Michigan Law Review

Volume 13 | Issue 1

1914

Note and Comment

Joseph H. Drake
University of Michigan Law School

Hollis Harshman
University of Michigan Law School

Marcy K. Brown
University of Michigan Law School

Leslie C. McClelland
University of Michigan Law School

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT.

THE LAW SCHOOL.—The Law School opens with an attendance of 500, the decrease from last year's numbers (on account of the increased requirements for admission) being less than was anticipated.

Mr. Grover C. Grismore, a graduate of the Law School in the class of 1914, and a former member of the Board of Editorial Assistants of the MICHIGAN LAW REVIEW, has been added to the teaching staff as an instructor. There are no other changes in the teaching staff.

Ninety-one colleges and universities are represented in the Law School this year by graduates and former students. They are as follows:

University of Michigan, 258; University of Nebraska, 8; University of Colorado, University of Missouri, Valparaiso University, 7; Princeton University, University of Illinois, 6; University of Wisconsin, Mount Union College, 5; Pennsylvania State College, Lake Forest University, Olivet College, Bucknell College, 4; Cornell University, Philippine College of Law, University of Indiana, University of Montana, Alma College, University of Kansas, Amherst College, Lafayette College, Mount Pleasant Normal College, 3; Wabash College, Kalamazoo College, Marshall College, University of Texas, University of Southern California, Hope College, South Dakota College, Oregon State College, University of Chicago, Bethany College, Harvard

University, Albion College, De Pauw University, University of Minnesota, Drake University, 2; Adrian College, Agricultural College of Utah, Augustana College, Bowdoin College, Brown University, Buena Vista College, Chattanooga College, University of Cincinnati, Carthage College, Coe College, Columbia Univerity, Colgate University, Dartmouth College, Detroit University, Earlham College, Edinboro State Normal, Findlay College, Fremont College, University of Georgia, Goshen College, Gustavus Adolphus College, Hamline University, Henderson-Brown College, Hiram College, Huron College, Illinois State Normal College, Iowa State College, Jefferson College, Kansas State Normal College, University of Kentucky, Knox College, Lebanon College, Mansfield State Normal, Marietta College, Muhlenberg College, Notre Dame University, University of Oklahoma, Oregon Agricultural College, Pennsylvania State Normal, Pomona College, St. Viator's College, St. Bonaventure's College, University of California, Upper Iowa University, U. S. Naval Academy, University of Virginia, University of Wooster, Wesleyan University, Westminster College, West Virginia State University, Washington and Lee University, Western State Normal College, Yale College, Ypsilanti Normal College, 1.

JURISPRUDENCE: A FORMAL SCIENCE.—HOLLAND defines jurisprudence as "the formal science of positive law" ("JURISPRUDENCE," 10th ed., p. 13). The meaning of science is plain enough. A good many pages are devoted to the elucidation of the words "positive" and "law," but the term "formal" he explains only by analogy. As there is a formal science of grammar to which belongs, for example, the concept of possession, which has its material manifestation in Latin grammar in a genetive termination and in English grammar in the preposition "of," so there is a formal science of law, material manifestations of whose fundamental principles are found in various systems of actual legal rules. It is manifest that formal is used here as the synonym of essential, and if the latter word were substituted for the former it would materially clarify the definition for many students of jurisprudence. In a forthcoming volume of the "LEGAL PHILOSOPHY SERIES" (Volume X) the Italian of DEL VECCHIO's title, "I presupposti filosophici della notizione del diritto" is paraphrased as "The Formal Bases of Law," and as there is likely to be the same difficulty of interpretation here as in HOLLAND's definition some account may not be amiss as to why formal means essential as well as non-essential and how it came to have the two opposite meanings.

