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Damages: Date at Which Rate of Exchange Should Be Applied [Student Comment]

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the party the reasonable value of his or her services, that is, what it would be necessary to pay another for the same services; second, allow a reasonable return on the capital representing the separate property; then, if there is anything left, let the balance go to the community, since generally all accumulations after marriage, with certain express exceptions, are presumed to be for the benefit of the community property.[18] This system would have a more equitable result than an indiscriminate allotment of all of the profits to the owner of the separate property; yet it does not go as far as the Spanish system, which is still in effect in some states, where all the rents, issues, and profits of the separate property belong to the community.[19] *W. P. H.*

DAMAGES: DATE AT WHICH RATE OF EXCHANGE SHOULD BE APPLIED—In allowing recovery for the breach of a contract to pay foreign money in a foreign country a domestic court can award a judgment only in domestic money.[1] It therefore becomes necessary to determine the equivalent in domestic money of the foreign money due. In determining that equivalent it is essential to know what rate of exchange to apply, i. e., the rate at what time. Should the court take the rate of exchange prevailing on the day it gives judgment, or on the day the contract obligation to pay arose?[2] The answer to that question would seem to depend upon whether or not at the time of default in payment a right to damages is substituted for the principal debt or whether the debt continues and it is that

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legislature, in providing that the rents, issues, and profits of the separate property belonged to that property, contemplated that the husband might devote all his time to the development of his separate property at the expense of the community which was entitled to his services. The harshness of this rule was concisely pointed out by Justice McFarland in the Estate of Cudworth, supra, n. 14, where he stated, "In nearly all civilized countries marriage immediately vests in the wife some estate in the property owned by the husband at the time of the marriage; but such is not the rule here, and if he chooses, as in the case at bar, to afterwards do nothing except to collect his rents and profits, he may after a long period of faithful wifehood leave her penniless. Her only chance to acquire by marriage any interest in the property is to marry a man who has nothing, with the hope that he may afterwards earn something in which she will have community rights."

[18] Fennell v. Drinkhouse (1901) 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; In re Boody (1896) 113 Cal. 682, 45 Pac. 858.

[19] See note 31 L. R. A. (N. S.) 1092; 5 Cal. Juris. 283; 10 California Law Review, 271; 3 California Law Review, 359; 1 California Law Review, 32.

[1] See Sedgwick on Damages, § 274 and cases there cited. See also Edward Gluck, Rate of Exchange in the Law of Damages, 22 Columbia Law Review, 217, 243, footnote 83. In his opinion in Guinness v. Miller (1923) 291 Fed. 769, 771, Judge Learned Hand suggests that a different rule might be applicable if specific performance were possible in these cases.

[2] There are several dates possible of selection: (1) the date of judgment; (2) the date of the commencement of the suit; (3) the date of the obligation to pay a liquidated amount; (4) the date of the breach of contract. See, Edward Gluck, Rate of Exchange in the Law of Damages, 22 Columbia Law Review, 217, 218.

which is recovered.[3] If the former, the rate of exchange on the date the obligation arose should be taken, for it places the plaintiff in as good a pecuniary position as he would have been had the contract been performed. If the latter the rate of exchange on the date the judgment was rendered should be taken, for the plaintiff is recovering not damages, but a continuing debt, the equivalent of the exact amount of foreign money called for in the obligation.[4] This problem confronted the United States Supreme Court in the case of *Hicks v. Guinness*,[5] a suit by an American firm to recover an amount owed by a German firm on a stated account payable in marks. The court ruled in favor of the breach date rule declaring that ". . . . the plaintiffs were entitled to recover the value in dollars that the mark had when the account was stated. . . . When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors you are too late to perform what you have promised and we want the dollars to which we have a right by the law here in force. . . ."[6]

This seems a desirable rule. Mr. Justice Holmes, who gave the opinion of the court in the instant case, justifies the result as follows: (1) In the case of actions for a tort the rate of exchange at the date of the commission of the tort is taken.[7] The principle is the same in contract, the loss of the plaintiff "happens at the moment the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time."[8] (2) The rule adopted seems to "flow from fundamental theory and not to need other support."[9] (3) "It is in accord with the decisions of several state courts and Circuit Courts of Appeal as well as of the English House of Lords."[10]

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[3] See note 29 Harvard Law Review, 873.

