

THE DEFENSE OF PAYMENT UNDER CODE
PROCEDURE

Inexactness in legal nomenclature proves a very fertile source of inexactness in our jurisprudence. Looseness of general expression is a fault, but the use without discrimination of a single word which is capable of diverse meanings is a greater fault, for it is fraught with much more serious possibilities for reaching mischievous results. In my opinion the continued use of the word "payment," as defining an issue in an action, serves as a pertinent illustration. "The law upon the subject of alleging and proving payment is in some confusion," says Justice Vann, of the New York Court of Appeals, in a late case¹—a confusion arising, I believe, from the use by judges of the word payment, without reducing its application to exactness. Justice Vann's effort at a clarification of the situation, by laying down some general rules, proved abortive, as a majority of the court declined to approve.

What does the issue of payment comprehend? Presupposing that the defendant's obligation is the payment of a sum of money, it is obvious that such a payment may have been made, (1) before the day of maturity, (2) upon the day of maturity, or (3) at any time after maturity. The time when the payment was actually made has an exceedingly important effect upon the standing of the parties before the law; it is determinative of the question whether plaintiff has sued without ever having possessed a right of action, or whether, having possessed such a right, he has subsequently permitted it to be extinguished.

One of the few propositions in law that may be stated without exception is, that the making of a contract does not of itself give rise to a right of action. To the making of the contract must be added its breach by one of the parties. The breach having occurred, there is then in contemplation of law no existing contract, but in its place, and only consequent upon its demise, arises a right of action at law for the damages. If the parties keep their respective promises, thus fulfilling the contract obligations, the contract is at an end, and there never can be and there never has been a right of action existing with regard to it.

¹ *Conkling v. Weatherwax*, 181 N. Y., 258; 73 N. E., 1028.

Should one of the parties, under such condition of an entire fulfilment of its obligations, attempt to base a right of action upon it, how illogical seems a judicial rule that the plaintiff may recover without even essaying to combat fulfilment of the contract, or in other words, without showing that he ever possessed a right of action resting upon the defendant's broken promise—and that the defendant cannot be heard upon the claim that he completely discharged his contract obligation on the contract day, unless he has presented a plea in confession and avoidance (though he certainly cannot confess that there has ever been a right of action against him, and he ought not to try to avoid what never existed in law).

Should the agreement of the parties be, for example, a present sale and delivery of a horse by A, upon B's agreement to deliver five sheep within two months hence, it seems plain that A's statement of a cause of action for money damages based upon that agreement must necessarily involve the fact that B failed to deliver the sheep within the contract period; and it seems equally plain that A's proof, to entitle him to go to the jury, would have to cover the fact of B's default. If, however, B has failed to make delivery within the contract period, but A has accepted a later delivery, B would have the burden (founded upon a plea proceeding upon the confession of a cause of action in A, yet asserting an avoidance of the liability because it was subsequently extinguished) of proving the tardy delivery and acceptance. I know of no case asserting a doctrine in any wise contrary to these propositions, provided B's promise involved the delivery of property; but if B's promise was to pay money, numerous authorities may be found asserting that the payment upon the contract day may not be shown under a general denial.

The making and delivery of an instrument for the payment of money only does not of itself confer upon the holder a right of action. Only when the day for payment comes and passes without such payment does such right arise. But when the day of maturity has passed without payment, the right of action is complete, and it is rendered no more complete by the lapse of further time and a continuance of the maker's default; therefore, a complaint in an action upon such an instrument may properly

confine its allegation of the breach to the failure to pay at maturity.² It is plainly essential that a non-payment on the contract day be alleged.³ The defendant's attitude in such an action ought not to be difficult to put into pleading; if in fact he made payment at maturity, he ought to be allowed to deny plaintiff's allegation to the contrary and to prove such timely payment at the trial; if he allowed the day of maturity to pass without payment, thus breaking his promise, and subsequently was permitted to make tardy payment, he cannot deny what plaintiff has charged and he must set up affirmatively the tardy payment and assume the burden of establishing it at the trial. Authorities under code procedure in New York apparently deny the defendant the right to show payment on the day of maturity, unless he has interposed an affirmative plea of payment.⁴

Where plaintiff charges the sale and delivery of goods to the defendant and says nothing as to credit, the presumption is that payment was agreed to be made on delivery. It is essential for plaintiff to charge non-payment at the time of delivery.⁵ Beginning with the earliest decision under code procedure,⁶ holding that payment for the goods is not admissible under a general denial, through a long line of subsequent cases applying the rule, there is no instance where the use of the word "payment" in the opinion discloses whether the defendant was contending that payment was made upon delivery, or subsequently. In the pioneer case the judge writing for the court classifies the defense of payment with the defense of release, or accord and satisfaction, each one of which proceeds upon the concession of a matured claim subsequently extinguished.

Upon an issue so frequently presented as that of payment, there is plain necessity for certainty. Certainty without logic to support it is not ideal, and fosters error. In the most recent discussion of the question in the New York Court of Appeals,⁷ it was asserted on the one side that confusion exists, on the other side that the authorities settle the question but do so in a concededly illogical manner. It is to be regretted, I think, that the court

² *Ahr v. Marx*, 44 App. Div., 391; aff'd, 167 N. Y., 582.

³ *Lent v. Mass. Railway Co.*, 130 N. Y., 504.

⁴ See cases collated in *Conkling v. Weatherwax*, *supra*.

⁵ *Tracy v. Tracy*, 59 Hun., 1.

⁶ *McKyring v. Bull*, 16 N. Y., 297

⁷ *Conkling v. Weatherwax*, *supra*.

did not unite (whether to effect certainty or overturn the paradox), and determine as a future rule of pleading and proof, that where the complaint declares upon a contract for the payment of money by defendant, plaintiff must allege and prove a breach of the obligation, *i.e.*, non-payment thereof when it matured, which proof may be contested by the defendant under his general denial—while payment after such breach may be presented in issue by the defendant's affirmative plea of a tardy payment.

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