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Contracts--Alternative Performance--Damages

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It is very clear that there is a substantial difference between gas in untested fields and the tangible equipment of this company. It would be decidedly unfair to the public to allow the utility to hold immense tracts of acreage under lease at a value of some $200.00 per acre, at a cost of not more than $5.00 per acre (delay rentals being charged to operating expenses and paid annually by the public) for by this means the utility could earn approximately $28.00 per annum ($200.00 multiplied by the 14% return on the base which was allowed). Further injustice could result if the utility should abandon the leases after several years, when the public would have paid in more than even their inflated value. (2) Aside from the question of property, it is submitted that this is a mere capitalization of earning power, which the court has refused to sanction under any circumstances. The true limit of the "present value" theory, even here, would seem to be the present value of leaseholds in the market. Uncontradicted evidence in these cases proved that the gas company had acquired leasehold rights during 1921 to 1923 at an average price of 83 cents per acre, and that in 1923, 15,184 acres were taken at a cost of 66 cents per acre. As before stated, delay rentals were paid by the utility and charged to operating cost. The whole investment amounted only to a few dollars per acre—and the public was asked to double or treble that amount annually in the form of rates on supposititious values, payable into the company coffers.

—R. P. HOLLAND.

CONTRACTS—ALTERNATIVE PERFORMANCES—DAMAGES.—An interesting subject, about which there is an apparent conflict among the authorities, is that of alternative contracts, i.e., such as by their nature may be executed by doing either of several acts, at the election of the party from whom performance is due. Completion of one of the modes, at the option of the promisor, is a performance of the entire contract. Where one of the modes of performance is to pay a sum of money however, considerable difficulty arises in determining whether it is still a true alternative contract, or merely a contract providing for liquidated damages. If the former, then by one rule the measure of damage for breach of the contract is the value of the least onerous alternative, on the supposition that had the promisor performed, he would have taken upon himself the discharge of the alternative the most beneficial to himself.[1] Thus the promisee has only been damaged to that

[1] WILLISTON, CONTRACTS (1920) §1407.

extent. If the latter, then upon breach of the contract the courts usually carry out the expressed intent of the parties, if to do so will not work injustice, and allow the promisee to sue for the sum agreed upon, whether payment be more onerous to the defendant or not.[2] In either case the promisor has an option which course he will pursue. To distinguish these two types of contracts, the determining question must be, is the intention of the parties, as ascertained from a fair interpretation of the contract, to form an absolute agreement to do, or refrain from doing a particular act, followed by a stipulation in relation to the amount of damages in case of breach, or is there merely an engagement to do or refrain from doing an act, or pay a sum of money, so that performance of the latter stipulation amounts to a performance of the contract, rather than damages for breach of an absolute agreement.[3] If the latter, it is a true alternative contract, and not one for liquidated damages.[4]

Assuming none of the alternatives is for the payment of money, and the promisor has failed to elect which mode of performance he will pursue by the date at which election is to be made, there are three theories suggested under which the promisee may proceed: (1) the promisee may make the election himself, and sue for breach of the alternative so chosen, or compel performance in a case where a court of equity may assume jurisdiction; (2) the promisee is limited in that he can only sue for the value of the alternative least onerous to the promisor; (3) the promisee may compel the promisor to make the election, if the contract is one suitable for equitable intervention. The first theory was established at an early date by the Supreme Court of Judicature of New York.[5] This case was cited in CYC and CORPUS JURIS,[6] and has been followed by a considerable number of courts in this country,[7] and cited with approval by others.[8] In a rather recent West Virginia

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[2] SEDGWICK, DAMAGES (9th ed.) Vol. 1, §391.

[3] Suggested by Bronson, J., in Pearson *v.* Williams, 24 Wend. (N. Y.) 244, 246 (1880).

[4] SUNDERLAND, DAMAGES (4th ed.) Vol. 1, §282.

[5] McNitt *v.* Clark, 7 Johns. (N. Y.) 465 (1811).

[6] 13 C. J. 697.

[7] Collins *v.* Whigham, 58 Ala. 438 (1877); Childs *v.* Fisher, 52 Ill. 205 (1869); Pitchin *v.* Swift, 21 Vt. 292 (1849); Phillips *v.* Cornelius, 28 So. 871 (1900); Kramer *v.* Ewing, 10 Okla. 357, 61 Pac. 1064 (1900); Dessert *v.* Scott, 58 Wis. 390, 17 N. W. 14 (1883); Norris *v.* Harris (*dictum*), 15 Cal. 226 (1860); Coles *v.* Peck, 96 Ind. 333, 49 Am. Rep. 161 (1884); BISHOP ON CONTRACTS (2nd ed.) 613; 5 PAIGE ON CONTRACTS, §2799.