[4] Cf. Globe Refining Co. v. Landa Cotton Oil Co. (1902) 190 U. S. 540, 543, 47 L. Ed. 1171, 23 Sup. Ct. Rep. 754; Hopkins v. Lee (1821) 6 Wheat. 109, 5 L. Ed. 218 (action for failure to deliver merchandise); Gould v. Banks (1832) 8 Wend. (N. Y.) 562, 567, 24 Am. Dec. 90.

[5] (Nov. 16, 1925) 70 L. Ed., Adv. Ops. 79, 46, Sup. Ct. Rep. 46. This suit was brought under § 9 of the Trading with the Enemy Act, Comp. Stats. 1918, Comp. Stats. Ann. Supp. 1923, § 3115½ e. A German firm was indebted to an American firm under an account stated on Dec. 31, 1916, for 1,079.35 marks. The debt was not paid when the United States entered the war against Germany, April 6, 1917. The suit was brought against the Alien Property Custodian who had taken property of the German firm of a value greater than the debt. The questions before the court were, (1) what rate of exchange should be taken? (2) should interest be allowed for the time covered by the war?

[6] 46 Sup. Ct. Rep. 46, 47.

[7] Preston v. Prather (1890) 137 U. S. 604, 34 L. Ed. 788, 11 Sup. Ct. Rep. 162.

[8] 46 Sup. Ct. Rep. 46, 47.

[9] Ibid.

[10] Ibid, citing Hoppe v. Russo-Asiatic Bank (1923) 235 N. Y. 37, 138 N. E. 497; Katcher v. American Express Co. (1920) 94 N. J. Law 165, 171; Simonoff v. Granite City National Bank (1917) 279 Ill. 248, 255, 116 N. E. 636; Wichita Mill & Elevator Co. v. Naamlooze etc. Industrie (1925) 3 Fed.

It might be contended that if the plaintiff in the instant case had sued in Germany he would have been entitled only to the number of marks called for in the obligation, for a court will not consider fluctuations in the purchasing power of its own money, and for that reason he should receive the equivalent of that number of marks in this country where suit is actually brought.[11] For example, in the instant case the stated amount due in 1916 was 1,079.35 marks. A judgment in Germany in 1926 would be for 1,079.35 marks. Why should the plaintiff, it is urged, especially if both parties are German citizens, get in effect a greater judgment by bringing suit in the United States? This contention may be met if the question is considered as one essentially in the law of damages. The plaintiff does not bring his suit in the United States in order to get marks nor to get performance of the contract, but to get damages in dollars for its non-performance. Furthermore the American court can take into consideration the fluctuations in the value of the mark. The damages should be awarded in accordance with the well settled principles of the law of damages which aim to put the plaintiff in as good position as if the contract had been performed. This can best be done by applying, as in the instant case, the rate of exchange on the date of the breach.[12] If the defendant had failed to deliver a shipment of wheat when due the plaintiff would recover the value of the wheat at that time regardless of fluctuations. Why should the breach of a contract to pay foreign currency be treated differently from a breach of contract to deliver wheat? When the defendant has failed to pay the foreign currency when due the plaintiff can go into the market and buy an equal amount of foreign money at the rate then prevailing. The plaintiff will then be reimbursed by a judgment based upon the exchange rate prevailing at the time he made the purchase.

(2d) 931; S. S. Celia v. S. S. Volturno (1921) 90 L. J. P. 385; [1921] 2 A. C. 544, 27 Com. Cas. 46; 37 T. L. R. 969.

Although the breach date rule may now be taken as the general American rule the earlier American cases favored the judgment day rule. Marburg v. Marburg (1886) 26 Md. 8; Lee Villocks (1819) 4-5 Serg. and Rawle (Pa.) 48; Taan v. Le Gaux (1793) 1 Yeates (Pa.) 204; Scott v. Hornsby (1797) 1 Call. (Va.) 41; Hawes v. Woolcock (1870) 26 Wis. 629. For a complete review of American cases on this problem see 11 A. L. R. 363.

