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Ralph S. Bauer

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THE ADMINISTRATION OF THE RULE OF AVOIDABLE CONSEQUENCES AS AFFECTED BY THE DEGREE OF BLAMEWORTHINESS OF THE DEFENDANT

RALPH S. BAUER*

As is well known, courts ordinarily say that they will not allow a plaintiff to recover, either in contract or in tort, for damage that would have been avoided if plaintiff had acted reasonably, after the occurrence of defendant's wrong, to prevent such damage. This is most plainly so where the breach of contract or the tort has been such as to evince little or no real fault or blameworthiness in the defendant, for a court is usually not desirous of inflicting upon a righteous defendant an unnecessarily large and unjust burden of damages; but, where the defendant has wilfully broken a contract, or where he has wilfully or recklessly committed a tort, courts have often seemed to regard the problem as sufficiently different to justify a different kind of result, and have often allowed the burden of the so-called duty to avoid consequences to rest rather lightly upon the plaintiff where he is the victim of a defendant whose conduct has been highly reprehensible. It seems that the usual feeling of the court is that the wilful or reckless defendant should not have too much protection by means of the rule of avoidable consequences, just as courts frequently have shown that they believe that such a defendant should not be helped too much by a very strict application of the rules of legal cause, certainty of proof, and excessive damages.[1]

*Professor of Law, De Paul University College of Law.

[1]See Bauer, The Degree of Moral Fault as Affecting Defendant's Liability, (1933) 81 U. Pa. L. Rev. 586, and Bauer, The Degree of Defendant's Fault as Affecting the Administration of the Law of Excessive Compensatory Damages, (1934) 82 U. Pa. L. Rev. 583.

Strictly speaking, there is no *duty* in any plaintiff to do anything to

In *Loker v. Damon*,[2] one of the earlier and better known cases on avoidable consequences, the defendant's wrong was the destruction and carrying away of ten rods of plaintiff's fence, very evidently a wilful tort, and the court held that the plaintiff could not recover for the loss of his grass by reason of his letting the field remain open, for ten months, to the ravages of neighboring cattle. Here was an instance in which a court, not feeling especially desirous of helping the doer of a wilful wrong, might not readily have applied the doctrine that a plaintiff is under a disability to recover for damage in the nature of avoidable consequences, if plaintiff had acted with mere negligence in his failure to avoid damage that could easily have been averted. But one thing probably more frequently overlooked than noticed, in referring to that case, is the fact that the court seemed to view the plaintiff's omission to close the gap as being rather a plain instance of a wilful or reckless omission to act than as being conduct of the grade of mere contributory negligence. Chief Justice Shaw said: "Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and wilfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly." Exactly what the court

avoid consequences of defendant's wrongful act and thereby to mitigate the damages that defendant will have to pay. Rock v. Van Dine, (1920) 106 Kan. 588, 189 Pac. 157, referring to Hohfeld, Fundamental Legal Conceptions (1923) 65; (1917) 26 Yale L. J. 710. The term *duty* is used, however, by many judges in their opinions, in the loose way above indicated, and it will be so used at points in this article, only because it makes for brevity of expression.

One writer apparently has rejected absolutely the idea that degree of blameworthiness has anything to do with the administering of the rule of avoidable consequences, saying:

"The rule . . . is really a rule of limitation upon the plaintiff's recovery. Nor is it properly to be regarded as a species of mitigation of damages. This relates to the defendant, and generally to the character of his acts; e.g., that a tort was not malicious; that, after committing a trespass, he repaired the wrong as far as possible. But a reduction of the plaintiff's damages by any such particulars as flow from his own imprudent act, or omission to act after the wrong has been committed, constitute a distinct class of remote damages in the strict sense of the word; of damages which flow from the illegal act, but for which the law gives no redress." Sedgwick, Damages (8th ed. 1891) 204, quoted with approval in Thieler v. Tillamook County, (1916) 81 Or. 277, 158 Pac. 804.

Many cases on avoidable consequences appear in the following casebooks: Beale, Cases on Damages (3d ed. 1928) Ch. VI; McCormick, Cases on Damages (1935) Ch. V; Crane, Cases on Damages (2d ed. 1940) Ch. V; and Bauer, Cases on Damages (3d ed. 1940) Ch. V.

