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on this same unit without specific authorization, as secured in this case, i.e., by obtaining an order from the Commissioner of Conservation, following a full hearing and based upon his findings, warranting such exception to basic order No. 96. It necessarily follows that the lease did not terminate for failure to pay rentals."[13]

In *Smith v. Holt* there was but a single servitude owner and lessee; in the *Sohio* case all the tracts in the unit were leased to the same lessee. This would seem to confine both cases to a "single ownership" category. Despite this narrow delimitation these cases seem to stand for the proposition that private rights and obligations may be placed in limbo by the police power of the state as enunciated by the commissioner pursuant to the Conservation Act. No safe indication has been given by the court as to how far they will extend the effects of a spacing order. However, it should be safe to assume from the instant case that where there is single ownership of the right to extract oil or gas from the ground for oneself or for others on a tract which has been designated by the commissioner as a unit upon which only one well may be drilled that a forced pooling order is unnecessary and that all the effects of a voluntary pooling agreement or forced pooling order will flow therefrom.

Charles C. Gray

SALES—MEASURE OF THE SELLER'S DAMAGES—SELLER'S PRIVILEGE TO KEEP THE GOODS

Defendant repudiated a contract obligating him to purchase from plaintiff a certain amount of scrap steel at a fixed price; plaintiff thereupon brought suit for specific performance. The demand for specific performance was dismissed by the trial court and abandoned by plaintiff. But, about a year after the institution of suit, the case was tried on the alternative demand for dissolution of the contract and damages for its breach. The market price of scrap steel had been less than the contract price at the time of defendant's repudiation; but, at the time of the trial, it was higher than the contract price. Defendant took the position that plaintiff had suffered no damages, because the pleadings showed that he had kept the goods and, consequently,

13. 222 La. 383, 396, 62 So. 2d 615, 620 (1952).

he could have sold them at the time of the trial at a better price than the contract price. *Held*, the measure of the seller's damages for the buyer's breach of a contract to sell[1] is the difference between the contract price and market price of the goods *at the time of the breach. Friedman Iron & Supply Co. v. J. B. Beaird Co.*, 222 La. 627, 63 So. 2d 144 (1953).

The decision was rendered on rehearing with Justices Hamiter and Hawthorne dissenting. The court had first held that, although plaintiff was not obliged to resell the goods in order to obtain dissolution of the contract and damages for its breach,[2] an award of damages placing plaintiff in a better position than he would have been in if the contract had been performed would have extended the law of damages for breach of contract beyond its purpose.[3] This, in effect, made the measure of the plaintiff's damages the difference between the contract price and market price of the goods at the time of the trial. At the same time, the court acknowledged that plaintiff could not have imposed upon the buyer the loss he might have suffered from the combination of his having kept the goods after the buyer refused delivery and a subsequent decline in the market.[4] In view of this acknowledgment, the result of the court's first decision would have been the unconscionably single-edged rule that a buyer guilty of a breach could avail himself of the gain resulting from the seller's having kept the goods but could not be charged with the loss resulting therefrom. Furthermore, as the court pointed out on rehearing, measuring the seller's damages as of the time of the trial in cases like this one would tempt parties to resort to sharp or frivolous procedural tactics to have their cases set for trial at

1. The contract involved was a contract to sell as distinguished from a perfected sale. The terms *seller*, *buyer*, and *resale* will nevertheless be used throughout with the former in mind, unless the context indicates otherwise.

2. It had been said in Mutual Rice Co. v. Star Bottling Works, 163 La. 159, 165, 111 So. 661, 663 (1927), that "it is the duty of the seller to minimize his loss by reselling the goods as soon as practicable after the buyer has refused to accept." The court in the instant case repudiated that statement as mere dictum and explained that resale is an evidentiary fact bearing on the certainty and quantum of damages, proof of which is not restricted to that evidence. The market value of the goods was established by means of a trade publication of recognized reliability. It can now be said correctly that resale is essential to a claim for damages predicated on a demand for dissolution only where the price obtained on resale would be the only satisfactory evidence of the quantum of damages.

