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Contracts -- Effect of Second Contract With Defaulter Upon Rights for Breach of First

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waived his right to do so, should make some offer of the evidence that he would like to prove under the stricken pleadings. Where the motion is denied, the moving party's only remedy is to object to the evidence when presented. If it is denied on the merits, the Superior Court judge has made his decision to allow the evidence to come in. In this situation the moving party should except to the denial and then object to the evidence. If he does not except to the denial he may be considered to have waived his right to object to the evidence by acquiescing in it; while if he fails to object to the evidence, he may, on appeal, be considered to have waived his right to his exception to the denial. If the judge denies the motion by invoking the "chart" rule, he is simply deferring a decision on the question until the evidence is offered. Thus it seems that the moving party would not have to except in order to object to the evidence. However, in many instances the judge may give no reason for his denial, and exception should be taken in all such cases to prevent any subsequent contention that the judge's ruling was on the merits.

In the interest of simplicity, and in order to clarify the difficult, and in many cases unnecessary problems that develop from the use of the motion to strike, it seems that it would be advantageous from both the point of view of the court and of the parties litigant, for the court to lay down the following set rule on motions to strike made in apt time: (1) Where allowed, the aggrieved party may (a) except and appeal immediately, and obtain a decision as to whether or not he may support the contested allegations by evidence at the trial, or (b) except to the ruling and be allowed to raise the question if the case is subsequently appealed, provided, at least, that he has preserved his exception by offering the evidence at the trial. (2) Where denied, he may not appeal, but must seek his relief by excepting to the ruling and objecting to the evidence when and if it is offered.

J. B. CHESHIRE, IV.

Contracts—Effect of Second Contract With Defaulter Upon Rights for Breach of First.

An elementary rule of contract law is that a party injured by a breach of contract has a "duty"[1] to mitigate any damages suffered

[1] Strictly speaking the "duty" to mitigate damages is not a duty at all, not an affirmative obligation. The rule merely sets up a standard for ascertainment of damages, recognizing a disability in the injured party to collect avoidable damages. RESTATEMENT, CONTRACTS (1932) §336, comment (d); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3795, 3813. In the interests of brevity the word "duty" is used throughout this note as qualified by this footnote.

thereby.[2] Yet, in a recent case[3] where the injured party entered into a second contract with the defaulting party, in order to dispose of products left on his hands by the breach, the court held that the second contract "superseded and rescinded" the first, and thereby barred any recovery of damages for breach of that contract. The majority reasoned that since the two contracts were inconsistent with each other and performance of both was impossible, the first was abrogated by the second, despite lack of an express provision to that effect. Thus, the court, while recognizing the doctrine of mitigation of damages, interpreted the making of the second contract as indicating no such intent, but rather the intent to terminate all rights under the first contract. In a vigorous dissent, one judge[4] contended that by virtue of the "duty" on the injured party to mitigate damages resulting from the breach of the first contract, he should be allowed to enter into the second contract with the party in default without barring his rights to recover damages for the former breach.

Cases involving employment contracts have often given rise to the question of the effect of a subsequent contract on the rights of the parties to a breached contract. These cases arise where the employee has been wrongfully discharged by his employer, who subsequently makes an offer of re-employment. In view of the recognized "duty" to mitigate damages, it is usually held that if the best offer, within the limits set up by the mitigation rule, comes from the defaulting employer, then the employee must either accept or else forfeit a *pro tanto* amount of the damages suffered.[5] Thus, these cases impliedly hold that the second contract will not rescind the first.

[2] McCORMICK, DAMAGES (1935) 127, 132; RESTATEMENT, CONTRACTS (1932) §336 (1); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3795, 3875.

[3] United States v. Brookridge Farm, Inc., 111 F. (2d) 461 (C. C. A. 10th, 1940).

[4] Huxman, Circuit Judge; *id.* at 465. In the principal case another judge dissented on the ground that damages should not be recoverable for breach of the first contract because that contract was not one that could be enforced in court. It seemed that there was no competition when the first contract was made, and this judge was of the idea that the seller had taken advantage of this fact to charge the buyer, the United States, an exorbitant price for the goods. When the second contract was made between the parties there was competition, and the seller's bid for the second contract was approximately 30% less than his bid for the first contract had been.