[2](1835) 17 Pick. (Mass.) 284.

would have said, if the plaintiff's only misconduct had been an inadvertent omission to close the gap for a very short time, during which damage by marauding cattle occurred, we do not know. The case is no satisfactory authority on this point, although it has often been cited as sustaining the rule that a plaintiff cannot recover damages for consequences that would not have occurred but for plaintiff's subsequent failure to do those things which a reasonably prudent person would have done in order to avoid consequences, or, in other words, would not have occurred but for plaintiff's subsequent negligence in that he failed to prevent damage that he could have prevented by acting as a reasonable man. *Loker v. Damon,* cited supra, is a case of a wilful wrong of defendant, plus subsequent contributory reckless misconduct on the part of the plaintiff in his wilful failure to do anything to avoid damage that was obviously imminent. The plaintiff's conduct was flagrant, his attitude apparently being: "Let damage come. However big it may be, I'll make this fellow pay for it." Of course, the same court would have reached the same result if the misconduct of the defendant had amounted only to negligence, because this a fortiori must be so, for the reason that courts are more ready to use the rule of avoidable consequence to protect a merely negligent defendant than to protect a defendant who has done a wilful wrong to the plaintiff.

Although there seems to be a tendency to apply the rule of avoidable consequences much less frequently to cases of defendant's wilful tort or wilful breach of contract than to other cases, judicial opinions seldom say anything about any rule or principle based on such a tendency. A few cases have accorded express recognition, or a seeming tacit recognition, to a more or less vague modification of the operation of the rule of avoidable consequences on the apparent ground that defendant has acted wilfully or recklessly. Very seldom has a court clearly and expressly recognized that the rule of avoidable consequences affords any less protection to the wilful or reckless defendant than to the merely negligent defendant.

In *Athens Manufacturing Co. v. Rucker,*[3] the court regarded the flooding of plaintiff's land by defendant as intentional and not as merely negligent, and, because of this, held that the rule of avoidable consequences did not apply.

In *Satterfield v. Rowan,*[4] the court held that the principle that

[3](1887) 80 Ga. 291, 295, 4 S. E. 885.
[4](1889) 83 Ga. 187, 190, 9 S. E. 677.

the defendant may reduce the recovery for an injury by showing that the plaintiff did not use ordinary care to diminish or avoid the damage, does not apply where the act complained of is not a mere act of negligence but is a "positive, continuous, tortious act," committed by the defendant in carrying dirt and ore from a mine and washing it in a stream flowing through the land of both parties, thereby producing continued adulteration of plaintiff's water.

A wilful tort was before the court in *Carmen v. Fox Film Corporation*,[5] where defendant had wrongfully caused plaintiff's employer to discharge her. Page, J., said:

"While there is a duty as between employer and employee, for the employee to minimize the damage flowing from a breach of the contract, there is no obligation on the part of a person who has been deprived of the contract of employment by the intentional wrong of a third person to minimize the damage to the third person by entering upon other employment."

But the force of the decision in the *Carmen Case,* as one to the effect that the rule of avoidable consequences does not apply to intentional wrong, is weakened by the following words of the court:

"The defendants claim that the plaintiff could only work for them, and it was on that claim that they sought to justify their interference with the employment of the plaintiff by the Keeney corporation. It is to be presumed, if she had obtained employment of the same kind and character with some one else, that the defendants would also have interfered with that employment."

From this latter statement, it appears that the court regarded it as having been outside of the actual power of Miss Carmen to avoid consequences by getting a similar position with another company. Therefore the case is not very strong authority for the proposition that, where the wrong is wilful, the plaintiff is not under a disability to recover for avoidable damage. The court has virtually said that the consequence of plaintiff's unemployment was, from the plaintiff's standpoint, unavoidable.