3. "Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived. . . ." Art. 1934, La. Civil Code of 1870. Cf. 3 Williston, Sales 293, § 599 (3d ed. 1948).

4. 222 La. 627, 636, 63 So. 2d 144, 149 (1953).

the time most favorable to them in view of changing market conditions.

On rehearing (wherein its first decree was reconsidered and set aside), the court awarded plaintiff damages in the amount of the difference between the contract price and market price at the time that he learned of defendant's repudiation.

Consistently with the decision, plaintiff might have had the goods on hand for resale at a market price above the contract price when final judgment was handed down. Thus, he might have been left by the decision in a better position, in a manner of speaking, than he would have been in if the breach had not occurred. Even so, it is submitted that his good fortune was no evidence of a miscarriage of the law of damages. It flowed from his election to take the risk of keeping the goods and only remotely from the operation of that law. If he had promptly resold the goods upon learning of the buyer's repudiation, immediately purchased identical goods at the price received, and kept them with a view to speculating on the market, his position would have been the same. Who would then attribute his enrichment to the law of damages and take it as evidence of its miscarriage? Yet between following that course and merely keeping the goods, there seems to be no material difference, especially since the contract did not contemplate the sale and purchase of any specific goods.

The decision does not appear to conflict with the broad provisions of Article 1934 of the Civil Code, the basic legislation on the subject of damages for breach of contract. That article provides, in part, that the debtor who has violated a contract is liable for such damages as were or may reasonably be supposed to have been contemplated by the parties at the making of the contract. If the debtor is guilty of fraud or bad faith as there specially defined, he is liable only for such additional damages as are the immediate and direct consequence of the breach. The court's refusal to use the market price at the time of the trial for measuring plaintiff's damages is supported by a number of Louisiana cases.[5] They hold that, as at common law,[6] the measure of the seller's damages in cases of this sort is the difference between the contract price and the market price of the goods at the

5. Washburn Crosby Co. v. Riccobono, 162 La. 698, 111 So. 65 (1927); Wertham Bag Co. v. Roanoke Mercantile Co., 157 La. 312, 102 So. 412 (1924); Jochams v. Ong, 45 La. Ann. 1289, 14 So. 247 (1893).

6. 3 Williston, Sales 241, § 582, and authorities there cited.

time for delivery or performance. The theory is that, at that time, the seller is privileged to resell and avoid any further loss. No prior case was found where the seller kept the goods and the market price rose above the contract price by the time of trial. But at common law, the measure above seems to be applied without regard to the rise or fall of the market after the time for delivery.[7]

The jurisprudence referred to above has consistently employed the term "time for delivery or performance." The reason for the court's use of the term "time of the breach" in the instant case, while relying on that jurisprudence, is probably to be found in the facts of the case considered in the light of plaintiff's prayer for relief. At common law, the fact that a contract to sell is repudiated by the buyer before the time for delivery has arrived does not prevent the application of the rule that the seller's damages are measured at the time for delivery.[8] The instant case could be taken as indicating that Louisiana takes a different view of the problem of "anticipatory repudiation," as it is called.[9] The contract originally called for delivery in installments extending through a three months' period. The buyer repudiated it before the arrival of the first original delivery date, and the court measured the seller's damages at a time soon after the repudiation and before that delivery date. As presented to the court, however, the contract contained no delivery schedule whatsoever. The plaintiff admitted his acquiescence in instructions by the defendant, sent before his repudiation, to withhold delivery until further notice. This notice, however, never came. If a reasonable delivery schedule was implied by the circumstances surrounding the contract, it was not brought to the court's attention. This defendant could not have been expected to do, the market having continued to decline for a considerable time after his repudiation. Plaintiff, on the other hand, prayed for a measurement of his damages at one of several dates proposed in the alternative. He supported these with arguments aimed rather at establishing the date of final, unequivocal repudiation than an implicit time for delivery. Thus there was no occasion in the instant case for applying a rule expressed in terms of "time for delivery."

7. A fact situation similar to the one in the instant case was similarly dealt with in Bridgford v. Crocker, 60 N.Y. 627 (1875); see note 6 supra.

