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Special Damages for Breach of Contract

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the surety.[23] There surely was no consideration for the six-day extension of time. Even an oral promise by Berkowitz, who was not legally liable for the debt, to pay six days late would not be sufficient, for it would be an engagement to pay the debt of another (Gast) and so within the Statute of Frauds.[24] We hold no brief for an "Indispensable Consideration," but the law requiring it, we think that law, like equity, ought to follow the law.

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SPECIAL DAMAGES FOR BREACH OF CONTRACT.

Ordinarily the damages recoverable for the breach of a contract are those which have been found, in the light of common experience, to proximately attend such a breach, *i. e.*, general damages.[1] In a common instance, breach of a contract of sale of personalty, the measure of damage is summed up as the difference between the contract price and the market price at the time of breach.[2] Thus, by reason of a rule of thumb limitation, the damages recoverable are those *usually* rather than those *actually* resulting from a breach. Such is not quite the case with special damages. There the law more nearly attains the ideal of complete compensation by permitting recovery of every item of actual damage proximately and naturally flowing from the breach in view of the unusual circumstances attendant upon the making of the contract, regardless of whether those items are the usual accompaniment of the type of breach involved, or are peculiar to the default under consideration.[3] It is settled law that a plaintiff will not be granted this exceptional remedy without bringing himself within certain well defined rules of law governing its application.[4] The case of Czarnika-Rionda v. Federal Sugar Refining Co.,[5] recently decided by the Court of Ap-

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[23] Powers v. Silberstein, *supra* note 14.
[24] N. Y. Personal Property Law, Sec. 31, Subd. 2.

[1] Hadley v. Baxendale, 9 Ex. 341. 23 L. J. Ex. 179, 18 Jur. 358, 26 Eng. L. & Eq. 398 (1854). See 17 C. J. 711.
[2] Saxe v. Penokee Lumber Co., 159 N. Y. 371, 54 N. E. 14 (1899); 3 Williston on Contracts (1920), Sec. 1383.
[3] Howard Supply Co. v. Wells, 176 Fed. 512, 100 (C. C. A. 7th, 1910); Moses v. Antuono, 56 Fla. 499, 47 So. 925 (1908); Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718 (1858); Booth v. Spuyten Duyvil Rolling Mill, 60 N. Y. 487 (1875); Hadley v. Baxendale, *supra* note 1; Clayton & Waller, Ltd. v. Oliver, 99 L. J. K. B. 165, A. C. 209 (1930).
[4] Globe Refining Co. v. Landa Cottonseed Oil Co., 190 U. S. 540, 47 L. Ed. 1171, 23 Sup Ct. 754 (1903); Lonergan v. Waldo, 179 Mass. 135, 88 Am. St. 365, 60 N. E. 479 (1901); Devlin v. Mayor, 63 N. Y. 8 (1875); Brauer v. Oceanic Steam Nav. Co., 66 App. Div. 605, 73 N. Y. Supp. 291 (1st Dept. 1901); Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49 (1882); Cory v. Thames Ironworks & S. B. Co., L. R. 3 Q. B. 181 (1868).
[5] 255 N. Y. 33, 173 N. E. 913 (1930).

peals, affords an excellent illustration of the insistence of the Courts that these requirements be met.

In that case plaintiff and defendant entered into three contracts, dated September 19, 1919, March 8, 1920, and April 21, 1920, respectively, whereby defendant obligated himself to deliver to plaintiff 1,670,000 bags of fine granulated sugar, delivery to be made in stated instalments between April and August, 1920. At the time of the execution of these contracts and for some time previously plaintiff had dealt exclusively, as to refined sugar, in the export trade. In fact the contracts of September 19th and March 8th were headed "Export" and contained a provision for prompt remittance to Czarnika of the customs bills of lading to enable defendant to secure drawback of duties paid on the raw sugar used in the exported product. In December, 1919, the first agreement was modified to give Czarnika permission to sell the sugar in the domestic market. The subsequent contracts contained a like option. At that time plaintiff had no contracts for resale in the domestic market. On March 27, 1920, the plaintiff made the first of a series of contracts with domestic subpurchasers, calling for a total equal to the amount to be shipped by the defendant; deliveries between May and August, 1920, arranged to match the defendant's shipments. The defendant did not learn that Czarnika had actually contracted for resale to domestic buyers *until May 18th* when it received routings for delivery to the subpurchasers, although it was aware from December 19th on, by reason of the option given plaintiff, that the sugar *might* be sold in the domestic market. Defendant breached its contract by delivering 29,691 bags of discolored sugar, not the "fine granulated" contracted for. As a result plaintiff's contracts were in many instances breached and plaintiff not only lost his profits, but was also compelled to account in damages. The sum of these disbursements and legal expenses incurred in connection therewith was found by the trial Court to be $442,484.03, for which judgment was given. The Appellate Division affirmed the trial Court. On appeal the Court of Appeals, reversing the Appellate Division, held that the plaintiff was entitled to general damages, in this case the difference between the value of the sugar received and that contracted for. The Court based its decision on the ground that the special circumstances enhancing damage, *viz.*, the subcontracts, were not forseeable at the time of the execution of the contracts.

