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## Damages: The Measure of Damages for Anticipatory Repudiation and Seller's Duty to Mitigate

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York rule when inter vivos disposition is restricted. Although in the *Michel* case the contract was binding prior to death and the stock was held to have passed under the will, the court stressed that this was because of the fact situation there, the optionee being also made legatee of the shares. Regardless of the merits of this decision when considered in the light of the *Wilson* case<sup>21</sup> it seems safe to predict that at least where that peculiar fact situation does not exist, the court would probably adopt the New York or so-called "Federal Rule."

Thus until further decisions clarify the present situation, it would seem most advisable for the attorney in drafting one of these agreements to fix its provisions with an eye to making the price set acceptable to the Commissioner of Internal Revenue and probably the Wisconsin Tax Department will follow suit unless the option holder is bequeathed the shares.

JOHN M. GROGAN

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**Damages—Measure of Damages for Anticipatory Repudiation and Seller's Duty to Mitigate**—By virtue of a binding contract the plaintiff was to sell 500 tons of scrap steel to the defendant, delivery to be made as specified in the contract. Prior to the time fixed for performance the defendant cancelled its order for the purchase, presumably because the market for scrap steel was rapidly descending. The plaintiff did not accept the repudiation as a breach of the contract and subsequently requested the defendant to accept the scrap steel. At the time of trial, about a year after the repudiation, the market value of the steel was \$6.00 per ton higher than the agreed purchase price. Since the seller had retained the steel the defendant contended (1) that the plaintiff had not been injured by the breach and therefore was not entitled to any damages, and (2) the plaintiff had not discharged his duty to mitigate damages as he had not sold the steel on the rapidly descending market within a reasonable time after the repudiation. *Held*: The measure of damages is the difference between the contract price and the market price at the date of the breach of the contract minus any savings derived by the plaintiff due to the defendant's breach, such as transportation costs. *Friedman Iron & Supply Co. v. J. B. Beaird Co., Inc.*, 63 So. 2d 144 (La. 1953).

The issue presented is: what is the measure of damages, and what is the seller's duty to mitigate, if any, in the case of an anticipatory repudiation that is not accepted by the seller when the market value of the goods is higher than the contract price at the time of trial?

The dissenting opinions in the instant case held that the plaintiff-vendor had a duty to resell the steel as a condition precedent to an action

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<sup>21</sup> *Supra*, note 8.

for damages, and also, that the plaintiff should not recover damages as the market value of the steel at the time of trial was higher than the contract price, and therefore the plaintiff had not incurred any loss. This latter statement was erroneously deduced from the salutary premise that the primary aim of the law of damages for a breach of a contract is to place the plaintiff in the same position he would have been in if the contract had been fulfilled.

The general rule for the measure of damages in the case of an anticipatory repudiation of a contract to sell goods, other than "futures"<sup>1</sup> is the difference between the contract price and the lower market price at the time fixed for performance by the contract,<sup>2</sup> and not the market value at the time of the repudiation,<sup>3</sup> as was used by both the majority and minority in the instant case.<sup>4</sup> The Uniform Sales Act provides that where there is an available market, and in the absence of special circumstances showing approximate damages of a greater amount, the measure of damages is the difference between the contract price and the market price at the time for performance.<sup>5</sup> The application of the rule introduces an element of uncertainty and speculation in assessing damages when the case is tried before the time set for performance. In such a case the *cy pres* doctrine is applied,<sup>6</sup> and damages are assessed "as near as" possible.<sup>7</sup> No authority was found by this writer that computes the measure of damages on the basis of the market value at the time of the trial as was suggested by the minority. If such was used as the criterion, the rights of the parties would depend on conditions arising at an uncertain and future date. In fact, it would leave the rights of the parties uncertain and encourage litigants to jockey for a trial on a date when the market was favorable.