Directly to the point is the observation of the court in *Rich-*

[5](1923) 204 App. Div. 776, 198 N. Y. S. 766. The following comment has been made upon this case: "It is submitted that there is no basis for the distinction between nonrecovery of avoidable consequences of a negligent tort, a breach of contract, and a wilful tort." Crane, Cases on Damages (1st ed.) 129 note. Undoubtedly this comment is perfectly proper. Any one liking the most logical, regular and orderly development of law would certainly prefer to agree with it. But here, as in many other portions of the law, the growth is not consistently logical, regular or orderly.

mond Hill R. Co. v. East Richmond Hill L. Co.,[6] as follows: "As a general rule, the law requires that one who has been injured either in his person or his property by the wrongful act of another especially where the act is not wilful or intentional or continued in bad faith, is under a duty to make reasonable effort to minimize the consequential damages, and if he does not make such reasonable effort he will be debarred from recovering the additional damages which result from such failure."

In support of the proposition that the rule of avoidable consequences does not apply to cases of intentional wrong, the court cites *Den Norske Amerikalinje Actiesselskabet v. Sun Printing & Publishing Association*,[7] in which Hiscock, C. J., said:

"But these cases [in which the requirement of avoiding consequences, where they can reasonably be avoided, is adhered to] do not involve instances of intentional injury to or invasion of the rights of person or property. Although the act complained of was unlawful as in breach of contract, or negligent, it was not performed with malicious or wilful intent to injure, and a distinction very well may be drawn between the two classes of cases in respect of any duty which would rest upon the injured party."[8]

Section 918 of the Restatement of the Law of Torts reads as follows:

"(1) Except as stated in Subsection (2), a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort.

"(2) A person is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended such harm or adverted to it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of such harm intentionally or heedlessly failed to protect his own interests."

It seems that the Restaters intended to project from the field of contributory negligence into the field of avoidable consequences the following formulae:

1. "Negligence of defendant + contributory negligence of plaintiff = no recovery."

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[6](1919) 226 N. Y. 1, 122 N. E. 463.

[7]Citing Athens Mfg. Co. v. Rucker, (1887) 80 Ga. 291, 4 S. E. 885; Satterfield v. Rowan, (1889) 83 Ga. 187, 9 S. E. 677; and Galveston, etc. Ry. Co. v. Zantzinger, (1898) 92 Tex. 365, 370, 48 S. W. 563, 44 L. R. A. 553, 71 Am. St. Rep. 859. The latter case is not really one of avoidable consequences, being rather a case sustaining the well-recognized rule that contributory negligence is not a defense to a wilful tort.

[8](1936) 246 App. Div. 301, 305, 285 N. Y. S. 424, 428.

2. "Recklessness of defendant + contributory negligence of plaintiff = recovery."

3. "Recklessness of defendant + contributory recklessness of plaintiff = no recovery."

On the question whether this section 918 of the Restatement is stated in the best possible manner, there would doubtless be much of disagreement. In fact, it would seem probable that very few practicing lawyers would like this section as it stands. The use of the word "advert" seems particularly unfortunate. It appears likely here that the meaning intended is "to turn one's attention to;" but the use of the word in this sense is not very common, and the word could mean "to refer to." Anyway, does the common man, the average juror, have any kind of clear conception of what is meant by such a word as "advert?" "Advert" is one of those vague English words of Latin derivation, which had, in the Latin, in the earlier centuries of its use, a meaning that was physical and plain, "to turn to." In classical Latin, *adverto* connotes a mental "turning to" a thing. In the English of today, "advert" is one of those vague, uncommon Latin derivatives, which tend rather to obscure than to clarify. "Advert" should not be used in any attempt to frame a rule of law that must be used as the basis of a clear instruction to a jury. A cloudy instruction to a jury is worthless. In the preface to the thirteenth edition of his textbook on Torts, the late Sir Frederick Pollock said that he had learned that a restatement of the law of torts was being undertaken by the American legal profession and that only good could come of such an undertaking if it were kept constantly in mind that the statement of rules of law of torts could be of value only if stated in such language as could be understood by a jury when put into the form of instructions. The word "advert" would always, at best, present so hazy a concept to the average juror, that the judge would, in every instance, find it necessary to explain the term or to substitute for it plainer English. If this portion of the Restatement had been placed before the legal profession in the form of a tentative draft, as were earlier portions, such a monstrosity might have been avoided, for practicing lawyers would have advised against it.