It is the general rule that a buyer of goods on contract who has contracted for their resale to a subpurchaser, may recover only general damages for a breach by his vendor since by a resort to the general market he might have performed his subcontract.[6] But if by reason of special circumstances, such as the uniqueness of the product contracted for, or the terms of the subcontract making replacement from the general market, if feasible, impracticable for

[6] 2 Williston on Sales (2nd ed. 1924) Sec. 599.

lack of time as in the Czarnika case, properly brought to the notice of the vendor, the resulting damage is enhanced, the amount recoverable "would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated." [7] A like principle governs where the loss arises from other causes as for instance where a plaintiff had made purchases of machinery useful only in connection with the special apparatus defendant had contracted to deliver.[8]

Various theories are advanced as the premise for the rule. It has been said that the damages are those which the parties impliedly contracted to pay; what the parties contemplated the damages flowing from the breach would be; or, more accurately, what the parties would have contemplated as the probable damages had they given any thought to the subject.[9] On the other hand it has been pointed out that men contract with the thought of performance in mind and rarely give a thought to the probable consequences of breach and that, therefore, the measure of damages cannot be founded on what the parties "contracted" or "contemplated." [10] It is probably true as suggested by Professor Williston that such theories are highly fictional and that, given certain facts the law will read into the contract a promise to pay the special damages suffered by reason of its breach.[11]

Just what is the nature of the communication necessary before the circumstances making breach especially damaging may be said to have been within the contemplation of the parties? In the Czarnika case the plaintiff sought to charge the defendant with knowledge of the dependent subcontracts through the option of December, 1919, giving plaintiff the privilege of selling the sugar contracted for in the domestic market. The Court held this notice too equivocal, stating that at most defendant only knew that the plaintiff *might* sell to the home market. A study of some of the adjudications on the subject indicates that even had the seller known that the buyer would sell the entire shipment to domestic purchasers, the fact that it didn't learn until May 18, 1920, long after the execution of the contracts, that Czarnika had actually consummated contracts for the resale of the sugar, would have barred the claim for losses sus-

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[7] Hadley v. Baxendale, *supra* note 1.

[8] Benton v. Fay, 64 Ill. 417 (1872); Chalice v. Witte, 81 Mo. App. 84 (1899).

[9] Leonard v. New York A. & B. Electro-Magnetic Tel. Co., 41 N. Y. 544 (1870); Grebert-Borgnis v. Nugent, 15 Q. B. D. 85 (1885).

[10] Globe Refining Co. v. Landa Cottonseed Oil Co., *supra* note 4.

[11] Palles, C. B. in Hamilton v. Magill, L. R. 12 Ir. 186 (1883) at 202, "Parties need not have in mind the probable result of a breach but merely the circumstances by reason of which the breach (if there were one) would result in a loss greater than the normal one." 3 Williston on Contracts (1920), Sec. 1357.

tained on them. In Setton v. Earle-Albrecht [12] the vendor's knowledge that the buyer was a jobber was held insufficient to warrant a liability for special damages, the Court stating:

> "Mere knowledge that the goods are purchased for resale in the ordinary course of business will not take the transaction out of the general rule and place it under the exception. If that were not so, the exception would swallow up the general rule completely, for it is always known that, when goods are bought from a manufacturer by a broker or wholesaler, or by a retailer from a jobber, the buyer purchases for resale." [12a]

In a Michigan case [13] it was held that the notice must come from the plaintiff, but in Louisiana [14] the defendant's own knowledge of seasonal weather disturbances which would aggravate damages in the event of breach, and in North Carolina [15] the defendant's knowledge of the time of maturity of the tobacco crop making it imperative that he deliver promptly the curing flues bought if the full crop was to be harvested, were held sufficient. There seems no reason for restricting the source of the notice so long as it is sufficient to apprise the party sought to be charged that the contract is made with reference to the circumstances involved. If the defaulting party realized at the time of the execution of the contract that the plaintiff necessarily depended solely for the fulfillment of his subcontract, or the completion of his special purpose on the performance of the original agreement and was contracting with reference to such dependence, it is not saddling him with an unforseeable liability to hold him for what he should have realized would be the natural and proximate consequences of his breach.[16] However, a bare notice of the probable ramifications of a breach which does not enable the contracting party to realize that the contract is, to some extent, founded on liability therefor is not sufficient.[17]

It is almost universally held that the notice must have come to the party sought to be charged at the time of, or prior to, the

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[12] 258 Fed. 905 (C. C. A. 8th, 1919); Accord Atlas Portland Cement v. Hopper, 116 App. Div. 445, 101 N. Y. Supp. 948 (1st Dept. 1906).