Where the vendor does not accept the repudiation as a breach of the contract the general rule is that the vendor need not resell the property

<sup>1</sup> The market value at the time of repudiation is used to determine the damages "in contracts for future performance—such as contracts to sell wheat or cotton or hops in the future, or to insure—where the contract itself can be said to have a market value." WILLISTON, SALES §587 (rev. ed. 1948); *Roehm v. Horst*, 178 U.S. 1 (1899); 38 MICH. L. REV. 94 (1939).

<sup>2</sup> *Roehm v. Horst*, *supra*, note 1; *United Press Ass'n v. National Newspaper Ass'n*, 237 Fed. 547 (1916); *Lagerloef Trading Co., Inc. v. American Paper Products Co.*, 291 Fed. 947 (1923); WILLISTON, SALES §587 (rev. ed. 1948); SEDGWICK, DAMAGES §636(d) (9th ed. 1912); 10 CORNELL L. Q. 135, 168 (1925).

<sup>3</sup> SEDGWICK, DAMAGES, *supra*, note 2.

<sup>4</sup> As a matter of *stare decisis* it appears that Louisiana is committed to the rule that the market value of the goods is determined as of the date of the breach. *Interstate Electric Company*, 173 La. 103, 136 So. 283 (1931). It should be observed, however, that most authorities hold that in the case of an anticipatory repudiation that is not accepted by the promisee the date of breach is actually the date set for performance, *infra*, notes 13, 16 and 17, and is not the date of the repudiation.

<sup>5</sup> UNIFORM SALES ACT sec. 64(3); Wis. Stats. (1951), sec. 121.64(3).

<sup>6</sup> 24 COL. L. REV. 55 (1924).

<sup>7</sup> 44 A.L.R. 246 (1926).

prior to the time set for performance.<sup>8</sup> The correctness of this rule can be sustained on the basis of various legal theories: (1) That since the ordinary rule of damages in anticipatory repudiation cases<sup>9</sup> "is generally supposed to fix a *minimum* of damages,"<sup>10</sup> and since "it is presumed that at the inception of an agreement the parties mutually contemplated that, in case of . . . (a breach, the promisee) . . . will be damnified to the extent of the difference between the contract price and the fair market value of the subject of the transaction at the time and place for such delivery,"<sup>11</sup> it would seem that the promisor should have no cause to complain that the plaintiff had not resold the goods prior to the time fixed for performance, providing the plaintiff does not seek damages in excess of the minimum; (2) That the rule requiring mitigation only applies to consequential damages and never to direct damages; that "direct damage is impossible to avoid; and the rule which forbids the recovery of compensation for avoidable consequences of an injury does not cover the direct loss in any way,"<sup>12</sup> and that the loss of profit on a contract is a direct loss; (3) That the rejection of the repudiation involves a continuance of the obligations on both sides of the contract;<sup>13</sup> that while the contract is "subsisting and unbroken," the parties can only be compelled to do that which its terms require;<sup>14</sup> therefore there is no duty upon the vendor to resell prior to the date set for performance as such a duty would be inconsistent with the idea that the contract continues unbroken;<sup>15</sup> (4) That the repudiation is a mere "prophecy" that the repudiator will breach the contract, or a mere threat of wrong, and it may be disregarded;<sup>16</sup> that a repudiation, itself, does not constitute a breach; that no one is obliged to mitigate upon a mere threat of wrong; it is only after a cause of action has arisen that a party is called upon to mitigate damages.<sup>17</sup> It should be noted that under this last theory that there is no duty to mitigate even as to consequential damages.<sup>18</sup>

In conclusion, on the mitigation issue, the majority in the instant case is supported by the weight of authority as well as what appears to be the better reasoned view. In assessing damages, however, the court, apparently because of the doctrine of *stare decisis*, stated the

<sup>8</sup> WILLISTON, *SALES* §588 (rev. ed. 1948); 10 CORNELL L. Q. 135, 176 (1925); 38 MICH. L. REV. 94 (1939).

