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The Plaintiff in Default

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I. Introduction

This article is concerned with one basic fact pattern. A party to a contract has commenced performance but has stopped short of completion. His failure to perform further is legally inexcusable. The other party has not performed, but is not in default. Can the one in default salvage anything from the wreckage of the contract when he himself "cast it on the rocks"? Can he recover the value of his part performance despite the fact that he refused to abide by his contract? The answer most commonly given by the courts is a righteous *no*.[1] But there are many factors which should, and sometimes do, enter into a determination of the question. We shall consider some of them here.

For a brief period in the early part of the last decade it looked as though there might be a dramatic reversal of the old rule denying the defaulting party relief. Judge Clark's decision in *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*[2] prophesied a change in the New York law; and the New York legislature adopted legislation allowing a measure of restitution to the defaulting purchaser of goods.[3] *Freedman v. The Rector, Wardens & Vestrymen*[4] indicated that California had abandoned its previous position[5] and favored restitution. Maryland law purported to protect some defaulting purchasers of both land[6] and goods[7] from unjust forfeiture. The Uniform Commercial Code, then a matter of widespread speculation, recognized rights in the defaulting purchaser.[8]

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1. *E.g.*, Hansbrough v. Peck, 72 U.S. (5 Wall.) 497 (1866); Tovrea v. Alderman, 211 F. Supp. 865 (D. Ore. 1962); Varner v. Hardy, 209 Ala. 575, 96 So. 860 (1923); Melton v. Amar, 86 Idaho 262, 385 P.2d 406 (1963); Henry v. Rouse, 345 Mich. 86, 75 N.W.2d 836 (1956); Notti v. Clark, 133 Mont. 263, 322 P.2d 112 (1958); Lawrence v. Miller, 86 N.Y. 131 (1881); Fokine v. Shubert, 210 App. Div. 468, 206 N.Y.S. 311 (1924); Medak v. DePrez, 236 Ore. 31, 386 P.2d 805 (1963); Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396 (1963).
2. 206 F.2d 103 (2d Cir. 1953).
3. N.Y. Sess. Laws 1952, ch. 823, § 1, repealed N.Y. U.C.C. § 10-102 [hereinafter referred to as N.Y. Pers. Prop. Law § 145-a].
4. 37 Cal. 2d 16, 230 P.2d 629 (1951).
5. See, *e.g.*, Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713 (1898).
6. Md. Acts 1951, ch. 596, §§ 117-23.
7. Md. Acts 1941, ch. 851, § 116.
8. Uniform Commercial Code § 2-718.

But the New York courts quickly rejected *Amtorg's* "tempting hint."[9] New York's legislation has had little impact on judicial attitudes.[10] Despite *Freedman*, forfeiture may still occur in California.[11] Maryland still follows the old rule in cases which do not come specifically within her statutes.[12] And the Uniform Commercial Code provision allowing restitution is at best an unknown remedy.[13]

Does this mean that the old rule purporting to forfeit the value of the defaulter's performance regardless of the inequity is still the law in the majority of jurisdictions? It is doubtful. In fact, it is doubtful if the rule was ever so broad in practice as the statement of it would indicate. There have been harsh decisions under the general rule.[14] But even in the strictest jurisdictions equity has managed to play a part.[15]

The judicial attitude that there can be no recovery by a plaintiff in default stems in large part from an unwillingness or an inability to distinguish quasi-contract from actual contract, from a confusion of restitution with damages for breach. Concededly, in actions for damages for breach of contract, where the promises of the defendant are dependent upon performance by the plaintiff, no relief is available to a plaintiff who has not performed.[16] He is not entitled to damages because the defendant has done him no wrong. But if the plaintiff has partly performed, if he has conferred something of value upon the defendant pursuant to the contract, even though his part performance is not sufficient to entitle him to demand any performance by the defendant, may he not recover the value of his part performance less the damage caused by his breach? This is restitution. The reluctance of courts to allow it arises from a feeling that to do so would somehow permit "a party an advantage from his own wrong."[17]

9. Pearson Int'l, Inc. v. Congeladora de Mazattan, 141 N.Y.S.2d 221, 226 (Sup. Ct. 1955).

10. No case has been found where N.Y. Personal Property Law § 145-a was decisive. See Zuback v. Moskowitz Floor Corp., 13 Misc. 2d 245, 176 N.Y.S.2d 404 (Sup. Ct. 1958); Lichtman v. I.P.M. Indus., Inc., 158 N.Y.S.2d 813 (Sup. Ct. 1956), where restitution was denied without citing § 145-a long after its enactment.

11. Lines v. Marin Municipal Water Dist., 228 Cal. App. 2d 60, 39 Cal. Rptr. 294 (Dist. Ct. App. 1964).

12. Quillen v. Kelley, 216 Md. 396, 140 A.2d 517 (1958).

13. Even in Pennsylvania where the UNIFORM COMMERCIAL CODE § 2-718(2) has been in effect longer than anywhere else, no cases have been found where it has been cited.

14. Bisner v. Mantell, 197 Misc. 807, 95 N.Y.S.2d 793 (Rensselaer County Ct. 1950).

15. MacMurray v. City of Long Beach, 292 N.Y. 286, 54 N.E.2d 828 (1944); Develop Realty Corp. v. United Engineering Trustees, Inc., 31 Misc. 2d 849, 226 N.Y.S.2d 801 (Sup. Ct. 1961).

16. RESTATEMENT, CONTRACTS § 269 (1932).

17. Stark v. Parker, 19 Mass. (2 Pick.) 267, 275 (1824).

The courts cannot deny the plaintiff's power to breach his contract, but restitution appears to concede him a right to do so, and this goes against the grain.

Unquestionably where the contract provides that the plaintiff's performance be completed first, he trusts the other party to perform. And, under our basic fact pattern, that trust has not been demonstrably breached. But did the plaintiff's trust encompass a forfeiture of his partial performance in the event of his default? Sometimes the contract so provides, and if both parties bargained in reference to such a result, as, for instance, in an attorney's contingent fee contract, a forfeiture of the plaintiff's effort, if it falls short of total performance, may appear just.[18] But where the contract does not provide for forfeiture, and even in many instances where it does, forfeiture may be most unjust. The general rule denies all recovery to a plaintiff in default despite the fact that the more nearly his performance approaches completion the greater will be the forfeiture. Is his trust to be his undoing? Here the actions of the courts belie their harsh statement of the general rule. In some instances the courts find the plaintiff's default to be so slight that it can be said that he has substantially performed. In these cases, he can be allowed a recovery on the contract because the defendant's refusal to perform is not excusable.[19] In other cases, the nature of the contract is such that it can be divided into a series of mutually dependent promises, and to the extent that his total performance encompasses one or more of these segments he can be allowed recovery on the contract *pro tanto*.[20] Finally, if neither of the above circumstances is present, he may still be able to recover a portion of his performance, or its equivalent, if its net effect was to unjustly enrich the defendant.[21]

The first two of these ameliorating subterfuges are actions upon the contract, in affirmance of it and in reliance upon it. They are achieved by finding either that the plaintiff's default is not a breach at all, as in the case of substantial performance, or that despite his breach of the overall contract he is not in default as to some of the parts. But the third remedy is restitution. It is not dependent upon the contract. It is equitable in nature and concerned with preventing unjust benefit to the defendant rather than with compensating the

18. Setzer v. All Steel Engines, Inc., 169 Cal. App. 2d 706, 338 P.2d 18 (Dist. Ct. App. 1959); Mormilo v. Allied Stevedores Corp., 8 App. Div. 2d 217; 186 N.Y.S.2d 744 (1st Dep't 1959); *In re* Polansky, 33 Misc. 2d 292, 223 N.Y.S.2d 606 (Dist. Ct. 1962); Holcomb v. Steele, 47 Tenn. App. 704, 342 S.W.2d 236 (1958).

19. Lawrence v. Cunningham, 160 Me. 89, 197 A.2d 767 (1964); Julian v. Kiefer, 382 S.W.2d 723 (Mo. Ct. App. 1964).

20. Joachim v. Andover Silver Co., 104 N.H. 18, 177 A.2d 394 (1962).

21. De Leon v. Aldreté, 398 S.W.2d 160 (Tex. Civ. App. 1965); Bryant v. Peunington, 346 S.W.2d 367 (Tex. Civ. App. 1961).

plaintiff for his loss. Performance of implied conditions here is irrelevant.