Quoting the above section of the Restatement of Torts, the Supreme Court of Mississippi, in a fairly recent case,[9] said: "This rule applies to all injuries wrongfully inflicted, whether

[9](1940) Yazoo & M. R. Co. v. Fields, 195 So. 489, 196 So. 503.

by means of a tort or the breach of a contract, and deals not with conduct of a plaintiff contributing to his injury, but with his failure to avoid the consequences of his injury after it has been inflicted, to avoid or diminish the damages resulting from his injury. Injury, strictly speaking, 'means something done against the right of the party, producing damage, whereas damage is the harm, detriment or loss sustained by reason of the injury.' " In overruling a suggestion of error in this case, the court held that, where railroad section workers set fire to grass between the main track and a spur track and left the place without completely extinguishing the fire, which later crossed the spur track and destroyed the plaintiff's gin house house and plant, if the fire had already reached the gin premises and was on the gin owner's private property at the time of plaintiff's gin foreman's asserted negligence in not intercepting the fire, the owner would be entitled to recover at least nominal damages, and that in itself was enough to avoid a peremptory instruction for the railroad, the defendant. In such a case, in other words, the technical right of action remains, although the doctrine of avoidable consequences may strip the action of all compensatory damages.

One wonders whether the direct proposition, sometimes made, that the rule of avoidable consequences does not apply to cases of wilful wrong has not its genesis in the rule that a wilful or reckless tortfeasor cannot set up contributory negligence as a defense. The avoidable consequences rule has sometimes been treated as if it were a part of the contributory negligence rule. This is natural, for the reason underlying the two rules is the same, i.e., that courts have not been willing to give a plaintiff damages for loss occasioned by his own act or omission.[10]

Probably most nuisances, if not amounting to wilful wrongs, can be said to be maintained in reckless disregard of the rights of neighboring property owners. Of course, this is not true of all nuisances; but the fact that it is true of so many of them is probably a factor in causing courts to treat so large a number of nuisance cases as not governed by the rule of avoidable consequences.

The rule of avoidable consequences was held not to apply to the nuisance of smelter smoke and fumes, where plaintiff, a farming corporation, could have minimized damage only by extraordinary expenditures and effort. The holding that extraordinary

[10]See Mayne, Damages (10th ed. 1927) 75, 87.

expenditures and effort need not be made by the plaintiff is of course usual in cases involving the issue of avoidable consequences; but, in this smelter case, the acts of defendant seem to have been flagrant and probably perpetrated in reckless disregard of the plaintiff's rights.[11]

An action was brought for damages resulting from depreciation in value of plaintiff's home and injury to the health of plaintiff's wife by reason of the operation of a gas plant very close to plaintiff's home. The court held that an instruction placing upon plaintiff a duty of minimizing damage was erroneous, saying:

"17 Corpus Juris, 777, under the heading 'Injury to Property,' states the rule to be that the requirement of minimizing damage is held not to apply in cases of nuisance, or in cases of intentional, or positive and continuing torts."[12]

It was held that the victim of a continuing nuisance was not required to take active measures, involving considerable expense, which might or might not be practical, to prevent further injury, in order to minimize damage.[13]

In an action wherein the court refers to "the wrongful acts of appellant's servants in negligently diverting the waters of 'Greasy Creek,' * * * and causing them to overflow and stand upon plaintiff's land," and refuses to allow the application of the rule of avoidable consequences, the following statement is made:

"He [plaintiff-appellee] was under no duty to relieve appellant of the consequences of its negligence, and could have done nothing in the matter of minimizing his damages, that would have been so effectual as the restoration by appellant of the natural streams by which his land was drained and its overflow prevented, before they were closed or changed by appellant."[14]

The court indicates that plaintiff might have been required to incur slight expense, but not great expense. Though this case seems to be treated by the court as one of nuisance arising through

[11]American Smelting & Refining Co. v. Riverside Dairy & Stock Farm, (C.C.A. 8th Cir. 1916) 236 Fed. 510.

