (1901); Sundt v. Tobin Quarries, 50 N. M. 254, 175 P.2d 684 (1946); Builder's Supply & Equipment Corp. v. Gadd, 183 N. C. 447, 111 S. E. 771 (1922); Allen v. Blyth, 173 Wash. 409, 23 P.2d 367 (1933).

payment as scheduled may be treated by the seller as a breach of the entire contract.[12] Though this statement by the court is essentially correct, it is generally qualified in this respect: If the failure to pay on time is the direct consequence of a prior default of the seller, then the buyer may be justified in withholding payment.[13] This situation occurs when the buyer withholds payment on subsequent shipments for the purpose of insuring himself against loss of the damages to which he is entitled because of a prior breach of the seller. In such a case the amount withheld must bear some reasonable relation to the amount of damages suffered as a consequence of the prior breach, and the buyer must notify the seller of the purpose for which payment is withheld.[14] In the instant case there was no indication that it was the seller's prior breach which induced the buyer's default; therefore the buyer was not justified in refusing to pay.

The above analysis shows that normally a seller in Robberson's position at the time the suit was brought has the privilege of treating the buyer's refusal to pay as a total breach and refusing to proceed further under the contract. Such a seller may also sue for the price of the steel delivered. By the same analysis, the buyer waived all other privileges by accepting the shipments after the time specified in the contract except a privilege of counterclaiming for loss occasioned by the delay in delivery of the first installment. The court followed this reasoning but defeated its logical conclusion by blindly applying the general rule that a party who is himself in default cannot rescind a contract. By this ruling the court forever barred the seller from exercising his privilege of rescinding for subsequent breaches by the buyer.

The decision cannot be rationalized on the theory that the buyer retained his privilege of suing for total breach and accepted shipment merely to mitigate damages. A buyer in accepting late deliveries under an installment contract retains only a privilege of suing for damages already suffered as a result of the late delivery.[15] However, even if it were assumed that he retains a privilege of suing for total breach, the rule of mitigation can have no application. The breach of a contract of sale by the seller where the article purchased has a market value places the buyer under no obligation to buy from others. The amount of damages in such a case is the difference between the contract price and the market price at the time of the breach and is unaffected by the actions of the parties subsequent to the breach.[16]

12. *See* Robberson Steel Co. v. Harrell, 177 F.2d 12, 16 (10th Cir. 1949).

13. Bradley v. King, 44 Ill. 339 (1867); Atlas Brewing Co. v. Hoffman, 217 Iowa 1217 (1934); Reiser v. Lawrence, 96 W. Va. 82, 123 S. E. 451 (1924).

14. Bradley v. King, 44 Ill. 339 (1869).

15. See note 11 *supra.*

16. Saxe v. Penoke Lumber Co., 159 N. Y. 371 (1899); 5 WILLISTON, CONTRACTS § 1383; Limberg, *Anticipatory Repudiation of Contracts,* 10 CORN. L. Q. 135, 175 (1925); *cf.* UNIFORM REVISED SALES ACT, § 113; UNIFORM COMMERCIAL CODE, § 2-712 (1949).

In allowing recovery of extra expense incurred by the buyer in securing steel elsewhere with which to finish the job, the court must have reasoned that the seller's attempted rescission after the buyer's failure to pay was an anticipatory repudiation. To recover damages resulting from anticipatory repudiation tender of performance need not be made, but the aggrieved party must allege that he is ready, willing, and able to perform.[17] Surely a buyer who is in unexcused default on three scheduled payments cannot truthfully allege that he is ready, willing, and able to perform.

This decision in addition to giving the buyer the right to sue for the damages resulting from late delivery of the initial installment, deprived the seller of the protection of his conditions precedent. Normally failure to perform a condition precedent excuses performance by the other party.[18] Here the court held that a party first in default can no longer treat the failure of the other party to perform a condition precedent as an excuse for his own subsequent non-performance. In a real sense the sanctions imposed by the court here are penal in nature. The normal measure of contract damages is the amount necessary to put the injured party in as good a position as he would have occupied had the contract been completely performed. The result here goes far beyond this measure, and in addition to making the buyer whole,[19] withholds from the seller its normal substantive rights.

