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THE MEASURE OF RECOVERY WHERE THE PLAINTIFF HAS PARTIALLY PERFORMED A CONTRACT AND COMPLETE PERFORMANCE IS PREVENTED BY THE DEFENDANT'S BREACH

In a recent bar examination the following question was propounded: *The Daily Evening Sun, a newspaper published in the City of Z., entered into a contract with the Park Moving Picture Theatre to run some advertising matter for the latter in at least twenty inches of space each week during the year, beginning September 10, 1918. The manager of the Park Theatre was to furnish a copy for publication subject to the approval or revision of the editorial department of the Daily Sun, and agreed to pay for its publication at the rate of 13½c per line daily, payable before the tenth day of each month. The contract recited that this special rate was a reduced rate in consideration of the defendant agreeing to advertise for a period of one year. On March 28, 1919, the manager of the Park Theatre refused to furnish more copy (the original provision being that the publication of the last copy "shall continue until new copy is given"), claiming he wanted to terminate the agreement, and refused to pay for any insertion after March 28, 1919. The Daily Sun brought an action in municipal court, asking for a judgment on the basis of 25c per line, which was the rate for a short term, or monthly rate, for insertions made prior to March 28, 1919. The case was tried before a jury, and verdict rendered for the plaintiff on the basis of 25c per line; this judgment was reversed by the Court of Appeals. It is now before the Supreme Court. What should the court hold? Why?*

This question calls for a discussion of the measure of the plaintiff's damages when the *defendant* has breached the contract and the plaintiff sues in quantum meruit to recover the value of his part performance. Should the plaintiff re-

cover the reasonable market value of what he has done or should he be restricted to the rate stipulated in the contract? A glance at the hypothetical question shows that the problem is vitally important. If the *Daily Sun* is permitted to recover the reasonable value of its services it will recover at a rate which is nearly double the contract rate. The sum recovered for part performance will be greater than the sum which could have been recovered for full performance.

The case of *Doolittle & Chamberlain v. McCullough* [1] is the leading authority which denies the plaintiff's right to recover the reasonable value of his partial performance of a contract which has been breached by the defendant. There the plaintiff had agreed to make certain excavations for a railroad bed at eleven cents per cubic yard. After the work was partly done the defendant breached the contract and the plaintiff sued in quantum meruit to recover twenty cents per yard which was the reasonable value of the work done. The Ohio court, in a vehement opinion, denied recovery, saying:

> "The price having been determined and mutually agreed upon . . . neither of the parties can vary the price so fixed by the contract. Nor, as to the price of the services actually rendered under the contract while in force between the parties, can it avail the plaintiff . . . that since the rendering of the services, the defendant has put an end to the special contract. The fact would still remain that the services were rendered under a special contract, and at the price agreed upon, and expressed by the parties."

This holding, although contrary to the weight of authority, is followed in Indiana,[2] Washington,[3] New Jersey [4] and Illinois.[5]

The Ohio court itself has placed serious restrictions upon the operation of the rule. In *Wellston Coal Co. v. Franklin Paper Co.*[6] it permitted the recovery of the reasonable value

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1 12 Ohio St. 360 (1861).
2 Hoyle v. Stellwagen, 28 Ind. App. 681, 63 N. E. 780 (1902).
3 Noyes v. Pugin, 2 Wash. 653, 27 Pac. 548 (1891).
4 Kehoe v. Rutherford, 56 N. J. L. 23, 27 Atl. 912 (1893).
5 City of Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263 (1880).
6 57 Ohio St. 182, 48 N. E. 888 (1897).

of part performance in quantum meruit. There the Coal Company agreed to furnish the defendant with all of the coal he would use for a year at the rate of $1.90 per ton. The defendant, after accepting the coal during the fall and winter months when the market price was high, breached the contract. The court held that the rule laid down in *Doolittle & Chamberlain v. McCullough* was correct if limited to the cases in which the plaintiff has a *losing* contract but where the plaintiff has a *valuable* contract justice required that he be allowed to recover the reasonable value of what he has done. This distinction is unsound because in all cases where the plaintiff desires the reasonable value of his services he has a losing contract. Unless the reasonable value is more than the contract value he will not desire the reasonable value and if the reasonable value is more than the contract value the plaintiff has a losing contract. If the Ohio court would follow its rule to its logical conclusion it would never allow the plaintiff to recover the reasonable value of his services where there is an express contract.