It may be noted that the use of formal as the synonym of essential seems to be peculiar to philosophic nomenclature and it may therefore be surmised that we must go to ancient philosophy for an explanation. Juristic philosophers as well as metaphysicians in general have always set before themselves the task of getting at the ultimate truth back of their subject, and although it is a brave man that would attempt to define philosophy or to formulate the ultimate purpose of philosophers, still as we go back over the history of the subject they all seem to be striving to get an answer to PILATE's question: "What is truth?" What is the real essence of things? What do we mean when we say a thing "is"? What is that something that we must think by virtue of our common intelligence—that something that is true for all times and in all places? The juristic philosopher, like his brother the pure metaphysician, in asking this question. He is

seeking the ultimate reality in his subject, law. We have had various formulations of this absolute reality. PLATO called it ἰδέα (the idea), which may be explained by an illustration from mathematics. The circle that we draw is not the real circle but only a copy of the true reality. The "idea" of circle is the mathematical concept of curved and continuous line, each point of which is connected, by radii of equal length, with the central point. This concept existed before any circle was made and would exist if none ever were drawn. It is therefore a true absolute, the something that eternally *is*. ARISTOTLE, the great successor of PLATO, called his absolute οὐσία, which is etymologically our "essence." The distinction between the concepts of ARISTOTLE and of PLATO is for our purpose immaterial. The significant thing about the concepts is that each is an absolute, a philosophic reality.

When CICERO was driven out of politics by the more practical politicians of his day, he betook himself to the consolations of the classical analogue of religion, namely, philosophy; and while no one, except CICERO himself, has ever thought he was a great philosopher, he performed a very important service for philosophy in that he gave to Greek philosophic nomenclature a proper Latin dress. We should naturally expect therefore to find in the works of CICERO the Latin equivalent of the ἰδέα of PLATO and the οὐσία of ARISTOTLE, and we are not disappointed. We find that he used the word "forma" as the equivalent of one of these absolutes. "De Orat." 10 "has rerum *formas* appellat ἰδέας Plato easque gigni negat et ait semper *esse* ac ratione et intelligentia contineri" ("These *forms* of things PLATO calls *ideas* and he says that they are not born but that they always *are* [*esse*] and that they are comprehended by reason and intelligence").

Here the Ciceronian "forma" is evidently made equal to the Platonic "idea." CICERO does not seem to have given any such exact definition of the Aristotelian absolute, at least no translation of οὐσία as "forma" appears in any of the lexicons of CICERO, but we have in his description of the Platonic absolute the statement that it is the essence of things (*esse*), and this justifies us in writing the equation, "forma" = "essens." It may be observed that this participle of the verb "esse" is hardly classical in origin. CICERO apparently does not use it at all. Even the abstract "essentia" occurs only in the "Fragmenta" (cf. Fr. K. 10, ed. C. F. W. Mueller). Mediaeval philosophy, however, coined two participles from the classical "esse," namely, "ens," which appears in our word "entity" and "essens" from which comes "essential." The word "essentia" is constantly used throughout the Middle Ages as the equivalent of the Aristolelian οὐσία and it appears in modern romance languages with the same meaning as in English.

The genealogy of the word "formal" as the equivalent of "essential" is thus perfectly plain and its use in this sense by such classically trained scholars as HOLLAND and DEL VECCHIO is what might be expected. HOLLAND'S "formal science" is the science of essential principles, and DEL VECCHIO describes the formal basis of law as "the eternal seed of justice, the foundation of the idea of law . . . not furnished by nature as the complex or succession of empirical facts but by the essence or nature of man."

The real difficulty is to explain the use of formal in its everyday sense as the opposite of essential, as when we say, "the distinction is merely formal but there is no real difference." There seems to be some squinting at this in the use of the word ἰδέα by PLATO which contains the root of the Greek equivalent of our word "see." We *see* only what is superficial and not the real essence of the thing, but this side of the concept was apparently not prominent in PLATO's mind and although ARISTOTLE calls εἶδος the "form," he means by it not the outward appearance but the sum of its specific determinants by virtue of which a thing is what it is. The mediævalists use formal generally in the sense of essential while all the examples of English usage given by the Oxford Dictionary of the meaning superficial or non-essential come from a comparaively late period. This may or may not be indicative of the fact that its use in this sense has developed in modern times.

J. H. D.

THE LIABILITY OF A THIRD PERSON FROM WHOM AN ATTACHING OFFICER TAKES A RECEIPT FOR THE GOODS ATTACHED.—*Stannard* v. *Tillotson* (Vt. 1914), 90 Atl. 950, presents some interesting questions as to the law governing the relations arising between the attaching officer and the receiptor for attached property.