[5] Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S. W. 242 (1920); Flikema v. Henry Kraker Co., 252 Mich. 406, 233 N. W. 362, 72 A. L. R. 1046 and note (1930). However, this duty to re-accept employment is a qualified one, extending only to employment offered in good faith; Gray v. Pacific Suction Cleaner Co., 171 Cal. 234, 155 Pac. 469 (1915); Schisler v. Perfection Milker Co., 193 Minn. 160, 258 N. W. 17 (1934); within the same general line of business; Russellville Special School Dist. v. Tinsley, 156 Ark. 283, 245 S. W. 831 (1922); Hussey v. Holloway, 217 Mass. 100, 104 N. E. 471 (1914); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3811; and not to an offer of re-employment more menial than that for which he originally contracted; Cooper v. Stronge & Warner Co., 111 Minn. 177, 126 N. W. 541 (1910); Connell v. Averill, 8 App. Div. 524, 40

In one leading case,[6] the seller refused to deliver goods to the buyer on credit according to the contract, but instead offered to deliver the same goods at a reduced cash price. The court held that the buyer should have mitigated his damages by accepting the new offer if he had the cash and was unable to obtain similar goods elsewhere, but ruled that the new contract did not terminate rights for damages under the original contract. This decision was based upon dicta in *Warren v. Stoddart*[7] to the effect that when a buyer refused to accept a seller's new cash offer, after breach of the original contract to ship goods on 30 days credit, then the buyer could recover only nominal damages for the breach of that contract. Many courts treat a second contract with the defaulting party as a proper method of mitigating damages,[8] refusing to allow recovery of damages that could have been, but were not,

N. Y. Supp. 855 (4th Dep't 1896); nor to work that would be degrading; Buffalo Bayou Co. v. Lorentz, 177 S. W. 1183 (Tex. Civ. App. 1915); Williams v. School Dist., 104 Wash. 659, 177 Pac. 635 (1919); 3 SUTHERLAND, DAMAGES (4th Ed. 1916) 2564; offensive; Price v. Davis, 187 Mo. App. 113, 173 S. W. 64 (1915); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3798; or unreasonable; Hirsch v. Georgia Iron & Coal Co., 169 Fed. 578 (C. C. A. 6th, 1909); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3798; nor does it apply if he already has another position; see Birdsong v. Ellis, 62 Miss. 418 (1884). Where the new offer varies the terms of the original contract so that its acceptance would force an abandonment of rights under the first agreement, there is no duty on the discharged employee to accept; Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S. W. 242 (1920); Holloway v. Levine, 107 Vt. 396, 180 Atl. 889 (1935); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3814; unless it expressly stipulates that entrance into the new contract will not prejudice the employee's rights under the first contract; Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916). If, after a reasonable time the employee cannot locate equivalent employment, then he should accept work for which he is best suited; Kramer v. Wolf Cigar Stores Co., 99 Tex. 597, 91 S. W. 775 (1906); retaining of course his right to recover damages for the breach of the former contract.

[6] Lawrence v. Porter, 63 Fed. 62 (C. C. A. 6th, 1894).

[7] 105 U. S. 224, 230, 26 L. Ed. 1117, 1120 (1882). In Lawrence v. Porter, *id.* at 67, Lurton, Circuit Judge, said of this case: "The opinion in *Warren v. Stoddart* rests upon the theory that the buyer does not surrender or yield any right of action he may have for the breach of contract. It rests wholly upon the duty of mitigating the loss by replacing the goods by others, if they are obtainable by reasonable exertion. If this duty be such as to require him to buy from the delinquent seller; if the article can be obtained only from him, or because he offers it cheaper than it can be obtained from others, such a purchase from the seller is not an abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage save in so far as the damage resulting from his bad faith was thereby reduced. If the seller offers to sell for cash at a reduced price, or to sell for a less price than the market price, though in excess of the contract price, with the condition that it should operate as a waiver of the original contract, or of any right of action for its breach, then the buyer would not be obligated to treat with the seller, nor would the seller's offer, if rejected, operate as a reduction of damages."