This minority rule which denies the right to recover the reasonable value is based upon the theory that the effect of a breach by the defendant is not to deprive him of all rights which he has under the contract. Even if he is guilty of breaching the express contract he has a right to have the damages which he must pay the plaintiff measured by the prices agreed upon in the contract. The substance of this argument is succinctly stated in *Cleveland, etc., Ry. Co. v. Moore,*[7] an Indiana case:

> ". . . the fact that the contract has been violated by the defendant does not authorize the plaintiff to recover under a quantum meruit for work comprehended within, and done under, the special contract, in excess of the price which the contract fixes as the compensation for the doing of such work."

Obviously the Indiana court thinks that the mere fact that the defendant is guilty of breaching the contract does not

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[7] 82 N. E. 52, 57 (Ind. 1907) *petition for rehearing overruled,* 84 N. E. 540 (1908).

authorize the plaintiff to ignore the contract in estimating the damages he has suffered as a result of the breach, but that the damages in all instances must be measured by the contract.

But the overwhelming weight of authority allows the plaintiff to recover the reasonable value of his part performance when the defendant has breached the contract.[8] The reasons given by the courts for permitting such a recovery are varied and often obscure. Sometimes no reasons whatever are given even in a case which is the leading case in that jurisdiction. *Clark v. Mayor, etc., of New York*[9] furnishes a good example of this situation. There the court announced that the plaintiff might at his election sue the defendant in quantum meruit and recover the reasonable value of his part performance and gave no reason why they had adopted the rule. Yet this case seems to have overruled the earlier New York case of *Koon v. Greenman*[10] and established the present New York rule. It is cited with approval in other jurisdictions.[11]

Many of the courts base their holding upon the theory that the defendant by breaching the contract has forfeited all of the rights he may have had under the contract and

8 Dunaway v. Roden, 14 Ala. App. 501, 71 So. 70 (1916); Eastern Arkansas Fence Co. v. Tanner, 67 Ark. 228, 41 S. W. 763 (1897); Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100 (1888); Valente v. Weinberg, 80 Conn. 134, 67 Atl. 369 (1907); Elliott v. Wilson, 2 Boyce. (Del.) 445, 80 Atl. 35 (1911); Hazen v. Cobb, 117 So. 853 (Fla. 1927); Weeter v. Reynolds, 48 Idaho 611, 284 Pac. 257 (1930); Draper v. Miller, 92 Kan. 695, 141 Pac. 1014 (1914); Madison-Jackson-Estill Lumber & Development Co. v. Coyle, 166 Ky. 108, 178 S. W. 1170 (1915); North v. Mallory, 94 Md. 305, 51 Atl. 189 (1903); Fitzgerald v. Allen, 128 Mass. 232 (1880); Kearney v. Doyle, 22 Mich. 294 (1870); McCullough v. Baker, 47 Mo. 401 (1871); Clark v. The Mayor, etc., of New York, 4 N. Y. (4 Comst.) 338, 53 Am. Dec. 379 (1850); Lynn v. Selby, 29 N. D. 420, 151 N. W. 31 (1915); City of Philadelphia v. Tripple, 230 Pa. 480, 79 Atl. 703 (1911); Davis v. Brown County Coal Co., 21 S. D. 173, 110 N. W. 113 (1906); Brady v. Oliver, 125 Tenn. 595, 147 S. W. 1135 (1913); United States v. Behan, 110 U. S. 338, 28 L. ed. 168 (1883); Newhall Engineering Co. v. Daly, 116 Wis. 256, 93 N. W. 12 (1903).

9 *Op. cit. supra* note 8.

10 7 Wend. 121 (1831).

11 Wellston Coal Co. v. Franklin Paper Co., *op. cit. supra* note 6; McCullough v. Baker, *op. cit. supra* note 8.

is not entitled to insist that the damages must be measured by the contract. Thus in *Fitzgerald v. Allen*[12] the court said:

". . . if the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon a count upon a quantum meruit, in which case the actual benefit which the defendant receives from the plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed."

The reasoning in *City of Philadelphia v. Tripple*[13] is to the same effect:

"Let it further be supposed, however, that the owner, who finds himself in this position of advantage, voluntarily puts an end to his contract rights in the premises. This in legal effect he does if he himself breaks the contract or discharges the builder from his obligation to perform it. . . . The owner, on the other hand, has deprived himself of the legal right which would have sufficed to defeat the equity. He accordingly stands defenseless in the presence of the builder's claim."

