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RESTITUTION-UNJUST ENRICHMENT-RIGHT OF DEFAULTING PURCHASER TO RECOVER PART PAYMENT

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RESTITUTION—UNJUST ENRICHMENT—RIGHT OF DEFAULTING PURCHASER TO RECOVER PART PAYMENTS—Plaintiff made a prepayment of $59,946.67, or twenty-five percent, on twenty printing presses which it was purchasing for shipment to Russia. Before their delivery a federal regulation was promulgated under which plaintiff was denied an export license. Plaintiff therefore rejected tender of the presses, and defendant vendor sold them to a third party for $18,765 more than the contract price to plaintiff. Plaintiff

sued to recover its down payment and the profit resulting from defendant's resale. On appeal from a judgment for defendant, *held,* reversed and remanded. A defaulting purchaser is entitled to restitution of its payments in excess of damages caused the vendor by the breach, but it is not entitled to any profits realized by the vendor from resale of the goods. *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.,* (2d Cir. 1953) 206 F. (2d) 103.

In a legal system opposed to forfeiture and unjust enrichment, the result of the present case would seem beyond cavil. Nonetheless, the vast majority of decisions assert without qualification that a defaulting purchaser cannot recover payments made prior to the default.[1] The facts of the cases seldom support such a sweeping rule. Much more often than not the purchaser is attempting to recover an amount which he has agreed to give up under a reasonable provision for liquidated damages, or which is so small in comparison with the total contract price that it probably does not exceed the loss caused the vendor by the breach.[2] On the other hand, where the purchaser can show that his payments exceed the vendor's injury, numerous courts allow restitution of the excess.[3] Such a result appears completely in accord with the traditional judicial aversion to forfeitures and penalties.[4] At the same time, the argument against restitution in executory contract cases seems to rest on little more than a notion which finds its ultimate expression in one court's contention that to permit a defaulter to take advantage of his breach "would tend to demoralize the whole country."[5] Something of the same dubious attitude is often exhibited by courts granting restitution, when they require as a condition for relief that the purchaser's breach must not be willful or deliberate.[6] Rarely is an attempt made to define these terms, and frequently the question of willfulness is simply ignored.[7] Furthermore,

[1] Neis v. O'Brien, 12 Wash. 358, 41 P. 59 (1895); Dluge v. Whiteson, 292 Pa. 334, 141 A. 230 (1928); 5 CORBIN, CONTRACTS §1129 (1951); 3 WILLISTON, SALES, rev. ed., §599m (1948); 11 A.L.R. (2d) 701 (1950). For cases dealing with land contracts see 59 A.L.R. 189 (1929); 102 A.L.R. 852 (1936); 134 A.L.R. 1064 (1941).

[2] Typical is Sandberg v. Rudd-Melikian, Inc., (D.C. Pa. 1951) 100 F. Supp. 967, affd. (3d Cir. 1951) 192 F. (2d) 192 ($7,500 down on $130,000 worth of machinery). See cases cited in 5 CORBIN, CONTRACTS §1132, nn. 74, 75 (1951); 45 COL. L. REV. 72 at 76, 77, nn. 29-31, 35 (1945). And note the *facts* of the cases collected in 11 A.L.R. (2d) 701 (1950).

[3] Michigan Yacht & Power Co. v. Busch, (6th Cir. 1906) 143 F. 929; Sabas v. Gregory, 91 Conn. 26, 98 A. 293 (1916); Humphrey v. Sagouspe, 50 Nev. 157, 254 P. 1074 (1927); 5 CORBIN, CONTRACTS §1129, n. 52, §1135 (1951). *Accord,* with the express qualification that earnest money may be retained by the vendor: 2 CONTRACTS RESTATEMENT §357 (1932); Dies v. British and International Mining and Finance Corp., Ltd., [1939] 1 K.B. 724 (1938).

[4] E.g., in mortgage law. See Thurston, "Recent Developments in Restitution: 1940-1947," 45 MICH. L. REV. 935 at 952 (1947); 5 WILLISTON, CONTRACTS, rev. ed., §1476 (1937). Observe also the courts' solicitude about the reasonableness of liquidated damages provisions. 138 A.L.R. 594 (1942); 6 A.L.R. (2d) 1401 (1949).

[5] Quoted with approval in Dluge v. Whiteson, note 1 supra, at 335.

[6] See Schwasnick v. Blandin, (2d Cir. 1933) 65 F. (2d) 354; 2 CONTRACTS RESTATEMENT §357(1)(a) (1932).