"The rule requiring the injured party to protect himself from the consequences of the wrongful act of another by the exercise of ordinary effort, care, and expense on his part does not apply in cases of nuisances." De Young, J., in Johnston v. City of Galva, (1925) 316 Ill. 598, 147 N. E. 453, 38 A. L. R. 1384.

[12]Champa v. Washington Compressed Gas Co., (1927) 146 Wash. 190, 262 Pac. 228.

[13]Joerger v. Pacific Gas & E. Co., (1929) 207 Cal. 8, 276 Pac. 1017.

[14]Madisonville, etc. R. Co. v. Cates, (1910) 138 Ky. 257, 127 S. W. 988.

defendant's negligence, if every person may be taken to intend the almost certain results of his acts, it would seem that it is possible to say that here the wrong was intentional or at least reckless, for the circumstances of the case would tend to prove that the result was one that the defendant knew to be coming as a result of his act. Probably, at the very least, recklessness is involved.

Where defendant wilfully caused damage to plaintiff by obstructing a ditch and overflowing plaintiff's land, it was held that plaintiff was not bound to remove the obstruction from the ditch or to dig an opening around the obstruction in muddy weather.[15]

Where the defendant, a power company, by its wilful act in placing dams and generators, set back the water of a river, rendering a ford between the lands of riparian owners impassable, and the defendant maintained a ferryboat at such ford, it was held that the defendant's conduct in maintaining such boat did not impose upon the plaintiffs, riparian owners, a duty to operate a similar boat in order to mitigate damages.[16]

In an action for fraud, it was held that it was not the duty of the defrauded party to attempt to minimize damages by making a reasonable effort to realize on his investment, which had been fraudulently induced by the defendant.[17]

Where an action was brought for the defendant's making it impossible for the plaintiff to use his pool for cotton-ginning purposes, by dumping burning cotton into it, it was held that the plaintiff was under no duty to diminish damage by restoring the pool. The plaintiff was held to be entitled to damages for the injuries to the pool, whether it was restored or not.[18]

The defendants wrongfully and forcibly ejected the plaintiff from land on which he had lived in a tent, and destroyed and burned his tent. They carried some of his goods to a poor person, to be used as fuel, and scattered the rest on the ground. It was held that the plaintiff owed the defendants no duty to gather such fragments, but was at liberty to leave them and to recover damages for their loss.[19] Of course, it must be admitted that this result might be justified on the ground that, when the goods of

[15]Wood Mosaic Co. v. Britt, (1912) 150 Ky. 357, 150 S. W. 355.
[16]Fewell v. Catawba Power Co., (1915) 102 S. C. 452, 86 S. E. 947.
[17]Penfield v. Berhenke, (1915) 94 Kan. 532, 146 Pac. 1187.
[18]Ross & Ross v. St. Louis, I. M. & S. R. Co., (1915) 120 Ark. 264, 179 S. W. 353.
[19]Eisele v. Oddie, (D. Nev. 1904) 128 Fed. 941.

plaintiff had thus been converted, plaintiff could sue for their full value, without making any attempt to get them back, or according to the better view, even refusing to accept their return by the wrongdoer.

In a case of wilful destruction of claimant's forebay, trespass, and building a wall on the plaintiff's land, the plaintiff was held to be under no duty to take extraordinary measures to minimize damages.[20]

In an action of trespass, where the treaspasser took gravel from the plaintiff's land and thereby weakened the plaintiff's irrigation ditch, the plaintiff was held to be under a duty only to make reasonable expenditures and efforts.[21]

An action was brought for the wrongful refusal of defendant to supply water to plaintiff for irrigation purposes. In affirming judgment for plaintiff on a verdict for $2,300, the court said that the rule of avoidable consequences did not require a plaintiff to do anything unreasonable. Apparently the plaintiff could have avoided damages by paying to the defendant $60. Clearly the fault of the defendant was great. The "duty" of the plaintiff to avoid consequences was relaxed.[22]

Whatever formula is used, whether it be that the rule of avoidable consequences does not apply to cases of wilful or reckless wrong, or that plaintiff is not obliged to go to extraordinary trouble and expense to avoid consequences, which latter formula, perhaps with a somewhat different force, would be true even in a negligence case, such cases as the above rather obviously relax the "duty" to avoid damage as fault increases.