These statements indicate that the courts regard the defendant's breach to be of such serious consequence as to effectually deprive him of all his contractual rights. He has no right to insist that the damages be measured by the contract. The loss of this right is one of the penalties of his breach.

To hold that the defendant by breaching the contract has deprived himself of the right to measure the damages by the contract is to destroy the very essence of the contractual relationship. The purpose for which the contract was made was to define the future rights and liabilities of the parties and to determine the obligation which each owed to the other and the obligation which each was entitled to receive from the other. This purpose is entirely frustrated by holding

12 *Op. cit. supra* note 8.
13 *Op. cit. supra* note 8.

that when one party breaches the contract the obligation which he owes to the other party is something entirely different from the obligation named in the contract. Why should the parties ever enter into a contract if the law will step in and set their contract aside and determine what their obligations are as if no contract had ever been made?

In *United States v. Behan*[14] the United States Supreme Court said:

> "The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred."

The Supreme Court then proceeded to compute the plaintiff's damages without even considering the value of the defendant's performance. Yet the defendant's performance is what the plaintiff actually bargained for and is what the breach has deprived him of. It, the defendant's performance, is what the plaintiff has actually lost. The Supreme Court was therefore erroneous in regarding the plaintiff's outlay as his actual loss; and, in basing the damages upon such outlay rather than upon what the plaintiff ought to have received, it gave damages to the plaintiff which have no necessary relation to his actual loss. Obviously such a computation violates the rule that the plaintiff's damages shall be commensurate with his loss.

Having seen that the basis of the rule as given by the cases is unsound, an examination of the textbooks discloses that most writers ignore the problem. Williston, in his work on Contracts, says that the rule is based upon the theory of "recission and restitution."[15] Unquestionably there are many types of cases to which this doctrine applies. Where the purchaser breaches the contract, the seller is entitled to restitution of the land conveyed.[16] In the sale of chattels, if

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14 *Op. cit. supra* note 8.

15 3 WILLISTON ON CONTRACTS § 1459.

16 McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559 (1898); Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730 (1895).

the purchaser breaches the contract, the seller is entitled to rescind the contract and keep the goods if they are still in his possession.[17] But where the performance or part performance consists of services and materials a return in specie is impossible as in the case of land or chattels. Professor Williston thinks that the reasonable value of part performance is given as a substitute for this return in specie, and that the giving of the reasonable value of part performance is an attempt by the courts to apply the doctrine of "recission and restitution" to "services and materials" contracts. We submit that the rule which permits the plaintiff to recover the reasonable value of his part performance of an express contract, whether based on the theory of "recission and restitution" or any other theory, is unsound in principle.

When the defendant breaches the contract the plaintiff is entitled to be put in as good a position as he would have been had there been no breach.[18] This is the generally accepted rule of damages. The result in the case of *Connolly v. Sullivan*[19] will demonstrate how the recovery of the reasonable value of the services in quantum meruit may violate this rule. There the plaintiff agreed to dig a cellar for the defendant for $750. After the plaintiff had dug a part of the cellar the defendant told him to quit. If the plaintiff is to be put in as good a position as he would have been had there been no breach he should receive a proportionate fraction of the contract price plus the profits he has lost. In no case would his recovery be more than $750. Yet the Massachusetts court, in allowing the plaintiff to recover the reasonable value of his part performance, gave him $1,200 instead of $750 or less. There may be instances in which the difference would not be so flagrant, but there is no reason why the result should be the same. The price agreed upon in the contract is not necessarily, or even in a majority of

17 UNIFORM SALES ACT § 61.
18 3 WILLISTON ON CONTRACTS § 1338.
19 173 Mass. 1, 53 N. E. 143 (1899).

instances, the reasonable value of the services. The fact that the defendant could secure the services at less than the reasonable rate may be the very reason why he became a party to the contract. It is true that in some instances the amount of recovery will be the same, but the mere possibility that the reasonable value of the services will be different from the amount recoverable according to the universal rule shows that it is erroneous to ever allow the reasonable value to be the measure of the damages as long as there is a contract in force.