In the New England States and New York the officer making an attachment commonly accepts a simple receipt from a responsible third party, instead of seizing the property itself or taking a forthcoming bond. The property may be actually delivered to the receiptor or left with the debtor, but the receiptor acknowledges possession of the property and promises to deliver it to the officer on demand. These receipts are not uniform, are not required to be so, and may be refused by the officer. Their validity is upheld and favored by the courts of the states mentioned, but seems generally not to rest upon the authority of statutes. In the principal case the statute provided for the acceptance of a receipt by the officer, but the court evidently decides the case upon the authority of the law as laid down by previous decisions. Similar cases outside of the states mentioned are not numerous, but some instances of a like practice have been seen in Illinois, Kentucky, and Wisconsin. See DRAKE, ATTACHMENT, 7th ed., § 344 et seq.; also WADE, ATTACHMENT AND GARNISHMENT, § 170 et seq.

In the principal case the plaintiff, a constable, attached realty and personalty, pursuant to PUBLIC STATUTES OF VERMONT, §§ 1452-54, by lodging a copy of the writ with the return in the town clerk's office, leaving the property in the custody of the debtor and taking a receipt therefor from the defendant, a stranger. Subsequently the plaintiff, at the suits of other parties, levied second and third attachments on the same property by lodging copies of the writs and the returns in the town clerk's office, but did not take physical possession thereunder. The second and third attachments were later dissolved. Subsequently a fourth attachment was levied, and upon an ensuing judgment and execution the plaintiff seized the goods. Previous to the seizure the debtor had sold a portion of the personal property. The plaintiff sued the defendant for the total value of the goods as shown by the receipt.

The court *held*: 1. That the first levy was valid. 2. That a receipt purporting to be for realty and personalty was valid as to the personalty. 3. That the second and third levies did not relieve the receiptor from liability. 4. That the fourth levy relieved the receiptor from liability to the extent of the value of the goods actually taken.

1. On the first point the court says, "The plaintiff, by the attachment, had the possession and the right of possession. . . . Between the plaintiff and the defendant the possession and the right of possession remained as before the receipt was given." This is a curious legal fiction, but it is the doctrine of a majority of the courts of the states where the custom of receipting for levied property is common. *Beach* v. *Abbott*, 4 Vt. 605; *Buzzell* v. *Hardy*, 58 N. H. 331; *Jordan* v. *Gallup*, 16 Conn. 535; *Tomlinson* v. *Collins*, 20 Conn. 364; *Peters* v. *Stewart*, 45 Conn. 109, 110; *Alsop* v. *White*, 45 Conn. 503; *Burkhardt* v. *Maddox Co.*, 9 Ky. Law Rep. 442; DRAKE, ATTACHMENT, 7th ed., § 351. An early Massachusetts case apparently lays down a contrary doctrine to the effect that there is no constructive possession in the officer when he has left goods in the possession of the debtor (*Knap* v. *Sprague*, 9 Mass. 258, 6 Am. Dec. 64), and there are expressions importing the same theory in *Bridge* v. *Wyman*, 14 Mass. 190, and *Boynton* v. *Warren*, 99 Mass. 172; but later decisions in Massachusetts hold that as between the parties the lien continues. *Wentworth* v. *Leonard*, 4 Cush. 414; *Colwell* v. *Richards*, 9 Gray 374; *Thayer* v. *Hunt*, 2 Allen 449. See also DRAKE, ATTACHMENT, § 351. Bulky goods, under REV. STATUTES OF MASS., c. 90, § 33, may be attached without assumption of actual possession. *Polley* v. *Lenox Iron Wks.*, 15 Gray 513. Maine seems to follow the earlier Massachusetts doctrine, some of the cases citing *Knap* v. *Sprague*, *supra*. *Pillsbury* v. *Small*, 19 Me. (1 App.) 435; *Waterhouse* v. *Bird*, 37 Me. 326.

2. Although the receipt was given for realty and personalty, the court held that it was valid only for the personalty. These contracts are, in some aspects, contracts of bailment. No case has been found where they have been given for realty, except in the present instance.