An action was brought for damages for the defendant's inducing a third party to break a contract to furnish the plaintiff certain machines. The court held that it would have been improper to give instruction that defendant was not liable for damage that could have been avoided by the plaintiff's using the defendant's machines, for the reason that the defendant had no right to shut out plaintiff from every other market and thus to force the plaintiff to buy machines from the defendant.[23] Here the "duty" of the plaintiff to avoid damage is relaxed. The tort of the defendant is wilful, and his fault is very great.

[20]People's Gas & E. Co. v. State, (1919) 189 App. Div. 421, 179 N. Y. S. 520.

[21]Bader v. Mills & Baker Co., (1921) 28 Wyo. 191, 201 Pac. 1012.

[22]Northern Colorado Irr. Co. v. Pouppirt, (1912) 22 Colo. App. 563, 127 Pac. 125.

[23]Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co., (C.C.A. 1st Cir. 1908) 159 Fed. 824.

In an action brought for fraud in selling an imperfect title to land, it was held that plaintiff did not have to avoid damage by buying in the outstanding title piecemeal or by running the chance of a purchaser's rights which could not be determined without litigation. The court said:

"Doubtless cases will arise when a duty may rest on one defrauded to minimize his loss; but this is not such a case, and we, of course, must limit our holding to the facts in the case before us."[24]

An action was brought for personal injuries. The plaintiff, a boy, was riding in the defendant's truck, which was driven by defendant. The plaintiff's presence in the truck had been consented to by the defendant. While the plaintiff was preparing to alight on a slippery highway, the defendant accelerated with a jerk, throwing the plaintiff to the pavement and seriously injuring him. On the question of the "duty" of the plaintiff to mitigate damage by having a surgical operation, the court said: "Of course, the plaintiff cannot be compelled to submit to an operation which involves the least danger to life."[25] When one considers that this was a case in which there was apparently more than the negligence of which the court speaks, in fact, perhaps considerable recklessness in the conscious taking of a great chance of throwing the boy to the highway by acceleration so sudden, one suspects that this recklessness may have been a factor in causing the court thus severely to limit the operation of the rule of avoidable consequences in this case, for the rule limiting the "duty" to undergo a surgical operation is not ordinarily so closely limited as it is here, when the court says that the plaintiff cannot be compelled to submit to an operation which involves the *least danger* to life in order to mitigate damages. One may well compare the more fairly typical negligence case of *Ward v. Ely-Walker Dry Goods Co.*,[26] which recognizes the "duty" of plaintiff to undergo a head operation, where the facts seem to make it obvious that such operation could not possibly have been without the "least danger to life." The latter case is, however, very clearly a pure and simple negligence case.

The American Law Institute's Restatement of the Law of Contracts does not take into account any difference in administering the avoidable consequences rule against wilful contract-

[24]Haukland v. Muirhead, (1925) 233 Mich. 390, 206 N. W. 549.
[25]Murray v. Cohen, (1926) 4 N. J. Misc. 139, 132 Atl. 221.
[26](1913) 248 Mo. 348, 154 S. W. 478, 45 L. R. A. (N.S.) 550.

breakers and negligent or accidental contract-breakers, merely saying:

"Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."[27]

Yet there exist contract cases on avoidable consequences in which clearly the courts have considered motive in the breach. Such a case is *Beeson Bros. v. Chambers*,[28] in which sawmill owners contracted with a hauler of lumber to put a road in good condition. It was held that the hauler, upon breach by the sawmill owners, was not under a duty to mitigate damages by repairing the road. The court gives as a justification the fact that the defendant sawmill owners were authorized by the road commissioners to make such repairs, and that plaintiff hauler was not so authorized, but does not say that the plaintiff could not easily have obtained such authority. Perhaps a more important reason is that this was plainly a case of wilful and malicious breach of contract. The court stresses motive.