One of the merits of a general rule is that it gives at least an illusion of certainty. But the more general the rule, the more inaccurate it may be when its literal application leads to injustice. It may linger on unchanged in form, but become so diluted in practice that it defeats its original purpose and causes uncertainty. So it is with the general rule denying recovery to the defaulting plaintiff. Restitution has achieved substantial justice in most cases but with a corresponding loss of predictability. And in those areas where the contract functions as a security device akin to a mortgage, a loss of predictable certainty may also mean a loss of equity. At least it is an invitation to litigation. Perhaps one reason for the firm statement of the majority rule by so many courts in land contract cases is that they believe it is desirable to support the reasonable expectations of vendors who have used a retained title as a security device. The installment land contract is widely used instead of a mortgage in the belief that it is a less costly and more efficient way of securing the payment of the purchase price.[22] The basis of this belief is the existence of the vendor's right to retake the property and forfeit the purchaser's payments. To recognize a right to restitution in the defaulting purchaser is to attack the very reason for using the installment contract. The vendor might just as well have used a mortgage if he is compelled to foreclose a right of restitution.[23] Once restitution is recognized there is no sure way a vendor can clear himself of a claim by a purchaser short of an equitable foreclosure. If a simpler alternative foreclosure procedure were available, perhaps many courts would be more willing to acknowledge openly the right to restitution.[24]

We shall consider first the rights of a plaintiff in default under a service contract, then under a contract for the sale of personal property, and finally under a contract for the sale of real property. In all of these situations, the chance of a recovery may be affected by a variety of factors. The following questions raise some of these factors and may be helpful in analyzing a particular case. They are, of course, not applicable to all situations.

1. What kind of contract is involved? Is the agreement a security arrangement such as a retained title contract designed to secure payment of a sum of money? If so, is there a need for predictable

22. See Dolson & Zile, *Buying Farms on Installment Land Contracts*, 1960 WIS. L. REV. 383.

23. See Hetland, *Land Contracts*, in CALIFORNIA LAND SECURITY AND DEVELOPMENT § 2.20 (1960).

24. See Lee, *Defaulting Purchaser's Right to Restitution under the Installment Land Contract*, 20 U. MIAMI L. REV. 1, 21 (1965).

certainty which may override the equities to some degree?

2. Does the defendant's retention of the benefit conferred by the defaulting plaintiff result in an unjust enrichment of the defendant, or do the damages caused by the plaintiff's breach approximate the benefit retained?

3. Is the benefit sought to be recovered a payment of earnest money?

4. Is the contract severable? Or is it an entire contract which calls for no recovery for less than full performance? Is it possible that the contract is merely masquerading as an entire contract to justify an otherwise unconscionable forfeiture?

5. What is the social setting of the contract? Are the parties equal in bargaining power? Was the contract induced by misleading advertising or compelled by high pressure salesmanship?

6. What are the contract provisions? Does it make time of the essence? Does it provide for forfeiture? Does it contain a liquidated damages clause? Is this clause bona fide or is it in truth a penalty?

7. What is the attitude of the defaulting party? Is he "willful" in his default? And what is meant by "willful"?

8. What is the attitude of the party not in default? Is he pressing for performance? Has he disabled himself from performing? Has he rescinded or accepted the plaintiff's offer to rescind?

9. How serious is the breach?

10. Is the nature of the benefit conferred such that it can be easily returned and thus its retention deemed an acceptance with knowledge of the breach?

11. Is the court able to distinguish between damages for breach and restitution?

12. What is the effect of legislation on the decision?[25]

II. SERVICE CONTRACTS

Included under this heading are contracts involving professional services, such as those of attorneys and architects, building contractors, salesmen, and promoters, in short, any contract where the primary performance of the plaintiff involves skill or labor rather than the sale of some form of property.

Two basic principles are in conflict in the decisions. Each is exemplified by a leading case whose holding is now largely of antiquarian interest but whose philosophy continues to support one or the other of these principles. In both cases, laborers who had breached

25. Consider for instance: UNIFORM SALES ACT § 44; UNIFORM CONDITIONAL SALES ACT §§ 16-26; UNIFORM COMMERCIAL CODE § 2-718(2); N.Y. PERS. PROP. LAW § 145-a.

their contracts of employment sued to recover the value of their services rendered prior to the breach. As might be expected, one was allowed recovery; the other was not. These facts are not likely to be seen again, as each case involved a plaintiff who had agreed to work an entire year for a total payment of 120 dollars, and, at the time of breach, in one case no payment at all had been made by the employer and in the other a substantial part of the payment was still unpaid. Today laborers are not so easily found and few will trust an employer for so long a time. Furthermore, wage statutes in many states now compel periodic payments to wage earners thus eliminating the possibility of long deferred payment for personal services.[26]

Stark v. Parker[27] rested its denial of recovery to the defaulting plaintiff upon the doctrine of implied conditions, holding it repugnant

> to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it. The true ground . . . is, that the party claiming has done all which on his part was to be performed *by the terms of the contract*, to entitle him to enforce the obligation of the other party.[28]

In *Stark*, sanctity of contract won out over unjust enrichment. Although the issue of unjust enrichment was clearly raised, the court was unable to distinguish quasi contract from actual contract. The trial court had instructed the jury to take into account any damage caused to the employer by the plaintiff's breach and to award only the excess of the benefit conferred over such damage. But this instruction was held error. The effect of this decision is to punish the defaulting party out of all proportion to the injury he has caused. It is punitive to the plaintiff and a windfall to the defendant, but it is still the law in Massachusetts and, according to most authorities, represents the majority view in the United States.[29] Adding up the factors which might justify such a result, we find first, that the plaintiff breached his contract "without excuse." However, he undoubtedly had an excuse; it was just not acceptable to the court. And whatever the plaintiff's reasons were for not performing, they should not have rendered him an outlaw. This is a typical example of "willful"

26. *E.g.*, Ark. Stat. Ann. 81-301 (1947) (semi-monthly payments); Conn. Gen. Stat. Rev. 31-71 (1961) (weekly payments); Mass. Gen. Laws Ann. ch. 149, §§ 148-159B (1965) (weekly payments).

27. 19 Mass. (2 Pick.) 267 (1824).

28. *Id.* at 271.

29. See Patterson, *Restitution for Benefits Conferred by Party in Default under Contract*, 1942 N.Y. Law Revision Comm'n Rep. 195, 210; Wade, Cases on Restitution 695 n.1 (2d ed. 1966). *But see* 5A Corbin, Contracts § 1127 (1964).

breach.[30] Second, the contract was an entire rather than a severable one. Apparently however, the employer had made some payments so it might be argued that the parties did not intend the plaintiff to work the full period before being paid. Also, the term of the contract was for such a long period, one year, that the implication would seem to favor periodic payment for periodic services.[31] Third, personal services are not the sort of benefit that can be returned by a defendant and hence he should not have to pay for them. But such an argument works both ways. The defendant knew when he received the benefits that they were incapable of specific return and might be presumed to have consented to pay something for them. And fourth, undoubtedly the breach caused some damage to the employer. But the jury took this fact into account in finding for the plaintiff in the trial court.

When one considers the inequality of bargaining power between the parties and the harshness of the result, it is hard to justify *Stark v. Parker* let alone prolong its life for over a hundred years. Although it may have served some social purpose in 1824, the case would seem deserving of retirement in the twentieth century.

Britton v. Turner[32] is the leading case representing the other line of authority. On facts almost identical to those in *Stark*, it allowed a defaulting laborer to recover in quasi contract for services rendered before his breach. Although one might question the court's effort to find a consideration to support the quasi contract,[33] the arguments used to sustain the result have a thoroughly modern ring. In place of the moral indignation of *Stark*, the New Hampshire court supported its position with practical reasoning. It recognized that the effect of the majority rule is to penalize the party in default in inverse proportion to the seriousness of the breach. It clearly saw that to forfeit the plaintiff's performance was to unjustly enrich the defendant. Although aware that the nature of the plaintiff's services were such that the defendant could not return them, the court found that the defendant "assented" to receive them and thus must compensate. And the court anticipated the wage statutes by asserting that the general understanding in laborers' contracts was that workmen were to be paid for work performed regardless of the terms of the contract. The contract price was used to determine the quasi contractual recovery, resulting in pro rata compensation, but the court realized that this was merely a means of finding the reasonable worth of the labor performed.[34]

When one examines the more recent cases, it appears that even

30. See generally 5A Corbin, Contracts § 1123.
31. See Osgood v. Paragon Silk Co., 19 Misc. 186, 43 N.Y. Supp. 271 (Sup. Ct. 1897).
32. 6 N.H. 481 (1834).
33. *Id.* at 492.
34. *Id.* at 495.

though the greater number of total decisions seem to favor the reasoning of *Stark v. Parker*, the trend is otherwise.

