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CONTRACTS - MEASURE OF DAMAGES FOR ANTICIPATORY BREACH OF CONTRACT FOR FUTURE DELIVERY OF GOODS HAVING A FUTURES MARKET

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CONTRACTS — MEASURE OF DAMAGES FOR ANTICIPATORY BREACH OF CONTRACT FOR FUTURE DELIVERY OF GOODS HAVING A FUTURES MARKET — Defendant agreed to buy part of plaintiff's annual crop of hops for three years. Several months before the first delivery was due, defendant repudiated. *Held*, the measure of damages was the difference between the contract price and the market price at the time of repudiation, rather than at the times delivery was called for in the contract. *Renner Co. v. McNeff Bros.*, (C. C. A. 6th, 1939) 102 F. (2d) 664.

The general rule is that when plaintiff sues for an anticipatory breach of contract, he is entitled to compensation based on the value of defendant's performance at the time it becomes due, and not at the time of repudiation.[1] Accordingly, it has been held that where trial takes place after the date set for performance and values are a matter of market history, the court will measure the damages at the time at which the contract ought to have been performed, or in the absence of specific data it will do its best to predict the future prices.[2] Cutting across these general rules is the doctrine of mitigation,[3] which denies

[1] 5 WILLISTON, CONTRACTS, rev. ed., § 1397 (1936); MCCORMICK, DAMAGES, 591 (1935); Limburg, 'Anticipatory Repudiation of Contracts," 10 CORN. L. Q. 135 at 167 (1925), also in SELECTED READINGS ON THE LAW OF CONTRACTS 1117 (1931); Callan v. Andrews, (C. C. A. 2d, 1931) 48 F. (2d) 118; 2 CONTRACTS RESTATEMENT, § 338 (1932).

[2] 2 WILLISTON, SALES § 582 (1924); Brown v. Muller, L. R. 7 Ex. 319 (1872); United States v. Burton Coal Co., 273 U. S. 337, 47 S. Ct. 351 (1926). See also 24 COL. L. REV. 55 (1924).

[3] 2 CONTRACTS RESTATEMENT, §§ 336, 338 (1932). In Roehm v. Horst, 178 U.S. 1 at 20, 20 S. Ct. 780 (1899), referring to the measure of recovery for anticipatory breach, Fuller, C. J., said: "the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete perform-

recovery for avoidable harm, thus requiring the injured party to take reasonable affirmative steps toward minimizing the damages attributable to the defendant's breach. There has been considerable confusion in the decisions as to whether or not mitigation requires making a new contract on the market when defendant repudiates in advance of the time for performance. The English decisions, in effect, require the innocent party to be a prophet, insisting that he must cover to protect the repudiator if the market prices are clearly tending in a direction that will make covering more profitable from the defendant's standpoint.[4] If the injured party does cover for the repudiator, the latter gets the advantage of any benefit from the transaction.[5] The requirement of prognostication has been severely criticized [6] and is generally not followed in the United States, but the idea of prescience is not unheard of in our law.[7] While generally time for performance is the starting point, and the injured party need not take any steps until the time set for performance, there is an exception rather well defined in our law in cases where the contract for future delivery is treated as a commodity, such as "futures" in grain, cotton, etc., dealt in on the exchanges. "When the parties understand that the contract is itself property, the promisee may be entitled to replace it, since it has a present sale value in his hands." [8] In one unfortunate case,[9] the court insisted that the *vendee* who covers with a

ance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

[4] In Roth & Co. v. Taysen, Townsend & Co., 8 Asp. M. Cas. 120 (1895), the market fell from time of repudiation to time set for performance. Plaintiff sold to a third party at time delivery was due. In holding the conduct unreasonable, Matthew, J., said (p. 122): "There would seem to be doubt that as the market was still giving way, and no reason to expect that prices would recover, it would have been prudent from a business point of view to have taken immediate steps to realize, and so avoid the risk of further loss. . . . He is not at liberty to permit the loss to be aggravated to the last farthing by the neglect of means which ought to be adopted by a prudent man, whereby the loss may be diminished." Similar ideas have been expressed in other cases. Nickoll v. Ashton, Eldridge & Co., [1900] 2 Q. B. 298; Melachrino v. Nickoll, [1920] 1 K. B. 693. Cases are collected in 2 SUTHERLAND, DAMAGES, 4th ed., § 651 (1916).

[5] Melachrino v. Nickoll, [1920] 1 K. B. 693.

[6] 5 WILLISTON, CONTRACTS, rev. ed., § 1397 (1936); Limburg, "Anticipatory Repudiation of Contracts," 10 CORN. L. Q. 135 at 178 (1925), also in SELECTED READINGS ON THE LAW OF CONTRACTS 1124 (1931); Callan v. Andrews, (C. C. A. 2d, 1931) 48 F. (2d) 118.

[7] See Skeele Coal Co. v. Arnold, (C. C. A. 2d, 1912) 200 F. 393; Kadish v. Young, 108 Ill. 170 (1883); Segall v. Finley, 245 N. Y. 61, 156 N. E. 97 (1927). Taking the English view: Missouri Furnace Co. v. Cochran, (C. C. Pa. 1881) 8 F. 463; Goldsmith v. Stiglitz, 228 Mich. 255, 200 N. W. 252 (1924). See 2 CONTRACTS RESTATEMENT, § 338, illus. 3 (1932).

[8] L. Hand, J., in Callan v. Andrews, (C. C. A. 2d, 1931) 48 F. (2d) 118 at 120. Taking this view are the principal case: Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780 (1899); Samuels v. Drew & Co., (C. C. A. 2d, 1923) 292 F. 734; Cox & Sons Co. v. Crane Iron Works, (C. C. A. 3d, 1925) 5 F. (2d) 314. See also 5 WILLISTON, CONTRACTS, rev. ed., § 1397 (1936); 2 CONTRACTS RESTATEMENT, § 336, illus. 3 (1932); Limburg, "Anticipatory Repudiation of Contracts," 10 CORN. L. Q. 135 at 178 (1925), also in SELECTED READINGS ON THE LAW OF CONTRACTS 1124 (1931).

[9] Missouri Furnace Co. v. Cochran, (C. C. Pa. 1881) 8 F. 463.

forward contract on the market, when notified that the vendor will not perform, does so at his peril. The distinction between vendor's and vendee's covering is unjustifiable in principle and is probably overruled by *Roehm v. Horst*,[10] which involved a covering contract by the vendor after vendee's breach, but no cases have been found where the buyer has been permitted to cover with a forward contract on the market and not have his recovery diminished because the market fell at the time set for performance. The instant case is precisely on all fours with the leading case of *Roehm v. Horst*.

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[10] 173 U. S. 1, 20 S. Ct. 780 (1899).