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Limitation of Actions--Statute of Limitations Applied to Quasi-Contractual Rights Arising Upon Anticipatory Breach of an Existing Contract

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to include such a payment as this in the term "gift"; therefore the question was one of statutory interpretation, which is a question of law. The argument made in the dissenting opinion is that the sole differentiating factor between a payment which is a gift and a payment which is compensation is the intent with which the payment is made, and intent is always a question of fact. This would be perfectly correct if it were conceded that the statutory tax-exempt "gift" is the same as the ordinary gift referred to in the law of personal property, but whether such be the case calls for a judicial interpretation of the statute and the consequent decision of a question of law. Hence the *Bogardus* case may be reconciled on the basis that it involved a question of statutory interpretation, although this is not clearly set forth in the opinion.

H. A. W., JR.

LIMITATION OF ACTIONS — STATUTE OF LIMITATIONS APPLIED TO QUASI-CONTRACTUAL RIGHTS ARISING UPON ANTICIPATORY BREACH OF AN EXISTING CONTRACT.— Plaintiff paid defendant premiums on three industrial insurance policies from November, 1921, to September, 1932. In 1932, the plaintiff's request for payment of the cash value of the policies was refused on the ground that the policies had lapsed in 1921, 1922, and 1925 respectively. The plaintiff had no knowledge or notice of this fact and in 1935 instituted this action in quasi contract to recover the premiums paid since the policies lapsed. Defendant pleaded the Statute of Limitations on the theory that the Statute commenced to run when the defendant treated the policies as having lapsed.¹ Held, that the Statute begins to run only when the injured party manifests his intention to treat the anticipatory repudiation as a "rescission" or as a breach. *Harless v. Western and Southern Life Insurance Co.*²

West Virginia has frequently upheld a right of action based on an anticipatory repudiation of an executory contract³ and now joins a majority of other courts in allowing suit upon a repudiation

¹ It was conceded that the five year statute of limitations was the correct limitation to apply in this case. W. VA. REV. CODE (Michie, 1937) c. 55, art. 2, § 6.

² 192 S. E. 137 (W. Va. 1937).

³ *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630 (1896); *Connolly v. Bollinger*, 67 W. Va. 37, 67 S. E. 71 (1910). For a complete discussion of W. Va. cases see Riley, *Anticipatory Breach in West Virginia* (1925) 31 W. VA. L. Q. 182.

of an insurance policy.⁴ This is undoubtedly a sound extension of the doctrine.⁵

In applying the Statute of Limitations to cases of anticipatory repudiation when the breach is accepted and acted upon, most courts distinguish between (1) the right of action on the contract for damages, and (2) the right to rescind and recover in quasi contract for benefits conferred.⁶ In case one, the better view, which is not undisputed however, seems to be that the statute runs only from the time of the election to sue for the anticipatory breach on the theory that the repudiation continues until acted upon or retracted and the claim is not "stale" as long as the defendant can make an effective tender of performance.⁷ In case two, the Statute starts to run either upon the breach or upon the election to rescind and sue in quasi contract. Most courts and writers take the position that the Statute runs from the time of the breach regardless of when the election to rescind is made, on the theory that at the date of the breach, a cause of action in favor of the promisee arises and it only remains for him to elect which remedy he will choose.⁸ If he elects a remedy which requires him to proceed on

⁴ *Erwin v. World Mutual Health & Acci. Ins. Co.*, 122 Pa. Super. Ct. 203, 186 Atl. 260 (1936); *Alexander v. Durham L. Ins. Co.*, 181 S. C. 331, 187 S. E. 425 (1936). Notes (1927) 48 A. L. R. 107; (1937) 107 A. L. R. 1233. *Contra*: *Gilbert v. N. Y. Life Ins. Co.*, 264 N. Y. S. 610 (1933); *Kelly v. Security Mut. L. Ins. Co.*, 186 N. Y. 16, 78 N. E. 584 (1906) (the plaintiff's remedy is by suit in equity to have the policy reinstated); *Porter v. Supreme Council A. L. H.*, 183 Mass. 326, 67 N. E. 238 (1903) (Massachusetts does not follow the doctrine of anticipatory breach).

The question of anticipatory breach as applied to insurance contracts was discussed but not decided in *Schwarzbach v. Protective Union*, 25 W. Va. 622 (1885).

⁵ Ballantine, *Anticipatory Breach and the Enforcement of Contractual Duties* (1924) 22 MICH. L. REV. 329, 335 (desirability of an immediate right of action upon repudiation of insurance contracts).

⁶ *Ga Nun v. Palmer*, 202 N. Y. 483, 96 N. E. 99 (1911), 36 L. R. A. (N. S.) 922 (1912); *Henry v. Rowell*, 64 N. Y. S. 488 (1900); *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244 (1915); 5 WILLISTON, CONTRACTS (2d ed. 1937) § 2027.

⁷ *Laegerloef Trading Co., Inc. v. Amer. Paper Products Co.*, 291 Fed. 947 (C. C. A. 7th, 1923); 2 WILLISTON, SALES (2d ed. 1924) § 585(e); Limburg, *Anticipatory Repudiation of Contracts* (1925) 10 CORN. L. Q. 135. (Some cases take the view that *P* must exercise his right to sue on the contract for the anticipatory repudiation within a "reasonable" time. "However, in no case has it actually been held that the promisor has exceeded the time allowed him for election.") *But of. Paducah Cooperage Co. v. Arkansas Stave Co.*, 193 Ky. 774, 237 S. W. 412 (1922); *Winter v. Amer. Aniline Products*, 236 N. Y. 199, 140 N. E. 561 (1923).