One purpose of installment contracts is to limit the credit extended to the buyer by requiring payment following each shipment. This decision forces the seller to continue shipments after the buyer has failed to make scheduled payments, which has the practical effect of requiring the seller to extend more credit than was bargained for. This sanction bears no relation to the original default of the seller. The severity of the penalty is directly related to the ability of the buyer to pay for the additional shipments rather than to the harm caused by the seller's original default. A man of ordinary business intelligence would normally expect that an unjustified refusal of a buyer to make an installment payment when due would excuse the seller from extending further credit. The trend of modern contract thinking is towards achieving legal results that the normal business man would expect to flow

17. Grey v. Smith, 83 Fed. 824 (9th Cir. 1897); Linton v. Allen, 154 Mass. 432, 28 N. E. 780 (1891); Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071 (1910); Bigler v. Morgan, 77 N. Y. 312 (1879).

18. Norrington v. Wright, 115 U. S. 188 (1885); Warren v. Stoddard, 105 U. S. 224 (1882); Davis v. Cotton State Life Insurance Co., 232 Fed. 343 (5th Cir. 1916); Skehan v. Rummel, 124 Ind. 347, 24 N. E. 1089 (1890); Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N. Y. 313 (1919); Jansen v. Schneider, 78 Misc. 48, 138 N. Y. Supp. 144 (1912); Kingston v. Preston, 2 Doug. 689 (1781), quoted in Jones v. Barkley, 2 Doug. 684 (1781); RESTATEMENT, CONTRACTS § 269, § 274 (1932).

19. An award of damages for delay in the initial delivery was the only remedy to which the buyer was entitled. See note 11 *supra*.

from particular situations and away from strict legalistic interpretations.[20] If this approach had been used here, the seller would have been permitted to rescind.

The above analysis shows that the court in applying the general rule without analyzing its effect was clearly in error. Further, the general rule as stated is unsound, and should be altered to read: "A party who is himself in default in performance of a contract cannot rescind for a subsequent failure of performance *having a causal connection with his own default.*" The application of the doctrine as modified would have reached the correct solution of allowing the seller to rescind the contract for the default of the buyer, subject, however, to damages for late delivery of the initial installment.

DOMESTIC RELATIONS

EFFECT OF HEART BALM ACTS ON INFANT'S RIGHT TO SUE FOR THE ENTICEMENT OF HIS PARENT

The mother of infant children was enticed away from the children and family home by Hicks. By their father as next friend, the children sued for damages resulting from the enticement. The Federal District Court allowed the action although a Michigan heart-balm statute had abolished actions for alienation of affections. The court reasoned that a cause of action should be recognized in favor of the children and that the heart-balm statute, being intended to abolish only the traditional alienation-of-affections suit, did not bar the children's action. *Russick v. Hicks,* 85 F. Supp. 281, (W. D. Mich. 1949).

In allowing the action the court surmounted two barriers: it first recognized a new cause of action to protect the children's interest in the parental relation and then determined the action to be outside the purview of an existing heart-balm statute.[1] There are indications of a trend to liberalize tort law in favor of the infant.[2] Three appellate courts, faced with facts similar to those in this case, have upheld the infant's action for injury to his interest in the security of the parental relation.[3] But the action has been

20. The UNIFORM REVISED SALES ACT and UNIFORM COMMERCIAL CODE which presumably will soon be in effect in many jurisdictions are excellent examples of this trend. See Gilmore, *On the Difficulties of Codifying Commercial Law,* 57 YALE L. J. 1341 (1948); Comment, 57 YALE L. J. 1360, 1360-1366 (1948).

1. "All civil causes of action for alienation of affections, criminal conversation, and seduction of any person of the age of 18 years or more, and all causes of action for breach of contract to marry are hereby abolished.. MICH. COMP. LAWS (1948) § 551.301.

2. Note, 35 VA. L. REV. 618 (1949).

3. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). This decision was the first to recognize a cause of action in the minor child where the father was enticed from the home. The decision provoked wide comment, and is noted in 13 U. OF CHI. L. REV. 375 (1946); 41 ILL. L. REV. 444 (1946); 25 CHI-KENT REV. 90 (1946); 59 HARV. L. REV. 297 (1945); 46 COL. L. REV. 464 (1946); 15 FORD. L. REV. 126 (1946); 30 MINN. L. REV. 310