

November 1953

Vendor-Purchaser--Rights of Defaulting Purchaser

C. F. S. Jr.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Consumer Protection Law Commons](#), and the [Contracts Commons](#)

Recommended Citation

C. F. S. Jr., *Vendor-Purchaser--Rights of Defaulting Purchaser*, 55 W. Va. L. Rev. (1953).

Available at: <https://researchrepository.wvu.edu/wvlr/vol55/iss3/12>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

to purchases and sales will correctly reflect income except an accrual method. . . .”

The courts must choose between two alternatives: (1) allow the taxpayer to escape taxation when he changes from a cash basis to an accrual basis of reporting his income, or (2) deny the taxpayer the right to report properly his income for the first year of the change from a cash basis to an accrual basis. U.S. Treas. Reg. 111, § 29.22 (c)-1 (1943), provides that “In order to reflect the income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor. . . .”

The *Welp* case refuses to draw the fine distinction found in the *Hardy* and *Schwyler* cases. If the courts are going to allow the taxpayer to benefit from the change then they should not distinguish between how the books were kept, denying relief to those whose books were kept on a cash basis and aiding those who kept their books on an accrual basis. Although an accrual basis more accurately reflects income when inventories are maintained, such method of accounting does not properly reflect the taxable income, which is the government's prime interest, when reported on a cash basis.

J. M. H.

VENDOR-PURCHASER—RIGHTS OF DEFAULTING PURCHASER.—Oral contract between *P* and *D* under which *D* agreed to sell land to *P*, the latter making part payment. Subsequently, the parties were unable to agree upon the balance due; whereupon *D* refused to give a deed unless *P* paid an amount in excess of what *P* claimed was due. *P* refused to pay and made motion for judgment for money had and received by *D* who counterclaimed for balance due. The lower court entered judgment for *D*. On appeal, *held*, that the judgment should be reversed since the contract was unenforceable under the statute of frauds, and both parties were in default in performance thereof. The purchaser should be allowed to recover the part payment. *Ballangee v. Whitlock*, 74 S.E.2d 780 (W. Va. 1953).

It is not the purpose of this comment to deal with the question which was before the court in the principal case but rather with the converse thereof. That is, can a defaulting purchaser recover his part payment, when because of his default the vendor terminates the contract or brings an action for damages?

It seems to be a rather well settled rule that such a defaulter cannot recover money which he has voluntarily paid, when the vendor is not in default. *Berger v. Victory Realty Tr. Co.*, 106 N.E.2d 429 (Mass. 1952); *McEnaney v. Spedick*, 13 N.J.S 37, 80 A.2d 237 (1951); *Stewart v. Elkins*, 101 W. Va. 557, 133 S.E. 125 (1926).

It appears that the general rule is unsound as applied to a vendor who does not ask for specific performance, but retains the title and acquiesces in the abandonment of performance. He should be allowed any damages he may have sustained, but not a grossly arbitrary penalty. It is certainly questionable whether, in the absence of a provision for forfeiture which is deemed valid, he should be permitted to retain all the purchase money, wholly without reference to the amount of his actual damage. The inequity is further pointed up when it is realized that if a purchaser has committed a total breach of his contract, having rendered no performance thereunder, no penalty or forfeiture will be enforced against him. All he must do is make the injured party whole through the payment of damages. While, on the other hand, a vendee who has rendered part performance and then breached his contract must lose all of that sum, irrespective of the damages suffered by the vendor. We thus have the anomalous situation in which a party who has almost fully performed is penalized more heavily than one who has performed none or only a small part of his contract.

It is submitted that the general rule which is to the effect that a vendee who repudiates his contract without legal excuse is not entitled to recover from the vendor money paid in part performance of an executory contract, should be subject to at least one exception. This exception is the doctrine of unjust enrichment, which, being equitable in character, permits recovery in certain instances where a person has received from another a benefit the retention of which would be unjust.

With an instinctive revolt against making the vendor more than whole as a result of the vendee's default and with the law's natural opposition to penalties and forfeiture, a steadily increasing trend away from the strict application of the general rule has sprung up. This opposition is evidenced by the cases of *Smith v. Wolf*, 50 Ga. App. 19, 176 S.E. 889 (1934) and *Dooley v. Stillson*, 46 R.I. 332, 128 Atl. 217 (1925). In the former it was held that although the purchaser has rescinded the contract, still if the vendor retakes the land without legal procedure, the purchaser can recover his partial payment, less damages occasioned by his breach,

and less the fair rental value of the land. The latter case stated that the vendor may not retain any part of the purchase money greater than the difference between the contract price and the actual value, as he may not profit by the purchaser's misfortune in being unable to complete the agreement.

Illustrating the law's opposition to forfeiture and penalties is the case of *Freedman v. St. Mathias Parish*, 37 Cal.2d 16, 230 P.2d 629 (1951). There it was held that if the denial of part restitution of the down payment would result in the imposition of punitive damages even a defaulting purchaser is entitled to relief.

Cases denying restitution can be justified on one or more of the following grounds: (1) defendant has not rescinded and is ready willing and able to perform; (2) plaintiff has not shown that the injury caused by his breach is less than the installments paid; or (3) there is a genuine and valid liquidated damages provision in the contract stating that defendant may retain money so paid in part performance. If none of these justifications exists--restitution should be allowed. See Corbin, *Right of Defaulting Vendee to the Restitution of Instalments Paid*, 40 YALE L.J. 1013 (1931).

In permitting restitution to a defaulting vendee the courts, of course, should not be unmindful of the rights of the vendor arising out of the contract. On the contrary "every contractual right of the vendor should be scrupulously preserved, but in cutting the pound of flesh no blood must be shed." *Melberg v. Bough*, 62 Utah 331, 218 Pac. 975 (1923).

C. F. S., Jr.

WILLS--VOID RESIDUARY--INTESTACY--RIGHT OF NONRENOUNCING SPOUSE TO SHARE.—Testatrix died leaving a will which devised a life estate in designated realty to her surviving husband, with a remainder over. The husband died without having renounced the will. The administrator of the testatrix sued for a construction of the will. Upon petition, nearest blood relatives of the testatrix were granted leave to intervene and file an answer and cross bill. The trial court, after holding the remainder void, declared that the husband being the paramount heir at law, took the remainder which passed by intestacy. Interveners appealed. *Held*, that a spouse who is a paramount heir under the descent and distribution statutes does not waive his right to intestate property, resulting from failure of the residuary clause, by failing to renounce the will. *Harmer v. Boggess*, 73 S.E.2d 264 (W. Va. 1952).