The Supreme Judicial Court of Massachusetts has relied upon *Stark* in two fairly recent cases. In *Jackson v. Boston Safe Deposit & Trust Co.*,[35] the plaintiff performed personal services for her employer for a period of nearly thirty years in reliance upon his promise to leave her his property in his will. When he died without doing so she brought suit for the value of the services rendered. The court conceded that the plaintiff would be entitled to a quantum meruit recovery provided she was not in default. The testimony indicated that the employer, a few years before his death, asked the plaintiff to stop coming to his home and thus stop her work because she did not get along with a woman friend of the employer who was living in his house. The plaintiff acquiesced. The court relied upon *Stark v. Parker* to deny her a recovery, holding that, whatever her motives may have been for ceasing employment, she was in default. This is a bad result. The plaintiff was not a volunteer. She gave up a substantial part of her life to the employer's service. Her breach, if such it was, was excusable and in fact was induced by the employer.

The result in *Le Bel v. McCoy*,[36] another Massachusetts case, seems fairer, but is still based upon *Stark v. Parker's* strict requirement of performance of implied conditions. The plaintiff, a building contractor, agreed to build a house for the defendants for a total sum of 7,600 dollars. No time for payment was fixed. The defendants obtained a construction mortgage providing for periodic payments to them, and the plaintiff and defendant subsequently agreed that payments were to be made to the plaintiff whenever the defendants received them from the bank. After making two payments totalling 3,800 dollars the defendants arbitrarily refused to make the third payment of 1,520 dollars. Their refusal was not based upon any complaint with the plaintiff's work. The defendants insisted that the plaintiff complete the house without further payment. The plaintiff stopped work and brought suit for the value of the labor performed over and above the payments already received. Despite the auditor's finding that the agreement to make periodic payments was merely a clarification of the original contract, the court held the agreement to be without consideration and therefore unenforceable. The decision was for the defendants upon the ground that the plaintiff was in default. His default, however, was not his refusal to perform without further payment, but rather that he had installed a wooden beam in place of the steel one called for by the plans. This substitution was

35. 310 Mass. 593, 39 N.E.2d 85 (1942).

36. 314 Mass. 206, 49 N.E.2d 888 (1943).

apparently not even known to the defendants when they stopped payment and the auditor found that the plaintiff had performed his work in a good and workmanlike manner despite the substitution.

If the result does not seem as harsh as *Jackson* it is only because the plaintiff, a businessman, was not so appealing a subject for equitable relief. Still the work which he did was of substantial value. Since the contract left open the time of payment, payment logically should have been made according to general custom. This would have justified the contractor's refusal to continue performance, but because of his substitution of beams, it still would not have entitled him to a recovery. The net result of this case is that the defendants received a substantial benefit for which they did not have to pay and the contractor paid a penalty that bore no relationship to his default.

Similarly, a very recent federal case, *Green Manor Construction Co. v. Highland Painting Service*,[37] denied a defaulting subcontractor recovery in quantum meruit as well as on the contract. But the reasoning does not support the majority rule. Highland, the defaulting plaintiff, satisfied the master and the trial court that it was entitled to a recovery, but on appeal, the judgment was reversed with the suggestion that the defendant should prevail on its counterclaim. Highland was held to be in substantial default and thus not to come within the rule allowing recovery for substantial performance. No affirmative relief in quantum meruit was allowed, but indirectly relief was given since Highland was awarded credit against the amount of defendant's counterclaim for all work and supplies actually furnished up to the time of total breach. This case, although not citing *Britton*, is more consistent with its reasoning than with that of the so-called majority position.

Corti v. Continental Copper and Steel Export Co.,[38] another recent federal case, denied a promoter recovery even though he went to a great deal of trouble and expense to negotiate, on the defendant's behalf, a contract for the construction and operation of factories in Italy. But the action was on the contract, not in quantum meruit. The plaintiff failed to interest an Italian group whose participation was essential to the deal and the court held this to be a condition precedent to any liability of the defendant. The understanding of the parties was that this was an all-or-nothing arrangement, and the reward for success was sufficiently large to justify placing the risk of failure to achieve total performance on the plaintiff. Another justification of the result is that even though it may be said that the defendant had the advantage of plaintiff's services, these services produced no ultimate benefit to the defendant.

37. 345 F.2d 657 (1st Cir. 1965).
38. 223 F. Supp. 503 (S.D.N.Y. 1963).

If the promoter's contract in *Corti* can be considered an all-or-nothing agreement, then surely an attorney's contingent fee contract should be similarly categorized. Yet in *Moore v. Fellner*,[39] the California Supreme Court allowed a quantum meruit recovery to an attorney in default under a contingent fee contract. Moore, the attorney-plaintiff, entered into a contract with Fellner which provided that Moore was to prosecute one law suit and defend another and was to be paid solely from the recovery in the former. The contract expressly called upon Moore to handle any appeals at the option of Fellner. Moore was successful in obtaining a judgment of 104,500 dollars in the first suit and arranged a settlement of the second. But when the defendant in the first suit appealed, Moore demanded 2,000 dollars additional fee to handle the appeal. This was a breach of his contract and Fellner treated it as such, relieving Moore of control of the case and retaining another attorney to represent him on the appeal for a fee of 1,000 dollars. The new lawyer was successful on the appeal and the judgment obtained by Moore was affirmed. Upon Fellner's refusal to pay Moore anything, Moore brought suit in quantum meruit. The district court of appeal reversed a judgment in Moore's favor on the ground that he was in default.[40] This, in turn was reversed by the supreme court, which recognized that Moore was in default, but treated the contract as divisible and thus distinguished this case from those cases holding a contingent fee contract to be entire.[41] The case was remanded to determine the value of Moore's services. This certainly was not a typical severable contract, however, where specific payment could be allocated to the severable portions.[42] Moore contracted for the whole job. His fee was sufficiently large to indicate that he assumed the risk of loss of his time and effort if he failed to perform. True, he had completed a substantial part of his agreement and undoubtedly his effort was the greatest single factor in the favorable result which Fellner obtained. The allowance of restitution may be partly explained by the supreme court's inference that Moore's breach was the result of a misunderstanding on his part. It is true that Moore's breach was so obvious and so dangerous that some sort of explanation seems called for. But was it for the court to make? If ever there was a justification for the philosophy of *Stark v. Parker*, the facts of *Moore* should have invoked it. Nonetheless, despite the dissent of Justice Traynor, the result seems sound. To

39. 50 Cal. 2d 330, 325 P.2d 857 (1958).

40. Moore v. Fellner, 318 P.2d 526 (Cal. App. 1957).

41. See Cahill v. Baird, 70 Pac. 1061 (Cal. 1902) and cases cited *supra* note 18.

42. Compare Joachim v. Andover Silver Co., *supra* note 20. *Moore v. Fellner* seems more analogous to those cases allowing recovery on the basis of the substantial performance.

deny Moore relief would be to punish his breach out of all proportion to the damage caused by it and to unjustly enrich the defendant.

The doctrine of substantial performance continues to be widely used to allow recovery by a building contractor despite his failure to perform his contract in all particulars. But its application is generally limited to those cases where the breach is comparatively minor.[43] In *Odgers v. Held*,[44] however, the Washington Supreme Court allowed a recovery on the contract to a builder who was substantially in default, awarding him full credit for his costs and his fee but offsetting this recovery with the sums the defendant owner had paid together with the difference between the value of the house contracted for and that delivered. The court rejected the usual rule in substantial performance cases, which allows the contractor recovery of the contract price less the cost of completing the structure according to the contract, on the ground that to complete the work as specified in the contract "would involve unreasonable economic waste."

It would seem more reasonable, where the contractor is substantially in default, to limit his recovery to restitution of the benefit conferred on the owner not exceeding the contract price. This was done in *Kirkland v. Archbold*,[45] a case in which the Court of Appeals of Ohio rejected its earlier position that a defaulting plaintiff can have no recovery unless he has substantially performed,[46] and expressly adopted the view of *Britton v. Turner*. So also, in *Broadway Roofing & Supply Inc. v. Covello*,[47] the Colorado Supreme Court denied rescission to the homeowner and allowed the contractor, who was substantially in default, recovery on his counterclaim for the value of the work completed. And in *Power-Matics, Inc. v. Ligotti*,[48] a New Jersey court, although finding the contractor in "willful default," nonetheless indicated that it would allow him a quasi contractual recovery to the extent of the benefit conferred. Furthermore, in *Burke v. McKee*,[49] the Oklahoma Supreme Court, citing *Britton v. Turner*, awarded a quasi contractual recovery to a plaintiff substantially in default under an entire contract to level trees and clear land belonging to the defendant. And in *San Augustine Independent School District v. Freelove*,[50] a Texas court allowed a defaulting architect the reasonable value of his services, also citing *Britton*.