The case of *Connolly v. Sullivan* [20] shows that the reasonable value of part performance will often be greater than the contract value of full performance. Therefore the recovery of the reasonable value of part performance must violate the rule established by *Hadley v. Baxendale*,[21] namely, that the plaintiff is entitled to recover such damages as were reasonably within the contemplation of the parties at the time the contract was made. If the parties stipulated that the plaintiff was to be able to recover $750 for full performance how can they have had the recovery of $1,200 for part performance in mind? It is self-evident that if the parties fix a certain stipulated price for full performance, it is impossible that they could have contemplated the recovery of a larger sum for part performance.

It is well-established that the party breaching the contract is subject to no penalty therefor.[22] In the case of *Hardy v. Bern* [23] Lord Kenyon and Buller, J., in commenting on the rule, said:

"It is apparent to us that the law was made in favor of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what is in conscience due. . ."

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20 *Op. cit. supra* note 19.

21 9 Ex. 341 (1854).

22 Ford v. Forgason, 120 Ga. 208, 48 S. E. 180 (1904); Aberdeen v. Honey, 8 Wash. 251, 35 Pac. 1097 (1894).

23 5 T. R. 636, 637 (1794).

In other words, there is nothing legally reprehensible in a party's breaching his contract as long as he stands ready to pay the plaintiff the damages he has *actually suffered* and he is subject to no *penalty* for so doing. But by the "reasonable value rule," which requires the defendant to do more than place the plaintiff in as good a position as he would have been in had there been no breach, the defendant is compelled to pay a sum over and above and in addition to the damages which the plaintiff has actually sustained. It, therefore, effectually places a *penalty* on the defendant for breaching his contract and is within the condemnation of the rule against penalties.

The "reasonable value rule" is condemned by its own absurdity when viewed in the light of other holdings of the courts on the effect of the defendant's breach. The courts unanimously agree that when the *defendant breaches* the express contract after the *plaintiff has fully performed* all the plaintiff is entitled to recover is the price or consideration stipulated in the contract.[24] This is so whether the plaintiff sues for damages caused by the breach of the contract or on a quantum meruit for the value of what he has done. If the defendant breaches the contract after the plaintiff has fully performed he is not subject to the penalty of having the damages measured by the reasonable value rather than by the contract value. But the "reasonable value rule" does subject the defendant to such a penalty if he breaches after the plaintiff has partially performed. The courts must think that a breach after part performance by the other party is so such a more serious consequence than a breach after full performance as to justify the imposition of a penalty in the former instance and not a penalty in the latter. The absurdity of this reasoning is apparent on its face.

From a practical viewpoint, the "reasonable value rule" is extremely illogical. For illustrative purposes, suppose the

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24 Barnett v. Sweringen, 77 Mo. App. 64 (1898); Porter v. Dunn, 131 N. Y. 314, 30 N. E. 122 (1892).

plaintiff has agreed to do a piece of work for $1,000, which will reasonably cost him $3,000 to perform. If the defendant breaches before the plaintiff has started to perform, it is apparent that the plaintiff can recover no substantial damages. If the defendant breaches after full performance the plaintiff is entitled to recover $1,000. Then if the defendant breaches after the plaintiff has done half the work why should not the plaintiff recover $500? Mathematical logic demands this result. If the plaintiff is to get $1,000 for doing all of the work he should get $500 for doing half of the work rather than the $1,500, which the "reasonable value rule" would give him.

It appears, then, that the case of *Doolittle & Chamberlain v. McCullough* laid down the correct rule, namely, that the plaintiff's damages must be measured by the contract in the cases in which he has *partly performed* as well as in the cases in which he has *fully performed.* This rule is nothing more than an application of the general rule that the plaintiff *is entitled to be put in as good a position as he would have been in had there been no breach* and is, therefore, based on the inherent justice of limiting the plaintiff's damages to his *actual* loss. It is impossible to ascertain whether the modern trend is towards the adoption of the "reasonable value rule" or towards the rule of *Doolittle & Chamberlain v. McCullough,* although there are several very recent cases which have applied the "reasonable value rule." [25] Regardless of the trend of current opinion, it is difficult to see how any rule which is as violative of established legal principles and as contrary to practical justice as the "reasonable value rule" can occupy an eternal position in the body of our law.

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25 Schwasnick v. Blandin, 65 Fed. (2d) 354 (1933); Polak v. Kramer, 116 Conn. 688, 166 Atl. 396 (1933).