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Bonds--Retirement by Lot--Nature of Contract--Breach (Hall v. Nassau Consumers Ice Company, 260 N.Y. 417 (1933))

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The right of dissenting stockholders to payment, created by the Legislature, cannot upon any ground of assumed public policy be limited by the courts to the dissenting stockholders of the absorbed corporation. It follows that the appellant, as a dissenting stockholder of the merging corporation was entitled to the relief demanded.

S. B. S.

BONDS — RETIREMENT BY LOT — NATURE OF CONTRACT — BREACH.—Plaintiff is holder of fifteen-year gold bonds issued by the defendant in 1925, providing for retirement by lot of bonds in the sum of $5,000 every year from 1930 to 1939, at 105% of its face value and accrued interest. Defendant failed to pay interest or retire any bonds in 1930 and 1931. Defendant was voluntarily dissolved and taken over by a successor in 1928. Plaintiff brings action for value of his bonds on ground of breach of contract. Defendant contends that plaintiff can have no cause of action on the bonds until 1940. Appellate Division affirmed a judgment for plaintiff on the grounds of anticipatory breach and impossibility of performance. On appeal, *held,* the failure to retire the bonds constituted a present breach of contract giving plaintiff an immediate right of action. *Hall* v. *Nassau Consumers Ice Company,* 260 N. Y. 417, 183 N. E. 903 (1933).

A failure to perform some obligation or promise which is part of the contract constitutes a breach thereof.[1] One of the rights plaintiff paid for and which defendant obligated itself to perform was the yearly retirement of bonds by lot.[2] Upon defendant's failure to so perform a breach occurred and an immediate right of action accrued to plaintiff therefore.[3] Where the contract is for the payment of money only at a future time, there can be no anticipatory breach and no action can be maintained thereon until the specified time has arrived,[4] unless it contains an acceleration clause. It is not anticipatory where the alleged breach of the contract does not precede the time of performance or actual tender.[5] The time for defendant to perform its obligations had passed. In the instant

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[1] WILLISTON, CONTRACTS (1924) §1288.

[2] Weinman v. Blake & Knowles Steam Pump Works, 156 App. Div. 168, 140 N. Y. Supp. 1085 (4th Dept. 1913).

[3] *Supra* note 1.

[4] Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584 (1906); Werner v. Werner, 169 App. Div. 9, 154 N. Y. Supp. 570 (1st Dept. 1915); Bauchle v. Bauchle, 185 App. Div. 590, 173 N. Y. Supp. 292 (1st Dept. 1918).

[5] Wester v. Casein Co. of America, 206 N. Y. 506, 514, 100 N. E. 488, 490 (1912).

case the defendant failed to retire bonds each year and the plaintiff was thereby deprived of his equal chance and right to have his bonds retired.[6] There was, therefore, not an anticipatory but an actual breach of the contract for which plaintiff had a right to immediately maintain his action and not wait until 1940. This was not an installment contract.[7]

J. P.

DOMESTIC RELATIONS—DIVORCE—RIGHT TO ALIMONY TERMINATES UPON REMARRIAGE—RELIEF ON SEPARATION AGREEMENT. —Plaintiff and defendant entered into a separation agreement providing primarily for the separate support and maintenance of the plaintiff, wife. Subsequently alimony was awarded to the wife by a judgment of divorce in her favor. Plaintiff remarried and the defendant moved to strike from the judgment the provisions for alimony. *Held,* The provisions for alimony should be stricken out, without prejudice to plaintiff's right to seek relief under the separation agreement. *Severance* v. *Severance,* 260 N. Y. 432, 183 N. E. 909 (1933).

Where the plaintiff in a divorce action remarries after the final judgment has been entered, the court upon proper application of the defendant, *must* modify the judgment by striking out the provisions for alimony.[1]

A separation agreement which provides for future support and maintenance is in recognition of the husband's continuing liability to support his wife.[2] The consideration for the husband's agreement to pay is his release from obligation, except as under the separation agreement.[3] Some cases hold that a valid separation agreement is not abrogated by a subsequent judgment of divorce

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[6] *Supra* note 2.

[7] Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780 (1899); Foxell v. Fletcher, 87 N. Y. 476 (1882); Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292 (1890); Wharton & Co. v. Winch, 140 N. Y. 287, 35 N. E. 589 (1893); McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208 (1902); Kelly v. Security Mutual Life Ins. Co., *supra* note 4.

[1] N. Y. CIVIL PRACTICE ACT §1159. The section is mandatory. Mowbray v. Mowbray, 136 App. Div. 513, 121 N. Y. Supp. 45 (1st Dept. 1910); Severance v. Severance, 235 App. Div. 799, 255 N. Y. Supp. 998 (2d Dept. 1932); Linton v. Hall, 86 Misc. 560, 149 N. Y. Supp. 385 (1914); Dumproff v. Dumproff, 138 Misc. 298, 244 N. Y. Supp. 597 (1930).

[2] Galusha v. Galusha, 116 N. Y. 635, 643, 22 N. E. 1114, 1116 (1889); Winter v. Winter, 191 N. Y. 462, 473, 474, 84 N. E. 382, 386 (1908); Lawson v. Lawson, 56 App. Div. 535, 537, 67 N. Y. Supp. 356, 357 (2d Dept. 1900); Effray v. Effray, 110 App. Div. 545, 547, 97 N. Y. Supp. 286, 287 (1st Dept. 1905); Dower v. Dower, 36 Misc. 559, 561, 73 N. Y. Supp. 1080, 1081 (1901).

[3] Pettit v. Pettit, 107 N. Y. 677, 679, 14 N. E. 500, 502 (1887).