[11] In France if the contract contains a clause providing for payment in gold a change in the money standard of the forum is recognized. Although it was enacted in 1870 and in 1914 that currency should be legal tender, the courts require an increased payment in currency when the latter is not on a par with gold. J. Perroud, "La Determination de la Monnaie de Paiment. La Clauise 'Paiment Or' et le Problème du Change". 51 Journal Du Droit Internationale 628, 639, 640. This seems a desirable rule and should be followed in other countries as well.

[12] See 29 Harvard Law Review, 873; 19 Michigan Law Review, 652; Osmond K. Frankel, Some Aspects of the Law Relating to Foreign Exchange, 20 Columbia Law Review, 832; Edward Gluck, Rate of Exchange in the Law of Damages, 22 Columbia Law Review, 217; 5 Minnesota Law Review, 146; 31 Yale Law Journal, 198, 33 Yale Law Journal, 564; 37 Law Quarterly Review, 38; Sedgwick on Damages, supra, n. 1.

It has been suggested that since the plaintiff might have had to borrow or draw re-exchange upon the defendant's default the rate of exchange selected should be the highest rate which existed within a reasonable time after the breach occurred.[13] A method analogous to this has been employed in determining damages for the conversion of pledged stock, the highest value the stock reached within a reasonable time after the conversion being taken as the measure of damages. This method, although more just than the judgment day rule, is not as satisfactory as the breach day rule for it lacks the certainty and ease of application of the latter whose effectiveness is not hampered by the difficult problem of determining what is a reasonable time.

The instant case further decided that interest on the obligation was recoverable for the period of the war notwithstanding interdiction of intercourse by the Trading with the Enemy Act. It was the view of the court that the question was not one of not performing a contract, in which case performance would have been excused, but of the continuance of a liability for damages sinces the cause of action accrued before the United States went into the war.[14] One is not excused from paying the principal obligation because of inability, for the same reason he should not be excused from paying the interest. The result reached seems correct. During the period of the war the German debtor had the use of the money withheld from the American creditor. *R. J. T.*

NOVATION: STATUTE OF FRAUDS: INVALID AGREEMENT AS DISCHARGE OF PRIOR VALID AGREEMENT—In *Producers' Fruit Co. v. Goddard*[1] the plaintiff and defendant entered into a written contract for the purchase and sale of fruit at stipulated prices. Subsequently an oral contract providing for the purchase and sale of fruit at the prevailing market prices was made by the parties with the understanding that the oral agreement should be substituted for the prior written agreement. For two years the vendor delivered fruit in accordance with the terms of the oral contract. The vendee refused to pay the market price, which was higher than the price stipulated in the written agreement, whereupon the vendor refused further performance. The vendee sued for breach of the first agree-

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[13] See criticism of this method in 22 Columbia Law Review, 217, 246.

[14] In support of its rule the court cites Miller v. Robertson (1924) 266 U. S. 243, 69 L. Ed. 265, 45 Sup. Ct. Rep. 73; Hugh Stevenson, Ltd. v. Altiengesellschaft für Cartennagen-Industrie (1918) 87 L. J. K. B. 416; [1918] A. C. 239, 245; 118 L. T. 126; 62 S. J. 290; 34 T. L. R. 206.

The case of Brown v. Hiatts (1872) 15 Wall. 177, 21 L. Ed. 128, in which interest was not allowed on an obligation for the period of the Civil War, is distinguished from the instant case on the ground that in the former, war existed at the time when the cause of action otherwise would have accrued. The court states, "it very possibly might be held that war excuses the performance of a contract although it does not impair or diminish a liability already fixed by law." 46 Sup. Ct. Rep. 46, 48.

[1] (Dec. 23, 1925) 49 Cal. App. Dec. 14, 243 Pac. 686. Hearing in Supreme Court denied February 18, 1926.