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## Specific Performance—Right of Defendant to Show Duress without Offering to Rescind Entire Contract

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of contract between the parties.<sup>15</sup> It has been generally held that the implied warranty is in the nature of a contract of personal indemnity and does not "run with the goods". This theory of extent of liability is not universally approved, especially in the late cases.<sup>16</sup> It is also intimated by some authorities that the seller's liability should not rest so much upon privity of contract as upon a violation of a duty voluntarily assumed, arising as an implication of the common law.<sup>17</sup> One very recent case holds that under the sales act it was not the legislative intent that strict "privity of contract" be essential to the bringing of an action by an ultimate consumer.<sup>18</sup> It would seem safe to say that there is a definite trend, at the present, toward an extension of the dealer's liability to include consumers other than the immediate purchaser. This would seem desirable in view of the increased dependence of the public on the dealer for food supply.

Note also, that the present case, by reference to prior decisions, distinguishes the theory of liability of the packer or manufacturer of articles intended for human consumption from that of the dealer. The West Virginia court places the liability of the latter on implied warranty, while liability of the former is definitely based on negligence in the preparation of its product.<sup>19</sup> A separate concurring opinion convincingly disapproves of this distinction as an anomaly. In effect the dealer is an insurer while the packer's responsibility is based on negligence. If a distinction is to be made it would seem more justifiable under modern conditions to place a higher duty on the manufacturer than on the dealer. It is submitted that the same responsibility should be placed on both.

V. K. K.

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SPECIFIC PERFORMANCE — RIGHT OF DEFENDANT TO SHOW  
DURESS WITHOUT OFFERING TO RESCIND ENTIRE CONTRACT. — *A* and  
*B* conducted an automobile repair business at *X* city for a number  
of years, first as a partnership and then as a corporation, of which

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<sup>15</sup> *Redmond v. Borden's Farm Products Co.*, 245 N. Y. 512, 157 N. E. 838 (1927).

<sup>16</sup> See *Timmins v. F. N. Joslin Co.*, 22 N. E. (2d) 76, 123 A. L. R. 591 (Mass. 1939); *Klein v. Duchess Sandwich Co.*, 93 P. (2d) 799 (Cal. 1939), superseding 86 P. (2d) 858 (Cal. 1939); *Jensen v. Berris*, 31 Cal. App. (2d) 537, 88 P. (2d) 220 (1939).

<sup>17</sup> *Flessner v. Carsten's Packing Co.*, 93 Wash. 48, 52, 160 Pac. 14 (1916).

<sup>18</sup> *Klein v. Duchess Sandwich Co.*, 93 P. (2d) 799 (Cal. 1939).

<sup>19</sup> *Webb v. Brown & Williamson Tobacco Co.*, 2 S. E. (2d) 898 (W. Va. 1939); *Parr v. Coca-Cola Bottling Works*, 3 S. E. (2d) 499 (W. Va. 1939); *Blevins v. Raleigh Coca-Cola Bottling Works*, 3 S. E. (2d) 627 (W. Va. 1939); *Note* (1939) 46 W. VA. L. Q. 82.

they were the sole owners. *A* took a lease on the premises in which the business was conducted in his own name to use as a "club" over *B* so the latter would refrain from the excessive use of intoxicating liquor. Sometime later a resolution dissolving the corporation was adopted and *B* sold all his interest in the corporate property to *A* and covenanted not to engage in the same business for five years within twenty-five miles of *X* city. *B* later breached the covenant not to compete and *A* brought an action to compel specific performance of the covenant. *B* resisted on the ground of duress in the procurement of the contract. *Held*, that in an action for specific performance an offer by the defendant to rescind the entire contract is not a prerequisite to his showing that the contract is tainted by duress. *Hopkins v. Bryant*.<sup>1</sup>

At first blush this case seems unsound because it would appear that the defendant is being permitted to retain benefits under a contract which he is trying to repudiate in part.<sup>2</sup> However, a closer examination of the case points to its soundness. The defendant is not trying to rescind the contract but is simply resisting plaintiff's attempt to get specific performance by showing unclean hands in the plaintiff.<sup>3</sup> When the defendant sets up duress or fraud as a defense to an action at law it is on the theory of rescission and there must be a restoration to the plaintiff of all benefits received under the contract.<sup>4</sup> This puts the parties in the same position they were in before the contract was made.<sup>5</sup> In the principal case the defendant is setting up the duress not on the theory of rescission but simply to show that the plaintiff's conduct has barred his right to the extraordinary remedy of specific performance. There are few cases in which courts of equity insist on the

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<sup>1</sup> 6 S. E. (2d) 246 (W. Va. 1939).