[8] Key v. Kingwood Oil Co., 110 Okla. 178, 236 Pac. 598 (1925); Plesofsky v. Kaufman & Flonacker, 140 Tenn. 208, 204 S. W. 204 (1918); Holloway v. Levine, 107 Vt. 396, 180 Atl. 889 (1935); Stone v. United Fuel Gas Co., 111 W. Va. 569, 163 S. E. 48 (1932); 1 SUTHERLAND, DAMAGES (4th Ed. 1916) 324; 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3876; See collection of cases in Notes (1902) 54 L. R. A. 718, (1919) 1 A. L. R. 436, (1927) 46 A. L. R. 1192, (1931) 72 A. L. R. 1049.

thus avoided,[9] and some of these expressly reject the idea that the second contract is a rescission of the first, barring rights thereunder.[10] The defaulter cannot escape liability under this rule by stipulating that the acceptance of the new contract will be an abandonment of the original right of action,[11] for the injured party need not accept such an

Conversely, some courts hold that entrance into a second contract, inconsistent with an earlier one between the same parties, operates to rescind the prior contract, and to extinguish the right to sue for the breach of that contract.[12] The reasoning applied is that the injured party had an election either to enforce the original contract or relinquish his rights thereunder, and that by entering into the second contract he chose the latter course.[13] However, several of these decisions may be distinguished from the principal case on the ground that there had been no breach before the second contract was made.[14] Frequently, as in the principal case, courts will merely recite that contracts incon-

[9] Lawrence v. Porter, 63 Fed. 62 (C. C. A. 6th, 1894); Schisler v. Perfection Milker Co., 193 Minn. 160, 258 N. W. 17 (1934); Hickey v. Perkins Dry Goods Co., 229 S. W. 951 (Tex. Civ. App. 1921). It is often held that "all reasonable steps" should be taken by the injured party to mitigate his damages; Gilson v. Royster Guano Co., 1 F. (2d) 82 (C. C. A. 3rd, 1924); Payzu, Ltd. v. Saunders, (1919) 2 K. B. 581, (1919) 18 MICH. L. REV. 702; but it is ordinarily said that it is not reasonable to require the injured party to borrow money in order to accept the defaulting seller's offer to sell for cash when credit was contracted for; Weber Implement Co. v. Acme Harvesting Mach. Co., 268 Mo. 363, 187 S. W. 874 (1916); Stanley Manly Boy's Clothes, Inc. v. Hickey, 113 Tex. 482, 259 S. W. 160 (1924). In instances where it is impossible to get the same goods elsewhere; Lawrence v. Porter, 63 Fed. 62 (C. C. A. 6th, 1894); as in public utilities; Henrici v. South Feather L. & W. Co., 177 Cal. 442, 170 Pac. 1135 (1918); Note, (1927) 46 A. L. R. 1192, 1195; or if a refusal to enter into the second contract would greatly aggravate damages; Ingraham v. Pullman Co., 190 Mass. 33, 76 N. E. 237 (1906); the courts are fairly consistent in holding that there is a "duty" to enter into the second agreement with the party in default, thus impliedly holding that the second contract would not of itself rescind the former agreement and bar rights thereunder.

[10] Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916); Siegle v. Hamilton-Carhartt Cotton Mills, 89 Okla. 68, 213 Pac. 305 (1923); Allen v. Maronne, 93 Tenn. 161, 23 S. W. 113 (1893); 2 SUTHERLAND, DAMAGES (4th Ed. 1916) 2298.

[11] Farmer's Co-operative Ass'n v. Shaw, 171 Okla. 358, 42 P. (2d) 887 (1935), (1936) 20 MINN. L. REV. 300; Holloway v. Levine, 107 Vt. 396, 180 Atl. 889 (1935); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3797, 3876.

offer.

[12] Wiley v. Dixie Oil Co., 43 F. (2d) 51 (C. C. A. 10th, 1930); McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); Arizona-Parral Mining Co. v. Forbes, 16 Ariz. 395, 146 Pac. 504 (1915); Riverside Coal Co. v. American Coal Co, 107 Conn. 40, 139 Atl. 276 (1927); McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159 (1913); Agel & Levine v. Patch Mfg. Co., 77 Vt. 13, 58 Atl. 792 (1904); Snowball v. Maney Bros., 39 Wyo. 84, 270 Pac. 167 (1928).

[13] Wood v. Brighton Mills, 297 Fed. 594 (C. C. A. 3rd, 1924); McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159 (1913); Johnson v. Ford, 147 Tenn. 63, 245 S. W. 531 (1922).