[8] Wheeler *v.* New Brunswick, etc., Ry. Co., 115 U. S. 29, 38 (1885); Atlantic Coast Line Ry. Co. *v.* Hollowell, 2 Fed. (2d) 674, 678 (1924); Franklin Sugar Refining Co. *v.* Egerton, 288 Fed. 698, 704 (1922); Ellison *v.* Boyd, 130 S. C. 269, 125 S. E. 493 (1924).

case involving the lease of coal lands, it was provided by the terms in the lease that if the lessee could not make satisfactory arrangements for an outlet for the coal within ninety days, it might surrender the lease. The ninety day period expired without surrender, and the court, without discussing the merits of the case, followed Corpus Juris in holding that the right of election was lost, and was thereafter in the lessor.[9] Whether right in principle or not, this is another example of the influence that an isolated decision of an inferior court may have upon the law, more especially when cited to sustain a proposition in a leading encyclopaedia.

Professor Williston maintains the doctrine is erroneous, and that (2) above is the better rule.[10] The Supreme Court of Florida has followed (3), holding that in a suit for specific performance of a contract, the defendant could be compelled to elect which alternative he intended to pursue, leaving it as a *quaere* whether the plaintiff himself had gained the right by the default of the defendant.[11]

In a recent New York case it was provided by the terms of a lease that on or before a certain date the lessor could either pay the lessee the value of a building he had erected on the premises, the amount to be determined by arbitration, or renew the lease. The date passed without the lessor having made his choice, and in a declaratory judgment the court held that the right of election passed to the lessee, even though the arbitrators had made no report.[12] This case has been commented upon in a leading periodical,[13] the writer taking the view that assuming the correct rule to be (2) *supra,* the case fell within an exception to that rule; namely, "that where the alternative is to pay money, even though this is more onerous to the promisor, it is enforced by construing it as a provision for liquidated damages," citing WILLISTON, CONTRACTS.[14] That author states in the section cited that the exception applies where one of the alternatives is "to pay a *certain* sum of money." To constitute a provision for liquidated damages the sum must be certain, and agreed upon as compensation for nonperformance, else there is no such thing as "liquidated" damages.[15] It apparently was the intention that the lessor had an

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9 Virginian Export Coal Co. *v.* Rowland Land Co., 100 W. Va. 559, 131 S. E. 253 (1926).

10 *Ibid.,* n. 1.

11 Taylor *v.* Mathews, 52 Fla. 776, 44 So. 146 (1907).

12 Trustees of Columbia University *v.* Kalvin, 230 N. Y. S. 386 (1928); affirmed, 231 N. Y. S. 903, reversed on other grounds, 250 N. Y. 469 (1929).

13 42 HARV. L. REV. 274.

14 *Ibid.,* n. 1.

15 AMERICAN DIGEST, "Damages" 82, 5 WORDS & PHRASES 4174. SEDGWICK, DAMAGES, §§391, 405.

option to do one of two things, rather than absolutely agreeing to do one, with a stipulation as to damages in case of his default in granting the renewal. Consequently, it is submitted that this was no contract calling for liquidated damages, but rather a true alternative contract.

Much can be said for the theory contended for by Professor Williston, for undoubtedly if the obligor performed, he would choose the alternative most beneficial to himself. Consequently there is reason in limiting the obligee to the value of the least onerous alternative, for in theory this is the extent of his damage. On the other hand, in every ordinary case where the defendant is given option to do one of two things, he contracts to exercise the option within a given time. Consequently, if he fails to exercise it, he has broken his contract in its entirety, else the time provisions in such contracts would have little meaning. Should the plaintiff be compelled to limit his damages because the defendant has broken his contract? If we admit that by failure to exercise his option at the agreed time the defendant has lost the right, and there is considerable authority in support of this rule,[16] then the effect of (3) above would be to give him a double option, and the same criticism could be made of (2), because he would probably choose the least onerous, if he still retained the right of choice.

—KENDALL H. KEENEY.

CHARITABLE TRUSTS.—Testator, who was seized of valuable real estate situated in West Virginia, devised the property to a certain banking company in trust, the income to be used in educating young men from certain counties in West Virginia and Ohio, at Lafayette College. *Held,* that the devise is valid under Section 3, Chapter 57, CODE, providing "Where any conveyance of land has been made * * * or shall be made to trustees for the use of

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[16] Texas & Ry. Co. *v.* Marlor, 123 U. S. 687, 31 L. ed. 303, 8 Sup. Ct. 311 (1887); Rewrick *v.* Goldstone, 48 Cal. 554 (1874); Choice *v.* Mosley, 1 Bailey (S. C.) 136, 19 Am. Dec. 661 (1828); 13 C. J. 697; 6. R. C. L. 860. In Wilson *v.* Lewis, 2 Yeates (Pa.) 466 (1799), the court said although the election was lost at law, equity would relieve in a hard case.