3. On the third point the court reasoned that the relations of the parties were not changed, that the second and third levies without actual seizure "vested the plaintiff with no different control over the property than he already had." The court considers that the possession of the defendant was in law the possession of the plaintiff; and, despite the fact that in the first instance the lodgment of the writ without actual seizure gives the officer possession in law and constitutes a valid levy in Vermont, comes to the conclusion that under subsequent levies the assumption of physical control by the officer is necessary to discharge the receiptor from liability. From this the logical conclusion would seem to be that the mere lodgment of a junior writ in the clerk's office, by the officer who made the first levy under which the debtor holds from the receiptor, will not operate to discharge the lien of the senior attachment unless the case proceed to judgment and seizure upon execution, or unless for some other reason the officer take manual possession of the property. This is the position taken by the supreme court of New Hampshire, which has held that if the receiptor retain actual posses-

sion of the property the sheriff may make a valid attachment by a return of the writ and notice to the receiptor, *Whitney* v. *Farwell,* 10 N. H. 9; *contra, French* v. *Watkins,* Smith 49; but if the receiptor allow the debtor to retain possession, a second attachment cannot be made without a new seizure, *Whitney* v. *Farwell, supra.* Although the New Hampshire decision is not cited in the principal case, the Vermont court evidently construes the statute to be merely declaratory, and decides this point in accordance with the law as settled in previous decisions.

4. The decision on the fourth point follows the doctrine consistently maintained by the Vermont courts. After actual seizure from the debtor upon a subsequent levy, the officer is held to have possession as though by demand on the receiptor, and is estopped from asserting the priority of the subsequent attachments. *Beach* v. *Abbott, et al., supra; Rood* v. *Scott,* 5 Vt. 263; *Kelly* v. *Dexter et al.,* 15 Vt. 310; *Rider* v. *Sheldon,* 56 Vt. 459. No cases exactly in point from other states are found. It is held, however, that a subsequent physical seizure on another writ by a deputy of the sheriff without the latter's knowledge will not relieve the receiptor of the sheriff from liability, on the ground that the acts of the deputy are not the acts of the sheriff. *Flanagan* v. *Hoyt,* 36 Vt. 565, 86 Am. Dec. 675. Although nominally the contract is one of bailment and on its face the promise of the receiptor to deliver the goods or their value is absolute and unconditional, the rule is generally recognized that the law operates to make the contract contingent, and it is in effect a contract to indemnify the officer to the extent of his liability to the attaching creditor and debtor. Upon such a theory as to the nature of the contract, to hold the receiptor liable after seizure by the officer under a subsequent writ would be to indemnify the officer for a loss caused by his own act. Under many circumstances, the liability of the receiptor is entirely dependent upon the liability of the officer (*Allen* v. *Carty,* 19 Vt. 65; *Plaisted* v. *Hoar,* 45 Me. 380; *Howard* v. *Smith,* 12 Pick. 202; *Roberts* v. *Carpenter,* 53 Vt. 678; *Bissell* v. *Huntington,* 2 N. H. 142); and, as a general rule, any state of facts which shows that the officer is under no liability to apply the property to the debt of the creditor or return it to the debtor or other owner is a sufficient defense to an action by the officer against the receiptor. *Wright* v. *Dawson,* 147 Mass. 384; *Drayton* v. *Merritt,* 33 Conn. 184; *Moulton* v. *Chapin,* 28 Me. 505. Thus, the receiptor may show that the property has been taken from him by the owner by virtue of paramount title, which rule applies generally in cases of bailment (*Learned* v. *Bryant,* 13 Mass. 224; *Denny* v. *Willard,* 11 Pick. 519); or that it was exempt from attachment and has been given up to the debtor (*Thayer* v. *Hunt,* 2 Allen 449; *Stone* v. *Sleeper,* 59 N. H. 295); or that the attachment was dissolved by the insolvency of the debtor (*Sprague* v. *Wheatland,* 3 Met. 416; *Grant* v. *Lyman,* 4 Met. 470; *Andrews* v. *Southwick,* 13 Met. 535; *Butterfield* v. *Converse,* 10 Cush. 317; *Lewis* v. *Webber,* 116 Mass. 450). But it seems that if the receiptor acknowledge in the receipt that the property is the defendant's and is of a certain value, and that he will deliver it or pay the amount of the debt and the costs recovered, he may not defend him-