43. See Lawrence v. Cunningham, *supra* note 19; Julian v. Kiefer, *supra* note 19; Mathis v. Thunderbird Village Inc., 236 Ore. 425, 389 P.2d 343 (1964).
44. 58 Wash. 2d 247, 362 P.2d 261 (1961).
45. 68 Ohio L. Abs. 481; 113 N.E.2d 496 (Ct. App. 1953).
46. Larkin v. Buck, 11 Ohio St. 561 (1860).
47. 144 Colo. 562, 357 P.2d 356 (1960).
48. 79 N.J. Super. 294, 191 A.2d 483 (Super. Ct. 1963).
49. 304 P.2d 307 (Okla. 1956).
50. 195 S.W.2d 175 (Tex. Civ. App. 1946).

In comparing the modern cases it appears that, whatever may be the numerical weight of authority, the doctrine of *Britton v. Turner* has prevailed in most jurisdictions which have had recent occasion to review the problem of the plaintiff in default under a contract for services.

III. Plaintiff in Default Under a Contract for the Sale of Goods

The plaintiff in default under a contract of sale, whether the subject matter be goods or land, is usually the purchaser. And again, regardless of the subject matter, the decided weight of authority denies him recovery.[51] The courts make no particular distinction between real estate contracts and contracts for the sale of goods, frequently citing the former as authority for denying relief in the latter. For instance, *Lawrence v. Miller*,[52] the leading New York case denying restitution, involved a land contract, but it is cited regularly in sales cases.[53] Legislation, however, has made a distinction between sales of goods contracts and contracts for the sale of land; the Uniform Sales Act,[54] the Uniform Conditional Sales Act,[55] and the Uniform Commercial Code[56] all purport to deal only with the former. Therefore, it seems appropriate to treat these two types of sales contracts separately in the following discussion.

Under a land contract the purchaser is usually the only party in need of restitution because vendors of land rarely transfer both possession and legal title until they have been paid in full or until the purchase price has been secured by a mortgage. In sales of personal property, section 44 of the Uniform Sales Act permits a seller, who has failed to deliver all that he contracted to deliver, to recover the contract price for the part delivered if the buyer knew when he received the goods that the seller was not going to perform fully; and if the buyer has used or disposed of the goods before he knows of the seller's breach, then the seller is allowed to recover the value of the goods from the buyer. In other words, the defaulting seller of goods has, by statute, a remedy either in contract or in quasi contract depending upon the buyer's knowledge of the breach.

Section 44 of the Sales Act embodied the common law rule, followed in the majority of jurisdictions, allowing a defaulting seller recovery

51. 5A Corbin, Contracts § 1129.
52. 86 N.Y. 131 (1881).
53. *E.g.*, Kovacich v. Metals Bank & Trust Co., 139 Mont. 449, 365 P.2d 639 (1961); Waldman v. Greenberg, 265 App. Div. 827, 37 N.Y.S.2d 565 (2d Dep't 1942); Miller v. Ellswere Caterers, Inc., 211 N.Y.S.2d 367 (Munic. Ct. Bronx 1961); Dwares v. Clifton Yarn Mills, Inc., 65 R.I. 471, 16 A.2d 501 (1940).
54. Uniform Sales Act § 44.
55. Uniform Conditional Sales Act §§ 16-26.
56. Uniform Commercial Code § 2-718.

for his partial performance.[57] But neither the weight of authority at common law nor the Sales Act offered the defaulting buyer a corresponding right to restitution of payments made prior to his default.[58] In an effort to give the defaulting buyer rights similar to those accorded the seller, the New York Law Revision Commission in 1942 and again in 1952 proposed and eventually prompted the enactment of section 145-a of the New York Personal Property Law.[59] This statute entitled the buyer in default to restitution of payments made in excess of the sum set forth in a valid liquidated damage clause, or if the contract had no such clause, then of payments made in excess of twenty per cent of the value of his total performance. Any recovery was subject to offset by the actual damage caused by the buyer's breach, provided there was no liquidated damage clause, and by the value of any benefit received by the buyer under the contract. Section 145-a became effective September 1, 1952, and expressly provided that it should not be applied retroactively.

Where a sales contract provides for delivery of goods to the buyer and, until the purchase price is paid, retention of title by the seller, it is within the terms of the Uniform Conditional Sales Act. This act recognizes the security nature of the retained title and provides, to some extent, a right of redemption to the buyer and an equitable process for foreclosing this right.[60]

Today these statutes are being repealed and replaced by the Uniform Commercial Code, which has already been adopted by a number of states previously without statutory law on the subject.[61] The Commercial Code deals specifically with the defaulting buyer's right to restitution in section 2-718(2). Under this section the purchaser in default can have restitution of his payments in excess of a valid liquidated damage amount, or, if there is no such amount set forth in the contract, in excess of twenty per cent of the value of his total performance or 500 dollars, whichever is smaller. An offset of damages caused by the plaintiff's breach and of any benefits received by him under the contract is provided for. This obviously is similar to New York Personal Property Law section 145-a except that the twenty per cent statutory liquidated damage is limited to 500 dollars.

Perhaps the most interesting thing about these statutes is the infrequency with which the courts have made use of them. One

57. 5 WILLISTON, CONTRACTS § 1474 (rev. ed. 1937).

58. Patterson, *supra* note 29, at 233.

59. See 1942 N.Y. LAW REVISION COMM'N REP., 179-243; 1952 N.Y. LAW REVISION COMM'N REP. 83-101.

60. UNIFORM CONDITIONAL SALES ACT §§ 16-26.

61. See FLA. STAT. §§ 671-80 (1965), which takes effect Jan. 1, 1967.

might have expected that legislative recognition of a right to restitution in a defaulting buyer would have resulted in similar judicial recognition, and even that the legislative policy might have been extended beyond the letter of the statute and caused the courts to allow restitution in similar cases not expressly covered by the acts. But such has not been the result.

In *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*,[62] Judge Clark, responsive to the mandate of *Erie R.R. v. Tompkins*,[63] sought to determine the then current New York attitude towards a purchaser in default. The public policy embodied in section 145-a and in the New York Law Revision Commission Reports[64] seemed to him indicative of a more lenient attitude towards restitution and helped sustain his decision for the defaulting plaintiff.[65] However, in *Pearson International, Inc. v. Congeladora De Mazatlan*,[66] a New York Supreme Court case, Justice Saypol rejected Judge Clark's "tempting hint"[67] and reaffirmed the New York position embodied in *Lawrence v. Miller*,[68] denying any relief to a plaintiff in default. The court suggested that section 145-a "might furnish ground for relief here but for its effective date."[69]

In cases arising since the effective date of section 145-a, the lower courts of New York have tended to ignore the statute.[70] Even where the defendant can no longer perform, the plaintiff in default cannot recover his down payment. In *Miller v. Ellsmere Caterers, Inc.*,[71] the plaintiff paid 100 dollars down on a catered party to celebrate the confirmation of the plaintiff's son. The total price was 1,095 dollars and thus the twenty per cent statutory liquidated damage of section 145-a was not exceeded. But subsequent to the plaintiff's breach of the contract the defendant's kitchen burned down and thus performance was an impossibility. Nonetheless, the Bronx municipal court

62. 206 F.2d 103 (2d Cir. 1953).

63. 304 U.S. 64 (1938).

64. *Acts, Recommendation and Study Relating to Recovery for Benefits Conferred by Party in Default*, 1942 N.Y. Law Revision Comm'n Rep. 179-243; *Act, Recommendation and Study Relating to the Right of a Buyer of Goods to Restitution for Benefits Conferred Under a Contract of Sale on Which He Has Defaulted*, N.Y. Law Revision Comm'n, 1952 N.Y. Leg. Doc. No. 65 (c), 1-19.

65. The decision actually rests upon the overriding national policy embodied in Export Control regulations of the Foreign Aid Appropriations Act, ch. 621, 63 Stat. 709 (1949).

