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# CONTRACTS - INDEFINITENESS - EFFECT OF BUYER'S RIGHT TO REQUIRE ALTERNATIVE PERFORMANCE

CONTRACTS — INDEFINITENESS — EFFECT OF BUYER'S RIGHT TO REQUIRE ALTERNATIVE PERFORMANCE — A buyer, who had agreed to take a certain number of gallons of oil within a viscosity range comprising seven weights, each weight being listed at a different price, repudiated his contract without having specified any of the seven types. In a suit by the seller to recover for breach of contract, *held*, as the indefiniteness of the agreement precluded any damages save those based on speculative, average, or other arbitrary price, it was not enforcible and plaintiff could not recover for defendant's refusal to accept oil. *Wilhelm Lubrication Co. v. Brattrud*, (Minn. 1936) 268 N. W. 634.[1]

In deciding whether contract damages can be assessed with sufficient definiteness to be recoverable, three questions must be answered: (1) Was there damage? [2] (2) Was it attributable to defendant's breach within the rule of *Hadley v. Baxendale*?[3] (3) Was its amount reasonably ascertainable or too

[1] However, the court allowed damages for 4000 lbs. of a specified kind of grease at five cents per pound, bought in the original agreement, on the theory that the agreement was divisible and enforcible in part. Its finding that the contract was severable is believed correct. 3 WILLISTON, CONTRACTS, rev. ed., § 860 A (1936); 1 CONTRACTS RESTATEMENT, § 266 (3), comment e; Uniform Sales Act, § 76: " 'Divisible contract to sell or sale' means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation."

[2] As in breach of contract to engage in speculative business, Webster v. Beau, 77 Wash. 444, 137 P. 1013 (1914).

[3] 9 Exch. 341 at 354, 156 Eng. Rep. 145 (1854), which states "the damages . . . should be such as may fairly and reasonably be considered either arising naturally,

speculative for judicial standards? It is the third of these which causes difficulty in the principal case. Despite some confusion of verbal origin, it seems that uncertainty and speculation in measuring contract damages, whether arising from indefiniteness of the terms of the contract or from other sources,[4] do not bar recovery so long as it is clear that defendant's breach caused damages more than nominal.[5] The class of cases involving certain damages of uncertain amount includes that in which damages could conceivably vary widely, with no clear maximum or minimum.[6] It includes also the case of an alternative contract[7] where the damages suffered may be within clearly demonstrable

i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

[4] As in unpredictability of success of a new business venture, Webster v. Beau, 77 Wash. 444, 137 P. 1013 (1914).

[5] McGinness v. Studebaker Corp., 75 Ore. 519, 146 P. 825, 147 P. 525 (1915); Wakeman v. Wheeler, 101 N. Y. 205 at 209, 4 N. E. 264 (1886), stating: "But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach." See also L. R. A. 1916B 872, on recovery of damages, uncertain in amount but certainly resulting from wrongful termination of employment; 46 HARV. L. REV. 696 (1933); and 3 WILLISTON, CONTRACTS, § 1345, p. 2401 (1920): "But though substantial damage must be shown in order to justify recovery of more than a nominal sum, the exact amount need not be. Where it is clear that substantial damage has been suffered the impossibility of proving its precise limits is no reason for denying substantial damages altogether."

But *contra*, De Honey v. Gjarde, 134 Wash. 647, 236 P. 290 (1925), where loss of profits occurred because of faulty construction of a building erected for a dancing academy. In Stephany v. Hunt Bros. Co., 62 Cal. App. 638 at 641, 217 P. 797 (1923), the court said, "While [plaintiff's] experience may have added to his value as a sales agent, it in no manner afforded the court an opportunity of determining with reasonable or any degree of certainty the damages suffered by plaintiff in this connection." Citing also Friedman v. McKay Leather Co., 179 Cal. 566, 178 P. 139 (1919), likewise an action for termination of a sales agency. While the courts may assume *some* damages in these cases, discussion is not pointed at this feature and cases where the existence of *any* damages is speculative are not excluded in the concept.

Courts have at times gone further than in the McGinness and Wakeman cases. On the theory that an opportunity to compete in a beauty contest, though not marketable, had a value assessable through considering it as though it were, an English court gave damages for its loss. Chaplin v. Hicks, [1911] 2 K. B. 786.

[6] As in crop failures due to faulty seed germination, Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484 (1917); or in failure to deliver a machine with consequent loss of use and perhaps profits, Griffin v. Colver, 16 N. Y. 489 (1858).

[7] The view of the court that the alternative from of agreement was fatal to any binding obligation seems to be against authority. 3 WILLISTON, CONTRACTS, § 1407 (1920): "A promise of one of several alternative performances will give the choice of alternatives, unless the contrary is stated, to the person who is to render the performance." Citing Co. Lit. 145a and many cases of alternative contracts, e.g., Kimball Bros. v. Deere, Wells & Co., 108 Iowa 676, 77 N. W. 1041 (1899).