self by proof that the goods were exempt from attachment. *Bacon* v. *Daniels,* 116 Mass. 474; *Stevens* v. *Stevens,* 39 Conn. 474. Nor may the debtor set up as a defense that the attachment was nominal, that the goods were never really seized nor delivered to him. *Jewett* v. *Torrey,* 11 Mass. 219; *Lyman* v. *Lyman,* 11 Mass. 317; *Morrison* v. *Blodgett,* 8 N. H. 238; *Spencer* v. *Williams,* 2 Vt. 209; *Lowry* v. *Cady,* 4 Vt. 504; *Allen* v. *Butler,* 9 Vt. 122; *Bowley* v. *Angire,* 49 Vt. 41; *Stimson* v. *Ward,* 47 Vt. 624; *Phillips* v. *Hall,* 8 Wend. 610; *Webb* v. *Steele,* 13 N. H. 230; *Howes* v. *Spicer,* 23 Vt. 508. In Vermont a construction which in its implications is contra to the general doctrine and is not necessary to protect the officer is put upon the contract in holding that the receipt is conclusive upon the receiptor as to the goods, their value, and their ownership. *Bowley* v. *Angire,* 49 Vt. 41; *Catlin* v. *Lowry,* 1 D. Chipman 396. H. H.

THE WISCONSIN MARRIAGE LAW UPHELD.—All doubts as to the constitutionality of the so-called "Wisconsin Eugenics Law" were resolved in its favor when the Supreme Court of Wisconsin in *Peterson* v. *Widule, County Clerk* (Wis. 1914), 147 N. W. 966, reversed the decision of the lower court. The Statute (ST. 1913, § 2339M) requires all male persons applying for a marriage license to file with the county clerk a physician's certificate that they are free from acquired venereal disease 15 days prior to the application. The action was mandamus to compel issuance of a license, petitioner being unable to secure an examination for the fee provided in the statute. The lower court gave judgment for petitioner and the county clerk appealed. The Supreme Court held that the statute is constitutional and is a valid exercise of the police power. It is neither an unreasonable restriction on the right to marry, nor a restraint of the right to enjoy life, liberty and the pursuit of happiness, nor is it based on an unreasonable classification because it does not require the same certification on the part of the women, all of which reasons were urged against it. The Wasserman test is not required as by words "recognized tests" the legislative intent was to include only those tests which can be made by a physician with the ordinary laboratory apparatus.

This decision shows the tendency of modern legislation and legal thought to find a solution for the elimination of evils springing up in a complex civilization and to create laws which will subserve the public good and at the same time eliminate as far as possible any substituted evils. This latter forms the basis of the chief criticisms against the law and is pointed out in a concurring and a dissenting opinion. The former censures the law severely, calling it "about as silly and obnoxious a piece of legislation as could be devised." It is also claimed against the wisdom of such a law that it tends to discourage marriage rather than to prevent the evil it was designed to remedy; that it tends to increase immorality rather than prevent it and, so favors an increase of venereal diseases, and that no necessity for it exists, as any prospective bride may amply protect herself as well as the legislation will protect her, and at the same time the half imputed stigma which the

proceedings casts upon the male, as well as any resulting scandal which might arise, would be obviated in the absence of the law. The question of the efficacy of this legislation is a very close one and cogent reasons to support both sides of the case may be advanced. Its ultimate benefit or detriment is a question which can only be settled in the future by a close comparison of statistics before and after the enforcement of the law.

This is the first case decided on this direct point, but the principles upon which the decision rests are well settled. The State has an inalienable right by virtue of the police power to pass all laws "to secure the general health, comfort and prosperity of the state." COOLEY, CONSTITUTIONAL LIMITATIONS, 830; FREUND, POLICE POWER, § 124. It is in the same class as laws prohibiting marriage with epileptics, (*Gould* v. *Gould,* 78 Conn. 242), laws ordering the destruction of tubercular cattle (*Houston* v. *State,* 98 Wis. 481), laws requiring vaccination (*Blue* v. *Beach,* 155 Ind. 121) and the like, all of which have generally been upheld, having in view the public welfare.

It is interesting in connection with the point raised in the main case to note the statutes passed in several states, providing for the sterilization of criminals and defectives, some of which have been declared unconstitutional. See 12 MICH. LAW REV. 400. Many states have passed laws regulating marriages and declaring marriages void with insane persons, epileptics, idiots, habitual drunkards and the indigent, but there were few states prior to Wisconsin which made any regulation as to venereal diseases and in these states the statute operates as a bar to marriage when the person is afflicted, but no means is provided for the discovery of the disease, and as a result the laws have been of little real value. A note on the state laws regulating marriage will be found in 4 JOURNAL OF CRIM. LAW 422.