66. 141 N.Y.S.2d 221 (Sup. Ct. 1955).

67. *Id.* at 226.

68. *Supra* note 52.

69. *Supra* note 66. The contract was made prior to September 1, 1952, the effective date of § 145-2.

70. Babbitt v. Wides Motor Sales Corp., 17 Misc. 2d 889, 192 N.Y.S.2d 21 (Sup. Ct. 1959); Zuback v. Moskowitz Floor Corp., 13 Misc. 2d 445, 176 N.Y.S.2d 404 (Sup. Ct. 1958); Lichtman v. I.P.M. Industries, 158 N.Y.S.2d 813 (Sup. Ct. 1956).

71. *Supra* note 53.

relied upon *Lawrence v. Miller*[72] and denied all recovery to the plaintiff. The reliance upon *Lawrence,* a case involving an installment land contract, is typical. Section 145-a was not mentioned. And in *Harris v. Emerson Sales Corp.,*[73] the Appellate Term refused to allow a defaulting purchaser of windows to offset his deposit against the claim for damages brought by the defendant supplier. Apparently the case held that the plaintiff in default must not only pay full damages for his breach, but must forfeit his deposit as well. No authority was cited.

Some relief from the harsh doctrine of *Lawrence v. Miller,* as applied in the New York cases, is to be found in a rather specious distinction between a deposit to insure performance and a deposit in payment of the contract price. Restitution is allowed in the former situation but denied in the latter. In *Chaude v. Shepard,*[74] a tenant who had deposited three months rent as security for faithful performance was allowed recovery of his deposit despite his breach. *Lawrence* was distinguished on the ground that the tenant's payment was not a partial performance of his covenant to pay despite the fact that by the terms of the lease it was to be applied in payment of the last three months rent. Thus a lessee in default may obtain some relief where a purchaser in default would not. In sustaining a rather shocking forfeiture, the New York Supreme Court, in *Bisner v. Mantell,*[75] refused to apply this doctrine to a deposit made upon the purchase price of furniture where the deposit was nearly fifty per cent of the total price.

Another possible avenue of escape from the *Lawrence* rule by the New York courts is to be found in *MacMurray v. City of Long Beach.*[76] In this case the New York Court of Appeals allowed restitution of money paid under a contract calling for installment payments of delinquent taxes on the ground that the contract specifically provided that the money was to be applied to reduce the lien. The city's subsequent sale of the tax lien to a third party for the full amount of the lien was held to create such an unjust enrichment as to give rise to a right to restitution in the defaulting plaintiff. *Lawrence* was distinguished, but the distinction is hard to see.

The New York courts are not alone in their reluctance to depart from the rule of *Lawrence v. Miller.* In the recent Montana case of *Kovacich v. Metals Bank and Trust Co.,*[77] the buyer of a house trailer

72. *Supra* note 52.
73. 160 N.Y.S.2d 659 (Sup. Ct. 1957).
74. 122 N.Y. 397, 25 N.E. 58 (1890).
75. 197 Misc. 807, 95 N.Y.S.2d 793 (Rensselaer County Ct. 1950).
76. 292 N.Y. 286, 54 N.E.2d 828 (1944).
77. *Supra* note 53.

under an installment contract was denied relief despite a Montana statute expressly designed to relieve purchasers from forfeiture. The plaintiffs had made substantial payments to defendant on an undisclosed purchase price when, due to a widespread copper strike, they became financially unable to continue their payments. A new agreement providing for reduced payments was entered into by the parties, but it was held unenforceable for want of consideration, despite the purchaser's reliance upon it and the acceptance by the bank of some reduced payments. The bank had repossessed the trailer when the plaintiffs brought this action seeking to recover the amount of their payments less the reasonable rental value of the trailer. They relied upon a Montana statute purportedly relieving them from forfeiture "except in case of a grossly negligent, willful, or fraudulent breach of duty."[78] The Montana Supreme Court denied relief, holding that the plaintiffs' financial inability was not sufficient to appeal to the conscience of a court of cquity. It quoted from *Lawrence* and affirmed the lower court's action in sustaining a demurrer to the complaint.

Those courts which adhere to the minority position, allowing a defaulting buyer of goods restitution of the excess of his payments over the damage caused by his breach, base their action largely upon the injustice of forfeiture. According to Professor Patterson,[79] the leading case supporting recovery is the old Connecticut case of *Hickock v. Hoyt*.[80] There the plaintiff contractcd to purchase wine and paid fifty dollars on account. He later found that he could not dispose of the wine profitably whereupon he defaulted. The seller resold the wine at a price higher than the contract price. The court in allowing a recovery stressed the fact that there was no express provision for forfeiture and that there was no loss to the seller. The existence of a forfeiture clause should not be controlling, because if it results in unjust enrichment it would seem to be a penalty. In fact the mere presence of a liquidated damage clause equating damages with payments made has, in some cases, been decisive in causing the court to allow recovery on the ground that to hold otherwise would be to condone a penalty.[81] *Hickock* was the principal authority relied upon in the leading Connecticut case of *Pierce v. Staub*,[82] an installment land contract case wherein restitution was allowed. But even in Connecticut the decisions have not been

78. Mont. Rev. Codes Ann. § 17-102 (1947).

79. Patterson, *supra* note 29, at 231.

80. 33 Conn. 553 (1866).

81. See Paradis v. Second Ave. Used Car Co., 61 So. 2d 919 (Fla. 1952) (land contract).

82. 78 Conn. 459, 62 Atl. 760 (1906).

uniform. Shortly after *Pierce* a purchaser in default under a contract to purchase an automobile relied upon *Pierce* in defense of a suit upon a check given in part payment. In *American Automobile Co. v. Perkins*,[83] the Connecticut Supreme Court of Errors denied the defense despite the fact that the seller was not damaged at all by the buyer's breach. *Pierce*, and indirectly *Hickock*, were interpreted as allowing restitution only where the seller has disabled himself from performing by a subsequent sale or otherwise. In *American Automobile Co.*, the plaintiff was a mere sales agent, and upon the buyer's breach the plaintiff made no further effort to procure a car for the buyer nor did it make any tender of one under the provisions of the contract. But its inactivity was not construed as a rescission, which would require restitution. However, in *Remington Arms Union Metallic Cartridge Co. v. Gaynor Mfg. Co.*,[84] the same Connecticut court relied heavily upon *Pierce* in allowing restitution to a defaulting buyer of bullets. Upon the buyer's breach the seller made no further effort to comply with the contract and tendered no more bullets. The court commented upon the fact that the contract contained no forfeiture provision, and it considered the inactivity of the seller to be a termination of the contract. The facts seem indistinguishable from those in *American Automobile Co.* and the holding seems in conflict.

The implication of these cases is that restitution will be allowed only when the seller has rescinded, and that being disabled from further performance by a sale to a third party indicates such a rescission. If this be true, the seller will never be able to dispose of the subject matter of the contract without the fear that the defaulting buyer may immediately demand restitution. Therefore, some practical means of foreclosing the right to restitution would seem to be needed. However, in *Segal v. Mooney*,[85] where a defaulting purchaser under a land contract sought recovery of a 500 dollars deposit on a total price of 24,000 dollars, a Connecticut court, after distinguishing *Pierce* on the equities, held that the seller might retain the deposit and that he was justified in selling to a third party in view of the purchaser's firm refusal to perform. The net effect of the Connecticut decisions is that restitution depends upon the general equities of each case, an eminently equitable solution but one leading to uncertainty and one which would seem to invite litigation.

