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Contracts-Breach Distinguished From Rescission

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CONTRACTS—BREACH DISTINGUISHED FROM RESCISSION—The plaintiff, Rose M. Kirkpatrick, and her husband, John Kirkpatrick, entered into a written contract with the defendant wherein the defendant agreed to sell and the Kirkpatricks to buy a certain vacant lot for the agreed price of \$1,774.51, to be paid in printing as demanded from time to time by the defendant. John Kirkpatrick died after there had been paid in printing, the sum of \$1,072.93. Rose M. Kirkpatrick qualified as administratrix of his estate and printing services were rendered by the estate and applied upon the contract as follows: March 31, 1928, \$317.50; May 16, 1928, \$308; August 21, 1928, \$76.08. The total amount of the services so rendered was \$1,774.51. On April 23, 1928, after the execution of the contract and before the last two payments on the contract were made, the

42 S. Ct. 214; *Rich v. Flanders* (1859), 39 N. H. 304; *Willar v. Baltimore* (1876), 45 Md. 546; *Lockett v. Usry* (1859), 28 Ga. 345; *Rhines v. Clarke* (1865), 51 Pa. 96; *Bost v. Cabbarus County* (1910), 151 N. C. 531, 27 S. E. 1066.

^c (1921) 257 U. S. 312.

defendant conveyed the title to the real estate in question to parties other than Rose M. Kirkpatrick or her husband, John Kirkpatrick. Whether Rose M. Kirkpatrick was aware of this conveyance at the time the last two payments were made is a disputed fact. The defendant never tendered a deed to the property and never tendered the value of the printing received. The plaintiff brought an action for breach of promise. *Held*, that by conveying to others before the time for performance of the contract, the vendor rescinded the contract and discharged the purchaser.¹

A contract may be breached in three ways, namely: (1) By one party renouncing his liabilities under it; (2) by his making its performance impossible; or (3) by his totally or partially failing to perform his promise. Breach by renunciation and breach by acts rendering performance impossible may take place while the contract is still wholly executory; that is, before either party is entitled to demand a performance by the other of his promise. Breach by failure of performance can only take place at or near the time for performance.²

The act of the defendant in voluntarily placing it out of his power to perform the contract constituted a breach thereof, for which the plaintiff might have brought an action although the time for performance by the defendant had not yet arrived under the terms of the contract³ and the plaintiff's obligation to perform conditions precedent was terminated by the defendant's breach.⁴ After the conveyance by the defendant to third persons, the plaintiff had a right to elect between the following remedies: (1) To rescind the contract and pursue the remedies based upon such a rescission. (2) To treat the contract as still binding and wait until the time for its performance, and at such time to bring an action upon the contract for breach. (3) To treat the renunciation as an immediate breach and sue at once for any damages he may have sustained.⁵ The plaintiff in this principal case followed the second course of action, suing for damages for breach of contract and not electing rescission.

When the breach occurs, the party to whom performance is due must elect whether he will rescind or will demand a continued performance, and the failure of the adverse party to perform does not, of itself, rescind the contract.⁶ The party seeking rescission must be willing and in a position to perform his part of the agreement.⁷ Therefore, if one party to the contract renders performance impossible, the other party may, at his election, rescind it.⁸

From these authorities it would appear that the decision of the court in the principal case is correct, but not for the reasons given by the court in its opinion.

O. M. B.

¹ *Johann Realty Corporation v. Kirkpatrick*, 177 N. E. 907, Appellate Court of Indiana, October 16, 1931.

² See, 13 C. J. 589, sec. 603, and cases there cited.

³ *Jewett v. Brooks* (1883), 134 Mass. 505.

⁴ *Landers v. Beck* (1883), 92 Ind. 49.

⁵ See, 13 C. J. 653, and cases there cited.

⁶ *Blake v. Osmundson* (1916), 178 Iowa 121, 159 N. W. 766.

⁷ *Sheridan State Bank v. Rowell* (1914), 212 Fed. 529; *Te Poel v. Shutt* (1899), 57 Nebr. 592, 73 N. W. 288.

⁸ *Shaffner v. Killian* (1880), 7 Ill. A. 620. See, also, Corbin's edition of Anson on Contracts, p. 524.