M. K. B.

BREACH OF CONTRACT BY REFUSAL TO PERFORM.—The Courts of Appeal in Kentucky and Texas have recently handed down two conflicting opinions regarding what each considers a sufficient refusal to perform by one party to a contract, to allow the adverse party to sue for breach of the contract. In *Elder* v. *Offutt,* 165 S. W. 424 the Kentucky court holds that by continually protesting and objecting, even though actually performing the contract, the defendant had refused sufficiently to give the plaintiff a good cause of action. In *Provident Savings Life Assurance Society* v. *Ellinger,* 164 S. W. 1024 the Texas court on the other hand lays down the hard and fast rule that a contract can be breached only in one of three ways, viz: by failure to perform, by a present positive declaration of an intention not to perform and an acceptance of such declaration by the other party as a repudiation of the contract before performance is again entered upon, and by a positive inability to perform. In *Elder* v. *Offutt* the latter had purchased a pair of scales for the weighing of live stock. He sold a half interest to A, who in time sold it to one Stone. Later Offutt sold his remaining interest to Stone, the consideration being sixty dollars and a perpetual right to use the scales free of charge in whatsoever hands they might be. About a year later Stone sold the scales to Elder who

protested and objected to the use of them by Offutt, but did not actually prevent it, and Offutt continued to use them but brought an action first at law and later, by amendment, in equity to enforce his rights. The court held that there was a sufficient breach to enable the plaintiff to have a court enforce his rights. In the Texas case Ellinger was insured in appellant company under an "annual renewable term policy," which remained in force from year to year if insured paid the premium. While he was so insured the appellant company consolidated with the Postal Life Insurance Company, which sent Ellinger a letter saying it would carry out all contracts of appellant and asked him to sign a policy for the ensuing year. Ellinger refused and sued on the ground that appellant had refused and was unable to perform its contract. The facts showed that appellant had retained some assets and was solvent and able to pay Ellinger. *Held,* that the three ways stated above are the only ones in which a contract may be breached and this did not come under either of them.

It has long been regarded as settled beyond dispute that a party may breach a contract by a declaration of a refusal to perform and that the adverse party may act on this repudiation as a breach and bring suit. ANSON, CONTRACTS, 375; *Hochster* v. *De La Tour,* 2 Ellis & B. 678; *Edward Hines Lumber Co.* v. *Allen,* 73 Fed. 603; *Frost* v. *Knight,* 7 Ex. 111. The declaration need not be in express words, as the party may by his conduct show just as clear an intention not to perform, but his conduct must be clear and unequivocal and constitute an absolute refusal to perform the contract or to recognize it as binding. PAGE, CONTRACTS, § 1439; *Houghton* v. *Callahan* 3 Wash. 158. None of these authorities, however, admits that there is such a breach as to give rise to a cause of action unless the adverse party accepts and acts on such repudiation.

BENJAMIN, SALES (7th Ed.) § 568 says: " A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct, unequivocal and absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he after continue to urge or demand compliance it is plain he does not understand it to be at an end." This doctrine is approved and followed in *Smoot* v. *United States,* 15 Wall. 36; *Dingley* v. *Oler,* 117 U. S. 490; and in *Swiger* v. *Hayman,* 56 W. Va. 123.

In *Sewer Commissioners of Amsterdam* v. *Sullivan,* 42 N. Y. Supp. 358 it was held that where a contractor made a statement saying he would not proceed unless his claim was allowed but did keep on working the city could not discontinue the contract for a breach when the claim was allowed, from which it would seem that the court thought the acceptance and repudiation should go together and certainly that there was no breach while the defendant kept on working.

To the same effect is the decision in *Shields* v. *Carson,* 102 Ill. App. 38, holding that one party might sue on the declaration of the other to stop work only where he accepts such declaration and regards the contract as at an end. From these cases it would seem that the decision in *Elder* v.

Offutt has gone a step farther than the majority of the courts are willing to go, and that they regard the two elements of repudiation and acceptance as going hand in hand and as both absolutely necessary to give a right of action. The decision in *Provident Savings Life Assurance Society* v. *Ellinger* more nearly accords with the accepted rule of law and in *Maguire* v. *J. Neils Lumber Co.*, 97 Minn. 293, the Minnesota court so holds in almost the exact words of the Texas case. They say that the renunciation of a contract required both intention to abandon it and external action so to do, which action was clearly not taken in *Elder* v. *Offutt*. L. C. Mc. C.