In *Stewart v. Moss*,[86] the Supreme Court of Washington allowed restitution to a defaulting buyer of a truck and trailer. The court even went so far as to return the purchaser his deposit of 500 dollars, which

83. 83 Conn. 520, 77 Atl. 954 (1910).
84. 98 Conn. 721, 120 Atl. 572 (1923).
85. 15 Conn. Supp. 41 (C.P. 1947).
86. 30 Wash. 2d 535, 192 P.2d 362 (1948).

the contract denominated liquidated damage, upon the defendant's failure to prove actual damages. The equities in this case were strongly with the plaintiff. The defendant had it within his power to assist the purchaser in financing his payments, but chose not to do so, preferring to keep the truck and trailer and forfeit the plaintiff's payments. Nonetheless, it would seem that the modest deposit of 500 dollars was probably a valid estimate of liquidated damage and that its retention should have been allowed. In placing the burden of proving damage caused by plaintiff's breach upon the defendant, *Stewart* goes even further than do the courts of California, a state notably partial to defaulting purchasers. In California, and in most other states where restitution is available, the plaintiff is entitled only to the excess of his payments over the damage caused by his breach, and the burden of establishing this amount requires him to prove the amount of damage.[87]

The factors that control the defaulting buyer's right to restitution are many. Even in a jurisdiction such as New York which adheres strictly to the majority view, restitution is possible if the sum sought to be recovered can be considered a "deposit" rather than a partial performance.[88] And although statutes such as New York Personal Property Law section 145-a and the Uniform Commercial Code section 2-718(2) have made only rare appearances in the courts, their impact on day-to-day unlitigated transactions may well be considerable. The nature of the buyer's breach may be decisive. If it be deemed a "willful" breach his equitable position is weakened. Unfortunately "willful" is a vague term.[89] Financial inability to complete the contract was treated as a willful breach in *Kovacich*[90] and forfeiture of the purchaser's payments was allowed despite a statute purporting to relieve defaulting buyers from forfeiture. And yet *Stewart v. Moss*[91] found that the plaintiff's breach was not willful because his financial ability was "the result of circumstances over which the defaulting party has no control."[92] The attitude of the defendant seller in insisting upon the letter of the law in *Stewart* made him appear unduly grasping and was the principal factor in causing the court to award the plaintiff restitution. On the other hand, where the payment is small in proportion to the total price and intended as earnest money, restitution will

87. Raffa v. Johnson, 35 Cal. 2d 36, 216 P.2d 13 (1950); Lines v. Marin Municipal Water Dist., 228 Cal. App. 2d 155, 39 Cal. Rptr. 294 (Dist. Ct. App. 1964).

88. Chaude v. Shepherd, *supra* note 74.

89. See 5A Corbin, Contracts § 1123 (1964).

90. *Supra* note 53.

91. 30 Wash. 2d 535, 192 P.2d 362 (1948).

92. *Id.* at 542, 192 P.2d at 366.

usually be denied.[93] Even in jurisdictions which have ruled out unjust enrichment as a basis for restitution, the equities do play a part, as witness *MacMurray v. City of Long Beach*.[94] Some courts have been influenced by the lack of a forfeiture clause in the contract,[95] although the mere existence of such a clause is no assurance that restitution will be denied.[96] Where the effect of a forfeiture clause is to create an obvious penalty, even a court which follows the majority rule may allow restitution.[97] If the defendant seller is still ready and willing to perform, restitution may well be denied, however, even in a jurisdiction adhering to the minority position.[98] But if the seller has "rescinded" or made it impossible for himself to perform, restitution may be required.[99] Nevertheless, resale to a third party may not indicate rescission if the buyer's default is unequivocal and final.[100] The net effect of these various factors is to leave restitution uncertain, with the equities being given more weight in the minority jurisdictions but being considered to some degree even in those states most firmly committed to the majority rule. In sales of goods the security element is not great except in those cases where possession is given to the buyer. There the Uniform Conditional Sales Act[101] and the Uniform Commercial Code[102] both recognize the security element and provide for an equitable statutory solution to the problems of both parties.

IV. Plaintiff in Default Under a Contract for the Sale of Land

In this area, at least in the case of the installment land contract, the seller uses his retained title primarily as security for the payment of the purchase price. No uniform act controls here. The results are generally equitable; but their lack of certainty mitigates against the use of the installment land contract. Although some state statutes have been enacted[103] and others have been proposed,[104] legislatures generally have been reluctant in devising predictable procedures to deal with breach of land contracts.

93. *E.g.*, Segal v. Mooney, *supra* note 85; Silverstein v. United Cerebral Palsy Ass'n, 17 App. Div. 2d 160, 232 N.Y.S.2d 968 (Sup. Ct. 1962).

94. *Supra* note 76.

95. *E.g.*, Pierce v. Staub, *supra* note 82.

96. *E.g.*, Stewart v. Moss, *supra* note 86.

97. *E.g.*, Paradis v. Second Ave. Used Car Co., *supra* note 81.

98. *E.g.*, American Automobile Co. v. Perkins, *supra* note 83; Biddle v. Biddle, 202 Mich. 160, 168 N.W. 92 (1918).

99. *E.g.*, Parchen v. Rowley, 196 Wash. 340, 82 P.2d 857 (1938).

100. *E.g.*, Segal v. Mooney, *supra* note 85; Reitano v. Fote, 50 So. 2d 873 (Fla. 1951).

101. Uniform Conditional Sales Act §§ 16-26.

102. Uniform Commercial Code §§ 9-501–9-507.

103. *E.g.*, Md. Ann. Code art. 21, §§ 110-116 (1957).

104. See 1937 N.Y. Law Revision Comm'n Rep. 343.

The overwhelming weight of authority denies restitution to the purchaser in default under a contract for the sale of land.[105] However, the general rule is applied with such variation and modification among the various jurisdictions that it is possible to classify some courts as being rigid adherents to the general rule. Others, although not altogether rejecting the general rule, have so diluted it that it is hardly recognizable. At the opposite ends of the spectrum are New York and California. Between them lie the rest of the states, administering equity according to the views of their several courts, affirming the rule while making exceptions to it, or denying the rule as they apply it. When it is realized that probably the majority of the cases involve installment land contracts in which the vendor's retained title is used as security for the payment of the purchase price, it can be seen that here, the lack of predictable certainty presents a serious problem.

Lawrence v. Miller[106] is the leading New York case embodying the strict rule permitting the vendor to forfeit payments made by a purchaser in default. The defaulting plaintiff, in that case, argued that the vendor should be permitted to retain only that portion of the 2,000 dollars payment which represented his actual damage. There had been no proof of actual damage caused by the plaintiff's breach and the court intimated that it could deny restitution on the ground that the plaintiff had failed to show that the damage was less than the amount of the deposit. But it was not content to rest there. It went further and declared, "that it is never permitted either at law or in equity, for one to recover back money paid on an executory contract that he had refused or neglected to perform."[107]

California which at one time adhered to the general rule as strictly as does New York[108] has, since 1951, so modified it that the state must now be recognized as being firmly opposed to forfeiture. In *Freedman v. The Rector, Wardens & Vestrymen*,[109] the Supreme Court of California allowed restitution to a willful defaulter on the theory that otherwise the effect would be to impose punitive damages for breach of contract in violation of statute.[110] However, the California court was careful not to overrule its previous decision in *Glock v. Howard &*

105. See, *e.g.*, Melton v. Amar, 86 Idaho 262, 385 P.2d 406 (1963); Graves v. Winer, 351 S.W.2d 193 (Ky. Ct. App. 1961); Macon v. Zeiler, 233 Md. 160, 195 A.2d 687 (1963); La Vallee v. Cataldo, 343 Mass. 332, 178 N.E.2d 484 (1961); Notti v. Clark, 133 Mont. 263, 322 P.2d 112 (1958); Davies v. Boyd, 73 N.M. 85, 385 P.2d 950 (1963); Diehl v. Welsh, 393 P.2d 834 (Okla. 1964); Pappas v. Lucas, 181 Pa. Super. 194, 124 A.2d 161 (1956); Weyher v. Peterson, 16 Utah 2d 278, 399 P.2d 438 (1965).

106. 86 N.Y. 131 (1881).

107. *Id.* at 139-40.

108. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713 (1898).

109. 37 Cal. 2d 16, 230 P.2d 629 (1951).

110. CAL. CIV. CODE § 3294.

Wilson Colony Co.[111] which was a blunt statement of the majority rule. The court distinguished *Glock* and the other California decisions allowing forfeiture on the ground that the vendee in each case was probably unable to prove that the vendor's retention of both land and payments would result in the imposition of punitive damages.[112] Nonetheless, the result of *Freedman* has been to reject forfeiture; a further result has been to destroy the utility of the installment land contract in California.[113] Without forfeiture the installment land contract is no more advantageous to the vendor than a mortgage.

Other states while generally adopting the language of the majority view, have managed to apply equity as they see it, leading to confusion and a loss of the predictable certainty which the installment land contract, as a security device, would seem to require.

A. Retention of Earnest Money

One might think that when the sole payment made by the defaulting purchaser is a deposit made as earnest money, to be forfeited if he breaches, restitution would be uniformly denied. If the payment were but a small percentage of the total price, it would appear justifiable to allow its retention as liquidated damage if nothing else.[114] But California has ruled out the liquidated damage theory on the ground that subsequent proof of actual damage establishes that it is not "impractical or extremely difficult to fix the actual damage"[115] and hence where actual proof is available, damages cannot be liquidated.[116] Such reasoning defers determination of the validity of a liquidated damage clause until after the breach and thus destroys its principal reason for existence. According to *Freedman*, whenever actual damage can be shown to be less than the liquidated figure, retention of the latter should be denied as a penalty.