<sup>2</sup> The contract had been executed on both sides except as to the defendant's covenant not to compete.

<sup>3</sup> It requires much less strength of case on the part of a defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain a bill to enforce specific performance. *Crotty v. Effler*, 60 W. Va. 258, 265, 54 S. E. 345 (1906); *Robenson v. Yann*, 224 Ky. 56, 5 S. W. (2d) 271 (1928); *Morris v. Curtin*, 321 Ill. 462, 152 N. E. 210 (1926).

<sup>4</sup> Rescission is not allowable in an action at law unless the party seeking to rescind can and does first restore or offer to restore any thing he has received under the contract. *Snow v. Alley*, 144 Mass. 546, 11 N. E. 764 (1887); *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086 (1902); *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244 (1912).

<sup>5</sup> For latest West Virginia case dealing with the restoration requirements in a suit for rescission see, *National Life Ins. Co. v. Hanna*, 7 S. E. (2d) 52 (W. Va. 1940).

maxim that he who seeks equity must do equity with more rigor than in a suit for specific performance.<sup>6</sup>

The *Restatement of Contracts* states the rule that a voidable transaction cannot be avoided in part and affirmed in part when the provisions are inseparable.<sup>7</sup> This rule plainly has no application to the principal case where the defendant is not attempting to repudiate his obligation under the contract but rather to block the plaintiff in his resort to the aid of a court of equity. A Florida case<sup>8</sup> clearly bears out this conclusion in holding that a defendant could retain a \$750,000 property received under a contract and yet successfully defend, on the ground of unclean hands, a suit for specific performance of a promise contained in that contract to mortgage the property. The court added that whether or not the plaintiff had a remedy at law was no concern of the equity court. This case and many others bear out the rule that the defendant may always resist an action for specific performance by showing unclean hands in the plaintiff even though the defendant has received benefits under the contract.<sup>9</sup> It is axiomatic that suits for specific performance stand on a basis peculiar to themselves since the remedy is an extraordinary one and is not a matter of right.<sup>10</sup>

Under the cases it is well settled that there is a middle ground or zone in which certain cases fall where equity will recognize certain facts as a defense to specific performance of a contract and yet will decline to order it cancelled, rescinded, or delivered up upon those facts.<sup>11</sup> The parties are left to their remedies at law. The principal case falls within this category. In the absence of a provision for liquidated damages for the breach of the covenant not to compete the practical difficulty of proving the damages makes it almost certain that the recovery would be small.

#### R. A. P.

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<sup>6</sup> *Haggerty v. Elyton Land Co.*, 89 Ala. 428, 7 So. 651 (1890); *Henley v. Engler*, 118 Ark. 283, 176 S. W. 330 (1915); *Short v. Kieffer*, 142 Ill. 258, 31 N. E. 427 (1892).

<sup>7</sup> *RESTATEMENT OF CONTRACTS* (1932) § 487.

<sup>8</sup> *Dale v. Jennings*, 90 Fla. 234, 107 So. 175 (1925).

<sup>9</sup> *Carver v. Van Arsdale*, 312 Ill. 220, 143 N. E. 579 (1924); *Kleinberg v. Ratett*, 252 N. Y. 236, 169 N. E. 289 (1929); *Haffner v. Dobrinski*, 215 U. S. 446, 30 S. Ct. 172, 54 L. Ed. 277 (1910).

<sup>10</sup> *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916 (1894); *Hefin v. Hefin*, 63 W. Va. 29, 59 S. E. 745 (1907); *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87 (1892).

<sup>11</sup> *Humbard's Heirs v. Humbard's Heirs*, 40 Tenn. 75 (1859); *Stephens v. Clark*, 305 Ill. 408, 137 N. E. 227 (1922); *Leonard v. Crane*, 147 Ill. 52, 35 N. E. 474 (1893); 2 *STORY, EQUITY* (13th ed. 1886) § 693.