[7] E.g., Humphrey v. Sagouspe, note 3 supra. In the instant case the court approved the *Restatement's* qualification that nonperformance must not be "wilful and deliberate,"

the condition establishes an illogical scale of "punitive damages" by imposing the heaviest penalty on the purchaser who performs most of his contract before defaulting.[8] When these considerations are coupled with the obvious fact that even the victim of a willful wrongdoer may be unjustly enriched, it becomes highly doubtful whether qualifications regarding willfulness serve any valid purpose.[9] Fortunately for defaulting purchasers, even where courts espouse the supposed majority view denying restitution regardless of the reason for the breach, a rigorous application of the rule is avoided by resort to such doctrines as substantial performance, waiver, and implied rescission.[10] But despite this fact, and despite the fact that the rule is usually invoked in cases where there is in reality no unjust enrichment, the repeated formulation of such a rule seems unwise. Inevitably some judges will accept the rule at face value and apply it with devastating results.[11] And federal courts in diversity cases may find it impossible to escape the impact of the stated rule.[12] If the courts do not remedy this situation, it is likely that the legislatures will. Relief against forfeiture is already provided for defaulting purchasers under the Uniform Conditional Sales Act.[13] California has long had a statute affording general relief in case of forfeiture.[14] Recently New York amended its sales act to allow a defaulting purchaser restitution of payments in excess of the amount of a reasonable liquidated damages clause or, in the absence of such a clause, in excess of twenty percent of the value of the purchaser's obligation

and then merely said that plaintiff was "suddenly caught in the operation of the export license system." Principal case at 105, 108. Thus a default due to economic hardship may not be considered willful.

[8] See Freedman v. Rector, etc., of St. Matthias Parish, 37 Cal. (2d) 16 at 22, 230 P. (2d) 629 (1951).

[9] See 5 CORBIN, CONTRACTS §1123 (1951). Both the Uniform Commercial Code and the recent amendments to the New York sales act allow restitution to a defaulting purchaser, without mention of willfulness. A.L.I. UNIFORM COMMERCIAL CODE §2-718 (1952); 40 N.Y. Consol. Laws (McKinney, 1953 Cum. Supp.) §145-a. But cf. Cal. Civ. Code (Deering, 1949) §3275.

[10] See N.Y. LAW REV. COMM. REP. 204-209 (1942); Hayt v. Bentel, 164 Cal. 680, 130 P. 432 (1913); Wonder Products, Inc. v. Blake, 330 Mich. 159, 47 N.W. (2d) 61 (1951).

[11] Bisner v. Mantell, 95 N.Y.S. (2d) 793 (1950) ($370 down on $748) suggests the possibilities. See also the state court handling of a prior phase of the present litigation. Miehle Printing Press & Mfg. Co. v. Amtorg Trading Corp., N.Y.L.J., Sept. 10, 1948, p. 403, affd. without opinion 275 App. Div. 748, 88 N.Y.S. (2d) 271 (1949).

[12] Consider the struggle of the court in the principal case to rationalize a finding that the New York Court of Appeals would have granted restitution despite earlier precedents to the contrary. Ultimately the court by-passed state law and rested its holding on an "overriding national policy" embodied in the Foreign Aid Appropriation Act of 1949, 62 Stat. L. 1059, §204 (1948), 1 U.S.C. Cong. Serv. 744-745 (1948). Principal case at 107-108. Cf. Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573 (1943).

[13] 2 U.L.A. §§19-21, 25 (1922, 1953 Cum. Supp.).

[14] Cal. Civ. Code (Deering, 1949) §3275. This statute was wholly disregarded in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713 (1898), but was revitalized by Barkis v. Scott, 34 Cal. (2d) 116, 208 P. (2d) 367 (1949), noted 2 STAN. L. REV. 235 (1949).

under the contract.[15] The Uniform Sales Act is strangely silent on this problem.[16] However, the proposed Uniform Commercial Code provides that a part payment of more than twenty percent or $500, whichever is smaller, will be forfeited only to the extent that it is a reasonable liquidation of damages.[17] In the absence of legislation it is up to the courts to repudiate their careless dicta and adopt a rule consonant with equitable principles. For the most part, that will be no more than saying what has always been meant.

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[15] 40 N.Y. Consol. Laws (McKinney, 1953 Cum. Supp.) §145-a. This act was not effective until September 1, 1952, and so was inapplicable in the present case.

[16] Decisions and dicta in states having the Uniform Sales Act go both ways. Granting restitution: Humphrey v. Sagouspe, note 3 supra. *Contra,* Dluge v. Whiteson, note 1 supra.

[17] A.L.I. UNIFORM COMMERCIAL CODE §2-718 (1952).