California purports to place the burden of proving actual damage upon the plaintiff in default.[117] But in *Freedman* the court made the finding solely on the basis that the vendor resold for 2,000 dollars more

111. *Supra* note 108.

112. See also Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367 (1949). For a detailed discussion of the California cases see Howe, *Forfeitures in Land Contracts*, in 1953-1954 CURRENT TRENDS IN STATE LEGISLATION 417, 457-65 (1955); see also Lee, *Defaulting Purchaser's Right to Restitution under the Installment Land Contract*, 20 U. MIAMI L. REV. 1 (1965).

113. Hetland, *Land Contracts*, CALIFORNIA LAND SECURITY AND DEVELOPMENT § 2.20, at 61 (1960).

114. See Macon v. Zeiler, *supra* note 105.

115. CAL. CIV. CODE § 1671.

116. Freedman v. The Rector, Wardens & Vestrymen, *supra* note 109, at 23, 230 P.2d at 633.

117. Baffa v. Johnson, *supra* note 87; Lines v. Marin Municipal Water Dist., *supra* note 87.

than the original contract piece and showed only a 900 dollar broker's fee as an offset to the profit. It would seem that other factors might affect the actual damage, for instance, taxes and maintenance pending the second sale, and that the plaintiff should have been required to prove them. The court, however, apparently felt that the second sale at an increased price indicated an obvious lack of damage. Although Connecticut is not so adamantly opposed to forfeiture as is California, *Pierce v. Staub*[118] placed the burden of proving actual damage on the vendor; and when no damage was proved, it allowed the defaulting purchaser full recovery. To this extent Connecticut would appear more lenient to the defaulting purchaser even than California, but in *Segal v. Mooney*,[119] a Connecticut court allowed forfeiture of a 500 dollar deposit on a purchase price of 24,000 dollars without any proof of actual damage and distinguished *Pierce* on the equities.

Maryland, in two recent cases has refused to allow a defaulting purchaser recovery of payments amounting to less than ten per cent of the purchase price without any showing of actual damage. In *Quillan v. Kelly*,[120] the payment was 22,500 dollars on a total price of 257,500 dollars, and in *Macon v. Zeiler*,[121] the payment was 1,000 dollars on a price of 20,000 dollars. In *Macon*, the court found the payment to be liquidated damage although the contract merely referred to it as a deposit. In *Graves v. Winer*[122] the Court of Appeals of Kentucky recently refused to compel a return of a ten per cent deposit even though it found that there was no damage caused by the purchaser's breach. It would appear that in most jurisdictions a payment of ten per cent of the purchase price or less can be retained by the vendor without proof of actual damage. But in California, at least, proof of actual damage less than the deposit entitles the defaulting plaintiff to restitution of the excess.

B. Rescission

Perhaps the most common ploy adopted to achieve equity within the confines of the majority rule is to find a rescission. Certainly if both parties agree to the rescission, a restoration of the status quo ante is called for. But if such is the case there will usually be no argument by the vendor. The more common situation is that the vendor has inadvertently done some act inconsistent with his purported intent to perform which is seized upon by the court as evidence of rescission. In *Pierce v. Staub*[123] it was the vendor's subsequent resale which was held to

118. *Supra* note 82.
119. *Supra* note 85. *Cf.* Stewart v. Moss, *supra* note 86.
120. 216 Md. 396, 140 A.2d 517 (1958).
121. *Supra* note 105.
122. *Supra* note 105.
123. *Supra* note 82.

establish a rescission although it took place long after the purchaser's default. In that case, the loss of 60,000 dollars by the purchaser's widow was just too much for the court to approve. Rescission was an acceptable way to reach an equitable result without disturbing the majority rule.[124] In *Segal v. Mooney*,[125] the Connecticut court admitted that *Pierce's* finding of a rescission was a fiction for adjusting the equities and refused to find rescission despite a later sale, distinguishing *Pierce* solely on the equities.

Even the most liberal of courts would be hard pressed to allow restitution against a vendor who not only was not in default but also was actively seeking specific performance.[126] But must the vendor always stand ready to perform? Can he never consider the first contract at an end and seek to find a new purchaser without running the risk that a court may hold that he has rescinded? The danger of the vendor's position is well illustrated by the Kentucky case of *Guill v. Pugh*.[127] There a defaulting purchaser was allowed restitution of a 500 dollar down payment on a purchase price of 9,500 dollars because the subsequent sale of the property to a third party for 9,650 dollars was deemed a rescission.[128] It will be recalled that, in the later case of *Graves v. Winer*, [129] the same Kentucky court refused to allow restitution despite the fact that no damage was caused by the breach. The result in *Graves* is attributable to the skill of the vendor's lawyer who had the foresight to sue for specific performance and damages even though his client had suffered no damage. This affirmative posture of the vendor made it impossible to find a rescission and thus the counterclaim for restitution failed. Presumably as soon as the decision in *Graves* was final the vendor could sell to a new purchaser secure in the knowledge that his right to the deposit was res judicata.

Although usually used to permit the defaulting purchaser to recover his payments, rescission is not a "one way street." It requires a return to the status quo ante for both parties. The recent Oregon case of *Johnston v. Gilbert*[130] illustrates the point. There the purchasers were clearly in default nnder an installment land contract. The vendor brought suit in equity to declare the rights of the purchasers forfeited. The trial court, holding that the vendor was in the wrong forum and that equity will never declare a forfeiture,[131] sustained a demurrer to

124. Compare Taylor v. Rawlins, 86 Fla. 279, 97 So. 714 (1923).
125. *Supra* note 85.
126. See Power v. North, 15 S. & R. 12 (Pa. 1826).
127. 311 Ky. 90, 223 S.W.2d 574 (1949).
128. Compare Frazier v. Ruskin, 203 Pa. Super. 525, 199 A.2d 513 (1964).
129. *Supra* note 105.
130. 234 Ore. 350, 382 P.2d 87 (1963).
131. Equity, however, frequently confirms a forfeiture by quieting title in the vendor without requiring restitution. See Pierce & Stevenson v. Jones, 109 Fla. 517, 147 So. 842 (1933); Mintle v. Sylvester, 202 Iowa 1128, 211 N.W. 367 (1926).

the bill. The purchasers, however, welcomed the vendor's action as an offer to rescind and acquiesced in it to the extent that they were willing to forfeit the payments made and be relieved of any further obligation. The trial court held that the vendor's suit was a repudiation of the contract and decreed that the vendor retain the payments made. The vendor appealed and was successful in establishing his right not only to retain the payments, but to recover the difference between the payments and the rental value of the premises if it should be found that such rental value exceeded the payments. The court stated, "the concomitant of rescission is restitution, not forfeiture."[132] In this case the vendor's recovery would include the benefit he had conferred set off by the benefit received.[133]

C. Retention of Payments Not Unjust

Malmberg v. Baugh[134] is one of the leading cases allowing restitution to the purchaser in default. It was a case of first impression in Utah and in its opinion the Supreme Court of Utah made a point of castigating the majority rule as unconscionable. *Malmberg* was quoted and heavily relied upon by the California Supreme Court in *Freedman*.[135] It is a decision which would seem to place Utah among those jurisdictions most favorable to the defaulting purchaser. But the subsequent Utah cases indicate no such thing. *Malmberg* is still good law, but its holding rests upon the unjust enrichment of the vendor. Recent cases have merely found that the vendor's retention of the purchaser's payments is not "unjust." The effect is to allow forfeitures which seem indistinguishable from those allowed in New York.