Contracts having as one alternative the payment of money form a special class

limits. Such is the present case. If a sale, in the given amount, of each of the seven weights of oil would have been profitable for plaintiff, his loss, caused by defendant's breach, was at least equal to the profit computed on the given amount of the least profitable oil. Certainty that the minimum damage was suffered is in no wise affected by uncertainty whether there were additional damages. In the case of uncertain damages with no clear maximum or minimum, care for defendant's rights has prescribed that measure of damages which seems reasonably certain, even at the risk of doing plaintiff less than justice. Such cases are those where the rental value of land or machinery is chosen in preference to more speculative profits. It would seem that solicitude for the defendant should not go further in the present case, and deny minimum damages. Yet the principal case is supported by some clear authority. That authority appears to stem from a case where there was merely "offer" and "acceptance" of a price list, without any quantity or value of goods being mentioned, and from an equivocal dictum.[8] In the federal courts the rule is not clear.[9] However,

of cases, in that the payment of the money is the alternative enforced when promisor fails to elect. Rewrick v. Goldstone, 48 Cal. 554 (1874).

[8] Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., (C. C. A. 8th, 1902) 114 F. 77. The statement within the decision at p. 81, "A contract for future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties . . ." obviously pertains to the stated facts. Wheaton v. Cadillac Automobile Co., 143 Mich. 21 at 23, 106 N. W. 399 (1906), said by way of dictum that, where, in an alleged contract of sale of fifty automobiles, plaintiff buyer having agreed to "specify" in his orders, "there was no such order and acceptance as would bind the defendant to deliver, or the plaintiff to accept, 50 automobiles." This dictum may well mean that plaintiff had not performed a condition precedent to defendant's liability, not that there was an absence of contract or inability to assess damages. These two cases were the authority for the pertinent branch of Oakland Motor Car Co. v. Indiana Automobile Co., (C. C. A. 7th, 1912) 201 F. 499, which also was concerned with an agreement to buy 50 automobiles. The parent case, Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., supra, is cited in all the following save the first: Wheeling Steel & Iron Co. v. Evans, 97 Md. 305, 55 A. 373 (1903); Price v. Atkinson, 117 Mo. App. 52, 94 S. W. 816 (1906); Price v. Wiesner, 83 Kan. 343, 111 P. 439, 31 L. R. A. (N. S.) 927 (1910); Overland Southern Motor Car Co. v. Hill Bros., 145 Ga. 785, 89 S. E. 833 (1916). Some of these cite also Wheaton v. Cadillac Automobile Co., supra. The cases in this footnote, except the Cold Blast Transp. Co. case and the Wheaton cases, are the authority cited by the principal case.

[9] Cases in addition to Oakland Motor Car Co. v. Indiana Automobile Co., (C. C. A. 7th, 1912) 201 F. 499, which support the principal case are: Utilities Production Corp. v. Carter Oil Co., (C. C. A. 10th, 1934) 72 F. (2d) 655; Jordan v. Buick Motor Co., (C. C. A. 7th, 1935) 75 F. (2d) 447. Though citing the Oakland case with approval it exhibits quite a different situation.

*Contra* to the principal case: William Whitman & Co. v. Namquit Worsted Co., (D. C. R. I. 1913) 206 F. 549, (C. C. A. 1st, 1915) 221 F. 49, where 48 varieties of worsted yarn were listed with respective prices, defendant having agreed to take 50,000 pounds; Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc., (C. C. A. 2nd, 1928) 29 F. (2d) 3, in which Hand, J., said, "There is no objection to a promise that is indefinite so long as the parties can tell when it has been performed. . . .[Damages] might at least be measured by the least profitable to the maker of any models which the dealer might choose."

federal cases holding in favor of the plaintiff have no difficulty in agreeing that he should have at least the amount he would have received from the least profitable selection. Authority generally seems in accord.[10] Whether, in exceptional cases, a rule more favorable to the plaintiff might not properly be adopted is arguable. There is some authority for giving the election to the other party after the party having the original option has failed to specify.[11] The speculative and punitive nature of the damages which this rule would secure do not recommend it in circumstances like the present. By a third possible rule,[12] if past practice and the needs of defendant's business indicate with sufficient certainty that the items least profitable to plaintiff would not be ordered by defendant, but rather others, on which plaintiff would have received larger profit, this increased amount should become, by normal standards, the proper measure of damages, and should be awarded.

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[10] W. J. Holliday & Co. v. Highland Iron & Steel Co., 43 Ind. App. 342, 87 N. E. 249 (1909); 3 WILLISTON, CONTRACTS, § 1407, p. 2498 (1920): "Where, however, no choice has been made either expressly by the promisor or automatically by the terms of the contract, or by law, the measure of damages for breach of such a contract is the value of the alternative least onerous to the defendant." These two authorities express damages in terms of burden on defendant. In Kimball Bros. v. Deere, Wells & Co., 108 Iowa 676, 77 N. W. 1041 (1899), it is in terms of smallest profit to plaintiff. The difference is only verbal.

[11] Storm v. Rosenthal, 156 App. Div. 544, 141 N. Y. S. 339 (1913); 42 HARV. L. REV. 274 (1928). 3 WILLISTON, CONTRACTS, § 1407, p. 2499 (1920), notes and criticizes this rule of measuring damages.

[12] Black Hardware Co. v. Mt. Vernon-Woodberry Mills, Inc., (Tex. Civ. App. 1934) 72 S. W. (2d) 303. The court found defendant would have specified, in the remaining and unspecified rolls of duck of the 200 purchased, rolls of approximately the same type as were chosen in the 43 selected, this being similar to duck specified in earlier business between the parties.