[14] Housekeeper Pub. Co. v. Swift, 97 Fed. 290 (C. C. A. 8th, 1899); Wiley v. Dixie Oil Co., 43 F. (2d) 51 (C. C. A. 10th, 1930); Arizona-Parral Mining Co. v. Forbes, 16 Ariz. 395, 146 Pac. 504 (1915).

sistent with each other cannot stand together since performance of one renders performance of the other impossible,[15] ignoring the possibility that a right of action remains and the entering of the second contract was in mitigation of damages.[16]

It is true that performance of the second contract renders performance of the original contract impossible, but the injured party agrees to the second contract only after the other party has, by repudiation, made it plain that the original contract will not be performed. When there is no breach of the first agreement, it is but reasonable to assume that the second agreement, inconsistent with the first, was intended to replace it and indicate a rescission of the first contract. In such a case the making of the new agreement caused the first one not to be performed, so that the non-performance can be called consensual. But where the new agreement was made only after such a repudiation by one party as to indicate that the original agreement was not to be carried out, then the new agreement should not indicate any intent to rescind its predecessor. Rather, the repudiation is the reasonable explanation of the non-performance of the original contract, and the new agreement made after the repudiation appears to be not a consent to the non-performance, but a device adopted by the parties to meet a situation where non-performance of the earlier agreement was already assured. It is true, as said by the court in the principal case, that the injured party entered into the new agreement because he felt that it was the best course for him to follow under the circumstances, but this statement is equally true of all mitigation arrangements. Performance of both contracts in such a situation, while impossible, is no more impossible than performance of both where the injured party has contracted with a third party rather than the defaulter, yet the courts never speak of impossibility in the latter case. A contract with a third party is the usual method of mitigating damages,[17] and no court contends that such a contract *ipso facto* bars the injured party's rights to recover for breach of the prior contract.

[15] Housekeeper Pub. Co. v. Swift, 97 Fed. 290 (C. C. A. 8th, 1899); McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159 (1913); 2 BLACK, RESCISSION AND CANCELLATION (1916) 1249.

[16] Some few courts consider and expressly reject the mitigation of damages doctrine, especially in employment contracts where it is usually held that to accept re-employment at less wages than those contracted for would be an abandonment of the original right of action, regardless of the "duty" to mitigate damages. McCabe Const. Co. v. Utah Const. Co., 199 Fed. 976 (D. Ore. 1912); People's Co-operative Ass'n v. Lloyd, 77 Ala. 387 (1884); Trawick v. Peoria & Ft. C. Ry., 68 Ill. App. 156 (1896); Moore v. Yazoo & M. V. R. R., 176 Miss. 65, 166 So. 395 (1936); 3 SUTHERLAND, DAMAGES (4th Ed. 1916) 2557.

[17] RESTATEMENT, CONTRACTS (1932) §336, comment (a); 1 SUTHERLAND, DAMAGES (4th Ed. 1916) 324; 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) §§1353, 1385.

Although the Restatement of Contracts[18] provides that "A contract containing a term inconsistent with a term of an earlier contract between the same parties is interpreted as including an agreement to rescind the inconsistent terms of the earlier agreement . . .", this has no express application *after* a breach of the first contract. Where there has been no breach of the first contract, the generally recognized doctrine of novation, or substitution of contracts, will apply.[19] Seemingly it is this rule to which the Restatement refers.

It appears unreasonably paradoxical to hold that a party injured by a breach of contract is precluded from recovering damages by virtue of entrance into a second contract with the defaulter, when under a court-made rule he has a "duty" to mitigate his damages, and his best opportunity lies in the form of a new offer from the party in default. Surely no court could hold that after a seller breached a contract for the sale of goods for $1,000, yet offers to sell the same goods to the buyer for $1,100, the buyer could buy from a third party for $1,250 and then recover $250 from the seller for the breach! Thus, some courts would reach the strange conclusion that if the buyer did not enter into the second contract with the defaulter he could recover only a part of his damages, while if he did enter into the second contract he could not recover any of his damages.[20] If the second contract is allowed without a waiver of the right to sue for damages, the original contract between the parties would in effect be enforced, as the buyer could recover any differential. Since the courts impose a "duty" to mitigate damages after a breach of contract, it seems highly desirable to allow the achievement of this by entrance into a second contract with the defaulter, especially where this appears to be the most effective method of minimization, yet to preserve the right to recover any damages ensuing from the breach of the first contract unless there is an express waiver of such right. Such a decision as the instant one leaves a court enmeshed in contradictory cross-purposes.