[12a] *Ibid.* at 907.

[13] Henry v. Hubbs, 165 Mich. 183, 130 N. W. 616 (1911)

[14] Chattanooga v. Lefebrve, 113 La. 487, 37 So. 38 (1904).

[15] Neal v. Hardware Co., 122 N. C. 104, 29 S. E. 96 (1898).

[16] Matter of Casualty Co. of America, 222 App. Div. 304, 226 N. Y. Supp. 175 (1st Dept. 1928).

[17] Chapman v. Fargo, 223 N. Y. 32, 119 N. E. 76 (1918); Horne v. Midland Ry. Co., L. R. 8 C. P. 131, 42 L. J. C. P. 59, 28 L. T. N. S. 312, 21 Weekly 481 (1872).

execution of the contract.[18] A different holding would work severe hardship. If a vendor is to be held to have assumed the risk of an extraordinary liability in the event of default, it is only just that he be given an opportunity to reduce the possibility of breach to a minimum by securing favorable terms of delivery, etc., or to realize a profit commensurate with the risk by adding to his usual price.[19] Obviously if the obligations of the parties were not fixed at the time of the consummation of the agreement one could subsequently come in and by informing the other of some particularly onerous obligation which he has assumed on the faith of performance, transform an ordinary mercantile contract into a Sword of Damocles hanging over his contractor's head. It is not however necessary that the subcontract be executed or the expenses contemplated on the faith of performance incurred at the time of the execution of the contract. Knowledge that negotiations which subsequently culminate in the contemplated agreement are in prospect or under way, is sufficient.[20] It follows from what has been said concerning the nature and source of the notice that it need not be express or formal. Since the obligation to pay damages is, in no true sense, part of the contract, oral notice will be binding even though the contract itself be one within the purview of the Statute of Frauds.[21] In this way the nature of a buyer's business may itself be sufficient notice to the seller.

It is interesting to note that in Hadley v. Baxendale,[22] generally regarded as the fountain head of the rule on damages, the Court refused to charge the defendant with such damages on the ground that the notice of special circumstances was inadequate. An employee of the plaintiff had brought the broken shaft of their mill to the defendant for transportation to a repair shop in a distant town. The defendant being informed of the character of the shipment and that it was to be expedited agreed to have it back within a definite number of days after it was placed in its hands by the machinists. As a matter of fact it had been necessary to shut down the mill pending the return of the shaft. Defendant did not return the shaft on the agreed date and plaintiff sought to recover for the

[18] Federal Wall Paper v. Kempner, 244 Fed. 240 (1917); Illinois Central R. R. v. Nelson, 139 Ky. 449. 97 S. W. 757 (1906); Swift River Co. v. Fitchburg R. R. Co., 169 Mass. 326, 47 N. E. 1015 (1897); B. F. Ducas v. Bayer Co., 163 N. Y. Supp. 32 (1916); Goldston v. Wade, 123 N. Y. Supp. 114 (1910); British Columbia Spar, etc. v. Nettleship, L. R. 3 C. P. 499, 37 L. J. C. P. 235, 18 L. T. N. S. 604, 16 Weekly 1046 (1868). 1 Sedgwick on Damages (9th ed. 1912), Sec. 158; V-C Peanut Co. v. Atlantic C. L. Ry. Co., 155 N. C. 148; 71 S. E. 71 (1911); Bourland v. Choctaw O. & G. Ry. Co., 99 Texas 407, 90 S. W. 483 (1906).

[19] Hadley v. Baxendale, *supra* note 1.

[20] Delafield v. Armsby, 131 App. Div. 572. 116 N. Y. Supp. 71 (1st Dept., 1909), *aff'd* 199 N. Y. 518, 92 N. E. 1083 (1910); Hydraulic Eng. v. McHaffie, 4 Q. B. D. 670 (1878).

[21] Amer. Bridge Co. v. Amer. Dist. Steam Co., 107 Minn. 140. 119 N. W. 783 (1909); Messmore v. New York Shot & Lead Co., 40 N. Y. 422 (1869).

[22] Hadley v. Baxendale, *supra* note 1.

enforced idleness of his mill beyond that date. The Court in denying such recovery pointed out that although the defendant was informed that the plaintiff was sending its broken mill shaft for repair and that the mill was stopped yet the circumstances were such that he could reasonably have thought that the plaintiff had more than one shaft and that the mill had been shut down temporarily.