<sup>9</sup> *Supra*, note 2.

<sup>10</sup> *Foss v. Heineman*, 144 Wis. 146, 128 N.W. 881 (1910).

<sup>11</sup> *Ibid.*

<sup>12</sup> Beale, *Damages Upon Repudiation of a Contract*, 17 YALE L. J. 443, 456 (1908).

<sup>13</sup> *Frost v. Knight*, L.R. 7 Ex. 111 (1872).

<sup>14</sup> *Ibid.*; *Kadish et al. v. Young et al.*, 103 Ill. 170, 48 Am. Rep. 548 (1883).

<sup>15</sup> *Kadish et al. v. Young et al.*, *supra*, note 14.

<sup>16</sup> *Ibid.*; *Frost v. Knight*, *supra*, note 13; *P. P. Emory Mfg. Co. v. Saloman*, 178 Mass. 582, 60 N. E. 377 (1901).

<sup>17</sup> *P. P. Emory Mfg. Co. v. Saloman*, *supra*, note 16.

<sup>18</sup> *Supra*, note 12.

general minority rule of contracts that the market value is to be determined as of the date of the breach, but then the court assumed that the contract was breached as of the date of the repudiation. Even under that minority rule, if the court had given recognition to the rule of the *Frost v. Knight* case<sup>19</sup> the result would have been to determine the market value as of the date fixed for performance, because, under that case, if the repudiation is not accepted the contract is not breached until the time set for performance.

FINTAN M. FLANAGAN

**Aliens—Validity of Marriage for Immigration Purposes—**Defendants participated in civil marriage ceremonies with three refugees in Paris, France, for the sole purpose of enabling these refugees to enter the United States as spouses of honorably discharged American veterans under the War Brides Act.<sup>1</sup> The refugees were subsequently admitted into the United States as such spouses, although the marriages were never consummated and the parties in two of the cases involved have never cohabited as husband and wife. Defendants were convicted of a conspiracy to defraud the United States by the making of false statements or concealing material facts from the immigration authorities.<sup>2</sup> *Held*: Affirmed. No evidence of French law having been presented at the trial, it will be presumed that French law on the point is the same as American law. Under American law these marriages would not be valid. Furthermore, the validity of these marriages as such is not in issue here, as the marriages were but one step in the defendants' scheme to defraud the United States. The question whether the marriages might be valid for other purposes is of no importance. *Lutwak et al. v. United States*, 344 U.S. 809 (1953), petition for rehearing denied 73 S.Ct. 726.

The status of marriage has for many years occupied a position of some importance under our immigration legislation. Under the Immigration Act of 1917,<sup>3</sup> which, despite several amendments is still the basic immigration law of this country,<sup>4</sup> preferential treatment is accorded to spouses of citizens or legal residents of the United States. This policy is preserved in the Immigration Act of 1924,<sup>5</sup> and the recent Immigration and Nationality Act, also known as the McCarran Act.<sup>6</sup> In many

<sup>19</sup> *Supra*, notes 13 and 4.

<sup>1</sup> 59 STAT. 659 (1945), 8 U.S.C. §232. The minority opinion expressly states, and the majority opinion appears to concede, that the marriages in question were ceremonially valid, at least in the sense that some judicial proceedings would be necessary if the parties wished to be relieved of their marital obligations. 71 L.Ed. 364 (1953).

<sup>2</sup> Under 43 STAT. 153, 8 U.S.C. §220(c) (1946 ed.).

<sup>3</sup> 39 STAT. 874 (1917).

<sup>4</sup> KANSAS, U.S. IMMIGRATION EXCLUSION AND DEPORTATION 103 (3rd ed. 1948).

<sup>5</sup> Sec. 4; 43 STAT. 153, 8 U.S.C. §220 (1946 ed.).

<sup>6</sup> 8 U.S.C. 1101 *et seq.* In particular, see 205(b).