Due to the conflict of decisions, it seems that the best available assurance that the second contract may be entered into safely, is to provide expressly therein that such contract is not to be construed as

[18] RESTATEMENT, CONTRACTS (1932) §408.

[19] Housekeeper Pub. Co. v. Swift, 97 Fed. 290 (C. C. A. 8th, 1899); Wiley v. Dixie Oil Co., 43 F. (2d) 51 (C. C. A. 10th, 1930); Arizona-Parral Mining Co. v. Forbes, 16 Ariz. 395, 146 Pac. 504 (1915); 1 BLACK, RESCISSION AND CANCELLATION (1916) 11.

[20] Compare Deere v. Lewis, 51 Ill. 254 (1869), with Trawick v. Peoria & Ft. C. Ry., 68 Ill. App. 156 (1896); Birdsong v. Ellis, 62 Miss. 418 (1884), with Moore v. Yazoo & M. V. R. R., 176 Miss. 65, 166 So. 395 (1936); Plesofsky v. Kaufman & Flonacker, 140 Tenn. 208, 204 S. W. 204 (1918), with Johnson v. Ford, 147 Tenn. 63, 245 S. W. 531 (1922).

a waiver or abandonment of any rights which have accrued under the breached contract.[21]

P. DALTON KENNEDY, JR.

Constitutional Law—Police Power—Municipal Prohibition of House to House Peddling.

A Georgia city, having statutory authority to "license, regulate and control . . . peddlers of all kinds,"[1] declared by ordinance that every solicitor, peddler, hawker, itinerant merchant and transient vendor of merchandise, who went uninvited to a private home for the purpose of conducting business, was a (public) nuisance.[2] *Held*, such an unqualified provision is an unreasonable and arbitrary interference with legal rights, in violation of the due process clause of the Federal Constitution.[3]

A preliminary question to be decided in every such case is: Has the legislature given the municipality power to pass such a law? This is of particular significance in that courts seem to find an affirmative grant of power a persuasive argument for constitutional validity. For, ordinances identical to the one under consideration have been upheld in all cases when passed by cities granted the specific power to "prohibit" hawkers and peddlers.[4] Likewise, this ordinance has been upheld in the only case arising where passed by another city under the delegated power to "regulate" similar activities.[5] Whenever a city had neither the power to regulate nor suppress this business, such an

[21] In Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916), Cardozo, J., said of such an express provision in the second contract: "The contract itself . . . says in so many words that the old contract is not to be deemed revived, and that no rights that have accrued under it are waived. The cause of action against the defendant was thus plainly preserved." Even such an express reservation might leave some room for argument if the language of Mr. Justice White in International Contracting Co. v. Lamont, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160 (1894), is to be taken literally. In that case it was said, at p. 310, "A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

[1] LAWS OF GEORGIA 1901, Part III, Title I, Sect. 37.

[2] This ordinance is identical with that originated by Green River, Wyoming, and upheld in Green River v. Fuller Brush Co., 65 F. (2d) 112 (C. C. A. 10th, 1933).

[3] De Berry v. La Grange, 8 S. E. (2d) 146 (Ga. App. 1940).

[4] Green River v. Fuller Brush Co., 65 F. (2d) 112 (C. C. A. 10th, 1933) *rev'g* 60 F. (2d) 613 (D. C. Wyo. 1932); McCormick v. Montrose, 99 P. (2d) 969 (Colo. 1940) (court used this reasoning); *cf.* Goodrich v. Busse, 247 Ill. 366, 93 N. E. 292 (1910) (similar ordinance upheld for this reason).

[5] Shreveport v. Cunningham, 190 La. 481, 182 So. 649 (1938). Accord: *Ex parte* Camp, 38 Wash. 393, 80 Pac. 547, 548 (1905). But *cf.* Cosgrove v. City Council, 103 Ga. 835, 31 S. E. 445 (1898); Good Humor v. Board of Comm'rs., 124 N. J. L. 162, 11 A. (2d) 113 (1940); Virgo v. Toronto, 22 Can. Sup. Ct. 447 (1893) (passing on similar ordinances).