Weyher v. Peterson,[136] a 1965 Utah case, was a forcible entry action brought by the vendor against a defaulting purchaser. The purchaser counterclaimed for restitution of the value of his equity in the property. The court allowed a forfeiture despite the fact that the purchaser had paid 9,387 dollars under the contract and had spent 3,078 dollars in improvements. The stipulated rental value of the premises was 8,950 dollars. The court found that the vendor had paid 700 dollars for repairs and 855 dollars for a commission in selling to a new purchaser. It deliberately disregarded the value of the purchaser's improvements stating, "the contract and law require him to sacrifice them in the event of his failure to meet his known duties under the contract."[137] To

132. 234 Ore. at 354, 382 P.2d at 89.
133. *Cf.* Cohen v. Kranz, 15 App. Div. 2d 938, 226 N.Y.S.2d 509 (2d Dep't 1962); Rubin v. Pugatch, 19 Misc. 2d 885, 191 N.Y.S.2d 882 (Sup. Ct. 1959).
134. 62 Utah 331, 218 Pac. 975 (1923).
135. 37 Cal. 2d 16, 20-21, 230 P.2d 629, 632 (1951).
136. 16 Utah 2d 278, 399 P.2d 438 (1965). *Accord,* Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989 (1958); Christy v. Guild, 101 Utah 313, 121 P.2d 401 (1942).
137. 16 Utah 2d at 280, 399 P.2d at 439.

similar effect is another recent Utah case, *Strand v. Mayne*,[138] where the purchaser had paid 19,262 dollars on a purchase price of 41,500 dollars and had spent an additional 9,500 dollars in repairs. The Utah court found nothing inequitable in denying restitution, because the purchaser had "resold" the property and received 15,615 dollars from the new purchaser, which, when added to the rental value of the property (14,850 dollars) more than equalled the purchaser's outlay. The plaintiff's purchaser also defaulted on his contract and forfeited his payments to the plaintiff. The result was that the vendor recovered his property and was permitted to retain benefits in excess of any loss to him. To denominate the vendor's retention of payments as "just" because the purchaser was able to pass the loss on to a third party leaves open a wide door for forfeiture and indicates an affinity for the majority rule. It also indicates a confusion of benefits conferred with injuries sustained. Negligibility of the latter need not affect recovery of the former.[139]

Idaho likewise, in two recent cases, justifies its adherence to the majority rule by finding that the retention of the defaulting purchaser's payments is not unjust. In *Miller v. Remior*,[140] the Idaho Supreme Court had before it a typical installment land contract, equating payments made with liquidated damages, making time of the essence and providing for forfeiture. The vendor, upon the purchaser's breach, was allowed to retain a house valued at 10,000 dollars given in part payment on a purhcase price of 29,844.25 dollars. The court found that the house and one payment of 578.76 dollars was sufficiently proportionate to the rental value of the ranch to constitute a valid liquidated damage. This is a good example of allowing later facts to validate a damage clause that was clearly invalid when drawn. Also, the rental value of the ranch was estimated at 7,600 dollars and the purchaser was held to account for that, but the rental value of the house which the purchaser contributed as part payment was not deemed a benefit to the vendor for which he need account. *Freedman* and *Malmberg* were quoted at some length and apparently the court felt that their facts warranted their distinction without comment. And in a later case, *Melton v. Amar*,[141] the same court, when called upon to determine whether forfeiture of all payments was a valid liquidated damage or an invalid penalty, applied similar reasoning to an even less justifiable result. The forfeiture of the purchaser's payment of 31,712 dollars was justified on equitable grounds because the purchaser had received total

138. 14 Utah 2d 355, 384 P.2d 396 (1963).
139. See Felder v. Reeth, 34 F.2d 744 (9th Cir. 1929); Federal Sugar Ref. Co. v. United States Sugar Equalization Bd., 268 Fed. 575 (S.D.N.Y. 1920).
140. 86 Idaho 121, 383 P.2d 596 (1963). *But see* Walker v. Nunnenkamp, 84 Idaho 485, 373 P.2d 559 (1962).
141. *Supra* note 105.

benefits under the contract amounting to 22,785 dollars. This left nearly 9,000 dollars to the vendor as a windfall but the result was not considered inequitable.

Many installment land contracts contain a forfeiture clause similar to that in the Idaho cases just discussed, a clause purporting to forfeit all payments made by the purchaser as liquidated damages in the event of his breach. Some courts, concluding that this forfeiture provision constituted a penalty, have held it invalid and thus allowed restitution. For instance, the Florida Supreme Court in *Paradis v. Second Avenue Used Car Co.*[142] allowed restitution of a 4,000 dollars deposit on the ground that the clause bore no relationship to actual damage and hence to allow retention would be to condone an illegal penalty. The burden of proving damage was placed upon the vendor. However, the same court has adopted the position that, even in the absence of a forfeiture clause, the purchaser in default cannot recover.[143]

In at least two recent cases the vendor benefited by having the forfeiture clause treated as a penalty rather than as liquidated damage. In *Ashurst v. Rosser*,[144] the vendor brought suit against the defaulting purchaser for damages. The contract provided that in the event of breach by the purchaser the vendor might retain all payments as rent. The defendants asserted that this was the limit of their liability, but the court said, "the amount so paid was in the nature of a penalty and not liquidated damages."[145] The vendor was thus awarded further damages over and above the retained payment. In *Cohen v. Kranz*,[146] the defaulting purchaser brought suit to recover his deposit of 4,500 dollars. The court found that the vendor's total damage was 6,000 dollars and after denying relief to the purchaser awarded the vendor 1,500 dollars on his counterclaim. It thus appears that although the majority rule refuses to take actual damage into account in determining the purchaser's right to restitution, it treats actual damage as relevant if the suit is by the vendor.

V. Conclusion

Perhaps the most interesting thing about the majority rule denying restitution is its persistence in the face of continuing criticism.[147] As

142. *Supra* note 97. *Accord*, Pembroke v. Caudill, 160 Fla. 948, 37 So. 2d 538 (1948).

143. Beatty v. Flannery, 49 So. 2d 81 (Fla. 1950). Compare De Leon v. Aldrete, 398 S.W.2d 160 (Tex. Civ. App. 1965).

144. 275 Ala. 163, 153 So. 2d 240 (1963).

145. *Id.* at 168, 153 So. 2d at 245.

146. *Supra* note 133. The persistence of defaulting plaintiffs in New York is remarkable in the light of the treatment they receive.

147. See, *e.g.*, 5A Corbin, Contracts §§ 1122-35 (1964); Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 Yale L.J. 1013 (1931); Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, 44 Yale L.J. 754 (1935).

long ago as 1937, the New York Law Revision Commission sponsored legislation to change the rule in that state.[148] It was not enacted. Similar legislation to prevent forfeiture in contracts for the sale of personalty was enacted only after ten years of waiting.[149] And even then the courts were reluctant to make use of the statute. Maryland has a statute designed to prevent forfeiture in real estate sales where the price is less than 15,000 dollars.[150] But it has not affected the general rule in that state.[151] The Uniform Commercial Code[152] indicates a disapproval of forfeiture which might be expected to carry over to the land contract area, but no such trend is visible. Jurisdictions such as California, Connecticut and Utah, which, in particular cases have strongly disapproved of forfeiture, have tended to retreat from these liberal positions.

It has been suggested that the failure of American courts to develop an equitable procedure similar to mortgage foreclosure to deal with the installment land contract is the result of preoccupation with freedom of contract.[153] Others have questioned whether equity may be decadent.[154] It may be that, despite the potential for abuse inherent in the majority rule, ameliorating devices such as fictitious rescission or, on occasion, frank recognition of equity when forfeiture would shock the conscience of the court, have managed to keep abuse to such a minimum that the rule evokes no general outcry. Inconsistency may be preferable to risk of undermining the sanctity of contract. Of course restitution would not affect the contract at all. But it is understandable that a court familiar with defaulters in their role as defendants might view restitution as somehow condoning sin. It is not surprising that the subject of restitution evokes but little response from the legislatures. Its political appeal is negligible. Legislation regulating installment sales is common.[155] But its primary purpose is to prevent fraud. The need of the real estate community for an economical, swift and yet just means of foreclosing the right of restitution arising from the installment land contract has not yet been recognized. But, all things considered, this is not an area which cries out for reform. The potential injustice of the general rule affects no organized group — and in most jurisdictions the injustice is potential only.

148. 1937 N.Y. LAW REVISION COMM'N REP. 349.

149. N.Y. PERS. PROP. LAW § 145-a, enacted 1952, was first proposed in different form in 1942, 1942 N.Y. LAW REVISION COMM'N REP. 179.

150. MD. ANN. CODE art. 21, §§ 110-16 (1957).

151. Quillen v. Kelley, *supra* note 120; Great United Realty Co. v. Lewis, 203 Md. 442, 101 A.2d 881 (1954). See 19 MD. L. REV. 51 (1959).

152. UNIFORM COMMERCIAL CODE §§ 2-718, 9-501—07.

153. Simpson, *supra* note 147, at 756.

154. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479 (1938).

155. *E.g.*, FLA. STAT. §§ 478.011-211 (1965); N.Y. PERS. PROP. LAW §§ 401-19.