8. 3 Williston, Sales 263, § 587, and authorities there cited.

9. No case found indicates definitely that Louisiana does.

Two other possible explanations, (1) that the decision qualifies a considerable body of jurisprudence couched in terms of "time for delivery," or (2) that the terms "time of the breach" and "time for delivery" are equivalents, do not seem tenable. The court relied upon the jurisprudence in reaching its decision. It actually stated the rule found there in terms of "time for delivery," at one point in its opinion.[10] There is not the slightest intimation in its whole opinion on rehearing that the decision was meant to limit or explain the scope of that jurisprudence. While the proposition that the two terms are equivalents may find some support in the code,[11] nothing in the opinion indicates that the court thought that the date selected as the "time of the breach" had anything to do with delivery. On the contrary, the court awarded damages in strict conformance to plaintiff's prayer, reducing, on second rehearing, the amount awarded on first rehearing to the lesser amount prayed for in plaintiff's amended petition. As stated above, that prayer looked to the date of unequivocal repudiation, not to the time for delivery. It is therefore submitted that the instant decision is not out of line with the jurisprudence but instead occupies a unique position attributable to the absence of a time for delivery in the contract presented to the court.

The rule that the measure of the seller's damages for the buyer's breach is the difference between the contract price of the goods and their market price at the time for delivery (or at the time of the breach) obviously rests upon the seller's privilege to resell the goods at that time. The loss or profit flowing from his failure to resell is not the buyer's.[12] No Louisiana case was found which applied this rule in a seller's suit for the buyer's breach of a perfected sale, but there seems to be no good reason for not applying it there as well as to a contract to sell. Doubts have been expressed that a seller in Louisiana is privileged to resell goods after title to them has passed to the defaulting buyer

10. 222 La. 627, 642, 63 So. 2d 144, 149 (1953).

11. Art. 1931 et seq., La. Civil Code of 1870. The term *breach* is first used with reference to passive in-executions of obligations, defined in Article 1931 in terms suggesting that a passive violation can take place only when the obligation is presently enforceable; the latter article suggests that an obligation yet conditional is subject to active violation, however. This view is not borne out by the use of the term *breach* elsewhere in the code, however.

12. The chance of the seller's obtaining specific performance of the contract cuts across this proposition. If specific performance is decreed, justice will presumably have been done; if not decreed, then the proposition as stated finds application.

and before judicial dissolution of the sale.[13] But it is the writer's opinion that the privilege is deducible from the Civil Code[14] and that the deduction will be made when the question is squarely presented,[15] because of the desirability of national uniformity in commercial law and the existence of the privilege at common law.[16]

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13. Comment, 4 Tulane L. Rev. 92 (1930).

14. It has been repeatedly said that the buyer who is in default cannot demand specific performance. See New Orleans v. Rigney, 24 La. Ann. 235 (1872); Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906); Southport Mill v. Ansley, 160 La. 131, 106 So. 720 (1926). At any rate it is certainly discretionary with the courts whether or not the buyer who is in default may perform his obligation in order to demand the performance of the seller's, whether the offer to perform comes by way of suit for specific performance or in response to a suit for dissolution brought by the seller. Arts. 2047, 2564, La. Civil Code of 1870. A holding that a seller is privileged to resell upon the buyer's default might therefore be nothing but a way of stating that upon the buyer's default and the seller's election to resell the goods (and whatever other conditions might recommend themselves to the court's sound discretion) the court would not have granted the buyer further delay to perform, thus freeing the seller from any enforceable or civil obligation to the buyer with respect to the specific goods forming the object of the sale and thereby returning title to him. It is submitted that further analysis would show this position tenable.

15. See Searcy v. Gulf Motor Co., 37 So. 2d 445, 448 (La. App. 1948), indicating the contrary. But cf. Mossy Motors v. McRedmond, 12 So. 2d 719, 723 (La. App. 1943), recognizing, in dictum, the applicability of the privilege in certain cases.

16. 3 Williston, Sales 161, § 543 et seq.