In spite of the fact that courts generally hold that punitive damages cannot be assessed for breach of contract, they have sometimes treated roughly the wilful breaker of a contract, by stretching legal principles, particularly the principles of the law of damages. In the comparatively recent case of *Groves v. John Wunder Co.*,[29] the plaintiff owned a tract of 24 acres of Minneapolis suburban real estate, served or easily reached by railroad tracks, and zoned for heavy industry; but, for lack of development of the neighborhood, it seemed that its principal value was in the deposit of sand and gravel therein contained. The plaintiff had on the tract a plant for excavating and screening the gravel. The defendant owned and operated a similar plant on neighboring land. Plaintiff and defendant entered into a contract, under which plaintiff leased to defendant its tract for a term of seven years, defendant agreeing to remove the sand and gravel and to leave the property "at a uniform grade, substantially the same as the grade now existing at the roadway * * * on said premises, and that in stripping the overburden * * * it will use said overburden for the purposes of maintaining and establishing said grade." Under the contract, defendant got plaintiff's screening plant and inci-

[27]Sec. 336 (1).

[28](1930) 155 Wash. 564, 285 Pac. 433.

[29](1939) 205 Minn. 163, 286 N. W. 235, 123 A. L. R. 502, annotated in (1939) 24 MINNESOTA LAW REVIEW 114, (1939) 53 Harv. L. Rev. 138, and (1940) 40 Columbia L. Rev. 323.

dentally got rid of plaintiff as a competitor. Defendant paid plaintiff $105,000. Defendant broke the contract deliberately. "It removed from the premises only 'the richest and best of the gravel' and wholly failed, according to the findings, 'to perform and comply with the terms, conditions, and provisions of said lease * * * with respect to the condition in which the surface of the demised premises was required to be left.' Defendant surrendered the premises, not substantially at the grade required by the contract 'nor at any uniform grade.' Instead, the ground was 'broken, rugged, and uneven.'" If defendant had performed its undertaking to level off the ground, plaintiff's tract would have been worth $12,160, for which, plus interest and costs, plaintiff had judgment. Plaintiff appealed, contending that it should have judgment in a sum sufficient to pay the cost of placing the ground in the condition in which defendant had contracted to place it. It was found that the reasonable cost of leveling the land would involve the excavation of 288,495 cubic yards of overburden, transportation of it from the premises, and the depositing of it elsewhere, which would bring the cost of defendant's performance to more than $60,000. In reversing the judgment, the supreme court held that the larger sum should be recovered. If the case had arisen on facts different in that plaintiff had already, at the time of bringing action, expended the necessary $60,000 or more to avoid the damage that might accrue from having the land unleveled as a result of the breach of contract by defendant, would the same court have said that plaintiff could recover for his expenditure, as against a contention on the part of defendant that such an expenditure constituted an element of avoidable damage? Probably so, when one considers the attitude of the court here toward the wilful contract-breaker.

In an action for breach of a charter-party by a freighter, in not supplying a cargo, it was held that the plaintiff was not under a duty to get rid of expense by keeping his boat and horses unemployed and dismissing his employees. Apparently this also was a case of wilful breach.[30]

With what appeared to be wilfulness, a buyer broke his contract to purchase timbers. It was held that the seller, to mitigate damages, need not sell to a person of doubtful credit.[31] If there were sufficient doubt about the credit, probably this would be so in any case; but it is natural to wonder whether a case of some-

[30]Benson v. Atwood, (1858) 13 Md. 20.
[31]T. J. Moss Tie Co. v. Phelps, (1911) 138 Ky. 71, 127 S. W. 516.

what slight doubt as to such person's credit might not be sufficient to excuse the seller from reselling, if the breach were wilful.

Defendant's agent had agreed to sell plaintiff, a woman, a railroad ticket to Lexington and Frankfort, to expire on the 15th; but he gave her a ticket to Elkatawa, to expire on the 12th. Her trip was ruined by her being escorted from the train at Elkatawa. Defendant's conductor, on the return trip, threatened to expel her from the train, whereupon, to avoid expulsion, she borrowed money from passengers. The case may properly be viewed as one presenting a somewhat flagrant, though negligent, breach of contract. The court, in affirming a judgment for $850, held that plaintiff was not under a duty to exercise more than ordinary care to avoid damage.[32]