Although loss of profits and expenses incurred as in the Czarnika case are the most common items of special damage they are but single instances of a class which is as comprehensive as the engagements which give rise to them. Thus in Massachusetts [23] failure to supply a retail grocer with trading stamps made the defendant liable for the loss of business resulting. The fact that a manufacturer of heating equipment knew that the apparatus he contracted to deliver was for installation in a greenhouse caused him to be held for the destruction to plants brought on by his failure to deliver it on time.[24] In Berghuis v. Schultz [25] the defendant landlord released the plaintiff tenant from liability for the balance of his term and agreed that he would not lease the premises for a general merchandise store during the period which the tenancy would have had to run. To the defendant's knowledge the tenant exacted this promise for his own protection on a similar agreement he had made with the third party who had purchased his stock in trade. The landlord breached his agreement and was held for the liability of the tenant to the third party. Recovery of profits lost on a resale contract is limited to a reasonable profit unless the party breaking the contract knew the terms of the subcontract; in that case he is bound thereby even though the profit be an extraordinary one.[26]

It often happens that a breach is beneficial rather than harmful. A change in conditions may make the special use for which the goods are bought less valuable than the use to which they are ordinarily put. The question then arises as to the effect on the liability of the party who has broken the contract. There is some authority for what Professor Williston thinks will be the prevailing view that the defaulter will not be permitted to benefit by the —to him—"accidental" circumstance of the buyer's subcontract or special purpose.[27] Such a holding is contrary to the fundamental concept of contract damages and would seem to be founded on policy rather than on principle. There is nothing inherently tortious

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[23] Gagnon v. Sperry Hutchinson, 206 Mass. 547, 92 N. E. 761 (1910).

[24] Kramer v. Messner, 101 Iowa 88, 69 N. W. 1142 (1897).

[25] 119 Minn. 87, 137 N. W. 201 (1912).

[26] Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521 (1896); McHose v. Fulmer, 73 Pa. St. 365 (1873); Guetzkow Bros. v. Andrews, 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. 909 (1896).

[27] Rodocanachi v. Milburn, 18 Q. B. D. 67 (1886); 3 Williston on Contracts (1920), Sec. 1386.

about a breach of contract. The cases limiting the damages recoverable to the loss actually sustained are more persuasive.[28] In Texas Co. v. Pensacola Maritime Corp.,[29] the Court stated:

> "The rule that where a contract for the sale of goods is breached, the measure of damages is the difference between the market price and the contract price, is only the rule for the ascertainment of damages which have been suffered, and where the evidence shows that the actual damage has been less than such difference the recovery should be limited to such actual damages." [29a]

The argument advanced that a party who breaches his contract should not, in justice, be permitted to profit by the fortuitous circumstance of the other party's subcontract or special use, loses much of its force when applied to a case where special damages are recoverable. There the subcontract or special use cannot be said to be an *accidental* circumstance, for the parties are deemed to have contracted with reference thereto. It is the very basis of the defendant's liability and should control the amount of recovery no matter in whose favor it operates. Incidentally, where the loss arises from the breach of a subcontract and the vendee has been held for damages for such breach, the limitation may be of little practical value for if the loss of profit to the vendee is small the subpurchaser's bargain is that much more valuable and his damages for the loss of it correspondingly greater.

In the absence of statutory enactment [30] it should be held that a party who is deemed to have contracted with reference to a particular contract or purpose so as to subject himself to the burden of its performance or fulfillment be allowed the diminishment of damages afforded by the drop in value of the dependent obligation or purpose. Such a rule is founded on reason and good sense [31] and would be a substantial advance toward the goal of which Judge Andrews speaks:

> "* * * For a wrong, the law's ideal, not always realized, is compensation, neither more nor less." [32]

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[28] Kaye v. Eddystone Ammunition Co., 250 Fed. 654 (1918); Isaacson v. Crean, 165 N. Y. Supp. 218 (1917); Messmore v. New York Shot & Lead Co., *supra* note 21; Foss v. Heinemann, 144 Wis. 146, 128 N. W. 881 (1910).

[29] 279 Fed. 19 (C. C. A., 5th, 1922).

[29a] *Ibid.* at 30.

[30] See 2 Williston on Sales (2nd ed. 1924), Sec. 599i for discussion of Sec. 67, subd. 3 of the Uniform Sales Act (N. Y. Pers. Prop. Law, Sec. 150, Subd. 7) which apparently sets an artificial minimum of damages in breach of warranty cases.

[31] 2 Sutherland on Damages (4th ed. 1916), Sec. 662.

[32] Orester v. Dayton Rubber Mfg Co., 228 N. Y. 134 at 136, 126 N. E. 510 at 511 (1920).