⁸ *McCurry v. Purgason*, 107 N. C. 463, 87 S. E. 244 (1915); *Matlock v. Gulf*, 70 S. W. (2d) 279 (Tex. Civ. App. 1934); *Penn. Co. v. Good*, 56 Ind. App. 562, 103 N. E. 672 (1913); Note (1935) 94 A. L. R. 455; 2 WILLISTON, CONTRACTS (1931) § 2027; Ballantine, *supra* n. 5; Limburg, *supra* n. 7.

the theory that the contract was terminated by the breach, the date of such breach marks the time when the cause of action accrued without regard to the time of the election.⁹ The promisee holds the promisor to his anticipatory breach and bases his action on the wrongful act of the promisor whenever it was committed.¹⁰ The principal case adopts the opposite view, measuring the period of limitation from the actual election to rescind on the theory that the promisee is not bound to exercise his right to rescission and restitution and his cause of action does not accrue until he has made manifest his election to treat the contract as ended.¹¹ Until terminated, the contract is still in existence, voidable but not void¹² and the promisee sleeps on no present right of action which the Statute could bar. It may be argued that it is preferable to allow the injured party to rescind at any time prior to the time of performance, thus enabling the promisee to permit the promisor to repent and perform, and yet preserve his remedy in quasi contract which in a majority of cases will be less severe on the promisor.

It appears that the obviously just result in the present case could have been reached upon either theory, as pointed out in the dissenting opinion¹³ since the Statute of Limitations may not be applied where the one who pleads the Statute has obstructed the bringing of the action, the Code¹⁴ tolling the Statute during the period of obstruction. Defendant's silence in regard to the lapsing of the policies and its continued acceptance of the premiums clearly

⁹ Penn. Co. v. Good, 56 Ind. App. 562, 103 N. E. 672 (1913).

¹⁰ The New York court holds that the right to sue on the contract for the anticipatory breach and the right to sue for the actual breach are different causes of action. *A fortiori* that court would hold that the right to rescind and the right to sue for the final breach are different causes of action and that the statute would run from the breach as against the right to rescind. Winter v. Amer. Aniline Products, 236 N. Y. 199, 140 N. E. 561 (1923); Henderson Tire & Rubber Co. v. Wilson & Co., Inc., 235 N. Y. 489, 139 N. E. 580 (1923).

If, however, the Statute does run on the promisee's right to rescind, the promisee always has his right to sue on the contract for the ultimate breach.

¹¹ Chapman v. County of Douglas, 107 U. S. 348, 2 S. Ct. 62 (1882); Sherman v. International Life Ins. Co., 291 Mo. 139, 236 S. W. 634 (1921); Richter v. Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39 (1900).

¹² Note that the promisor may still withdraw his repudiation. Rederiaktiebolaget Amie v. Universal Transp. Co., 250 Fed. 400, 162 C. C. A. 470 (1918); United Press Ass'n v. National Newspaper Ass'n, 237 Fed. 547 (C. C. A. 8th, 1916); RESTATEMENT, CONTRACTS (1932) § 319; 5 WILLISTON, CONTRACTS (1937) § 1335.

¹³ Judge Hatcher dissenting.

¹⁴ W. VA. REV. CODE (Michie, 1937) c. 55, art. 2, § 17.

constituted positive concealment and obstruction which suspend the Statute.¹⁵

A. L. B.

MARRIAGE AND DIVORCE — WIFE'S RIGHT TO SUIT MONEY IN ACTION TO MODIFY ORIGINAL DECREE AS TO CUSTODY OF CHILDREN. — *W* obtained a divorce from *H* and was granted custody of their minor children, the circuit court not expressly retaining the case on its docket for further decree concerning their custody. Five years later, *H* petitioned for custody of the children. *W* appealed from the decree granting custody to *H*, and the circuit court ordered *H* to pay costs of the appeal, including *W*'s attorney's fees, applying the code section which provides that the court may at any time after the commencement of the suit make any proper order compelling the man to pay to the woman any sum necessary "to enable her to carry on or defend the suit in the trial court or on appeal should one be taken."¹ *H* then petitioned the supreme court for a writ of prohibition to cancel this order. Petition dismissed. *Held*, that the statute² allowing the court granting the divorce to issue its decree fixing custody of the children and later to alter such decree on petition of either party, creates in the court a continuing jurisdiction over custody of children; thus, the petition for modification of the decree is a part of the original divorce suit and the suit money statute applies, allowing costs to be assessed to *H*. *Crouch v. Easley, Judge*.³

It was formerly settled in West Virginia that provisions in a divorce decree relating to alimony were *res judicata* unless the court expressly reserved the right to alter the decree as to such provision.⁴ This has supposedly been changed by statute since 1931, so that now power to alter the decree as to alimony is retained in the court without any express reservation to that effect.⁵

¹⁵ *Thompson v. Iron Co.*, 41 W. Va. 574, 23 S. E. 795 (1895); *Teter v. Moore*, 80 W. Va. 443, 93 S. E. 342 (1917); *Cameron v. Cameron*, 111 W. Va. 375, 162 S. E. 173 (1931).

¹ W. VA. REV. CODE (1931) c. 48, art. 2, § 13.

² W. VA. REV. CODE (Michie, 1937) c. 48, art. 2, § 15.

³ 192 S. E. 690 (W. Va. 1937).

⁴ *Cariens v. Cariens*, 50 W. Va. 113, 40 S. E. 335 (1901); *Burdette v. Burdette*, 109 W. Va. 95, 153 S. E. 150 (1930).

⁵ W. VA. REV. CODE (1931) c. 48, art. 2, § 15. The words "maintenance of the parties" were added to the statute in 1931, giving the court the power at any time to alter or modify the divorce decree as to such maintenance. The Reviser's note to this section states that this is intended to give to the court the right to make such alterations without expressly reserving this right in the divorce decree.