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Contracts–Right of the Plaintiff to Recover Damages at Law After Defendant Has Been Compelled by Injunction to Allow a contract Repudiated by Him to be Carried Out

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CONTRACTS—RIGHT OF PLAINTIFF TO RECOVER DAMAGES AT LAW AFTER DEFENDANT HAS BEEN COMPelled BY INJUNCTION TO ALLOW A CONTRACT REPUDIATED BY HIM TO BE CARRIED OUT.—P entered contract with D whereby P agreed to furnish material and labor required in the grading and paving of certain streets in the town at stipulated unit prices for the completed work. D absolutely refused to carry out its part of the contract. P secured an injunction forcing D to perform in so far as performance did not impose liability on D in excess of $54,000 and other available funds. The injunction was upheld in Atlantic Bitulithic Company v. Town of Edgewood et al., 76 W. Va. 630, 87 S. E. 183. P has been paid a total of some $60,000, but now claims that by reason of the increased cost of labor and material between the time he could have performed the work under the contract, if it had been permitted to do so by D, and the time that it was actually done after the injunction was awarded compelling D to accept performance of the contract by P he was damaged in the sum of $55,000. D's demurrer was overruled and D appealed. Held: Injured party may keep repudiated contract alive and at end of time specified sue thereon, or sue for profits which he would have realized; party compelling acceptance of performance of repudiated contract may not recover under contract and in addition damages for the breach. Atlantic Bitulithic Company v. Town of Edgewood, 137 S. E. 223 (W. Va. 1927.)

The court cited WILLISTON ON CONTRACTS, §1334, to distinguish between a material breach which does not indicate any intention to renounce or repudiate the contract and an absolute repudiation. In the latter situation according to Mr. Williston, "there can be no real election between continuation and cessation of performance * * * * * and the American law though giving the injured party in such a case an election of remedies, has not only wisely denied him in most cases the right to continue performance but has refused to regard a continued willingness to receive per-
formance as more than an indication that if the repudiator will withdraw the repudiation, but not otherwise, the contract may proceed." The same section says that "where there has been a material breach which does not indicate any intention to renounce or repudiate the contract, the injured party has a genuine election offered him of continuing performance or of ceasing to perform, and any action indicating an intention to continue will operate as a conclusive choice; not indeed depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his own part." Disregarding the possible effects of the original decree limiting D’s liability under the contract to the amount of the bonds authorized “and other available funds,” reported in Atlantic Bitulithic Co. v. Town of Edgewood, supra, the principal case presents a novel problem. To what type of case should Williston’s rule as to repudiation apply? Can there be such a thing as repudiation as distinguished from a mere delay or material breach which does not indicate any intention to renounce or repudiate the contract, in the case of a contract capable of being enforced in equity, and which has been in fact so enforced, after there has been a so-called repudiation? In other words, does not the decree compelling performance, for all practical purposes, have the effect of changing a repudiation into a mere delay or material breach so as to bring the case within that part of the rule relating to “breach”? Certainly the wording of the latter part of the rule does not seem to apply to a case like the present one. An examination of the authorities cited by Mr. Williston establishes the reason for its being. This is best illustrated by the famous case of Clark v. Marsiglia, 1 Denio (N. Y.) 317, 49 Am. Dec. 670. In that case the plaintiff was engaged by the defendant to clean, repair, and otherwise renovate certain pictures. After the plaintiff had commenced work the defendant renounced the contract and ordered him to cease work. The plaintiff, however, disregarded the order and completed the job. He then sued for the contract price. The court held that he could recover only for what he had done before the order was countermanded plus
such further sums as would compensate him for interruption of the contract at that time and the profits he would have made under the contract, because it was his duty to mitigate the damages. The other cases are to the same effect. None of these cases stand for the proposition that if the plaintiff had secured a decree compelling the other party to perform, that the plaintiff could not recover the damages caused by defendant's delay in refusing to perform until compelled to do so by a court of equity. Perhaps one of the most common types of contract sought to be enforced in a court of equity is a contract for the sale of real estate. In almost all of these cases there has been an absolute repudiation by the defendant in the suit. Yet we find that in England, before the enactment of Lord Cairn's Act, that courts of equity while granting specific performance of the contract, refused in most cases to award damages, and made the plaintiff sue at law for damages caused by defendant's breach or repudiation. From this state of facts it may be reasonably argued that it was the common practice of the English law courts to award damages for such breach or repudiation, after specific enforcement. Still, in 1855, in the case of *Prothero v. Phelps*, 7 De G. M. and G. at page 734, before the passage of Lord Cairn's Act, an English chancery court awarded damages after a prior decree compelling performance by the defendant, and in addition thereto, damages for the original breach plus damages for a breach after the original decree. See *Fry on Specific Performance*, 6th ed., ch. 3, as standing for the proposition that equity may grant damages after specific enforcement. But the tendency of the equity courts at this time was not to grant such damages as a matter of right, but generally to refer the injured party to the law courts for compensation. Pomeroy in his work on *Equity Jurisprudence*, Vol. 1, §241, states that equity may grant damages in addition to specific performance of the contract. However, the injured party is sometimes referred to the law courts for compensation. The impression one gathers from this situation is that it is the common practice, both in this country and in England, for law courts to award damages after specific enforcement of the
contract, without distinguishing between a breach and a repudiation, providing the doctrine of merger does not apply. It does not appear that the doctrine of merger would apply in the principal case, Page on Contracts, §3562. The same author, in section 3033, says "In some jurisdictions a party to an executory contract (notably a building or construction contract) who is not in default is permitted to ignore the attempted breach of the part of the adversary party, and to continue performance even though such performance increases damages." Continuing, Page says, "In some cases relief is given at common law on this theory (meaning that the contract by its terms fixes time for performance, and the law fixes this as the time for measuring damages; and one of the parties to the contract cannot modify the measure of damages by his own act) only in cases where specific performance might have been had." It would seem, therefore, that in such cases, where specific performance has been had, that damages should be awarded in a separate action at law providing there had been no merger of the right in the decree. The effect of the decree places the parties in the same situation as if the wrong-doer had merely delayed performance, in which case the first part of the rule stated by Mr. Williston, and not the part applying to repudiation, should apply. In such a case certainly the reason for the second part of the rule does not apply, for the injured party is not violating the mitigation of damages rule more than if the defendant had merely delayed performance, and the plaintiff had elected to keep the contract alive and had sued for damages caused by the delay. For a case holding that increased price of labor and materials between the time set for performance by the contract, and the time when performance actually occurred, because of defendant's delay, is a proper item of damages, see Bitting v. United States, 25 Ct. Cl. 502. So far as can be ascertained, the decision in the principle case is the only direct decision to the effect that a party compelling acceptance of a repudiated contract may not recover under the contract and in addition damages for the breach.

—H. R. W.