In a case of apparently wilful breach of contract by a purchaser, Lurton, United States Circuit Judge, referring to the rule that one must do what he reasonably can to mitigate the loss, said: "The duty imposed by the equitable rule referred to must be held within reasonable bounds. It is a rule which has never been regarded as requiring one to yield to a wrongful demand that he may thereby save the wrongdoer from the legal consequences of his own error."[33]

It has often been said in judicial opinions that only slight expenditure by the plaintiff is required, and that he need not go to great expense to avoid damage caused by defendant's wrongful act. Where this kind of pronouncement is made in a contract case, it is ordinarily a case of wilful breach. In *Stanley Manly Boys' Clothes, Inc. v. Hickey,*[34] the court said: "The duty to mitigate damages to favor one who has so breached his contract with you does not require an outlay of anything more than slight expense. No great expense or unusual or burdensome exertion or effort is required. We think the assumption of a debt to some third person is an unusual and unreasonable effort. * * * Breaches of contract should not be encouraged or made easy." The case in which this pronouncement was made was clearly a case of wilful breach.

Likewise, the restriction on the rule, to the effect, in terms, that only reasonable effort need be made to avoid consequences,

[32]Louisville & N. R. Co. v. Sandlin, (1925) 209 Ky. 442, 272 S. W. 912.

[33]Hirsch v. Georgia Iron & Coal Co., (C.C.A. 6th Cir. 1909) 169 Fed. 578.

[34](Tex. Com. App. 1924) 259 S. W. 160.

appears in what seem to be principally cases of wilful breach of contract. In *Salembier, Levin & Co. v. North Adams Manufacturing Co.*,[35] a case in which there seem to have been no extenuating circumstances attending the breach, and very possibly a wilful breach, the court said: "If the injured party makes reasonable efforts on behalf of the one in default, he has done all he is required to do." Furthermore, the court stresses the fact that defendant could have performed in full, if it had taken proper preparatory steps in season.

The plaintiff, a bondholder, under the terms of the bonds, had a right to convert the bonds. The defendant, the corporation issuing the bonds, denied the plaintiff's right to convert. It was held that plaintiff was not bound to accept principal and interest due on the bonds in order to mitigate damages for defendant's refusal to convert.[36] Here was an obvious case of wilful and high-handed breach of contract.

Even if, however, there be a very flagrant breach of contract, if there be also very great ease in avoiding consequences, it has often been required that the plaintiff shall have acted with reasonable diligence to mitigate damages. For instance, where action was brought by sellers of tobacco against a buyer for refusing to receive tobacco and pay for it according to contract, and defendant, the buyer, offered to accept and pay for all of the tobacco except a little, but the plaintiffs refused, judgment for plaintiffs was reversed, on the ground that plaintiffs could easily have avoided nearly all damage by permitting the defendant to have what he wanted.[37]

A brought action against B, a carrier, for misdelivery at point of destination of a carload of lumber. The shipment was to A's own order, with a specification in the bill of lading to notify C, to whom the shipment had been sold. The lumber was delivered directly to C, without A's consent or direction. A did not immediately learn of the delivery, and spent considerable time in fruitless negotiation with C. After A learned what had happened, C having used some of the lumber, A sold the rest to another purchaser, refusing to accept the offer of C to take the lumber and pay full price. The court held that A's conduct was not such as to

[35](1919) 178 N. Y. S. 607.

[36]Brooks & Co. v. North Carolina Pub. Serv. Co., (N.D. N. Car. 1929) 32 F. (2d) 800.

[37]Byars v. Hammock, (1924) 205 Ky. 684, 266 S. W. 365. See also Weed v. Lyons Petroleum Co., (D. Del. 1923) 294 Fed. 725, aff'd Lyons Petroleum Co. v. Weed, (C.C.A. 3d Cir. 1924) 300 Fed. 1005.

justify B in asserting that the shipper had not sought to reduce its damage by accepting the breach of the original contract of purchase by the consignee, and that the shipper, A, was not bound to break its new contract in order to accept the consignee's newer offer to take the lumber.[38]

Even where defendant's wrong is wilful, a court is sometimes ready to apply the avoidable consequences rule in favor of defendant, if the plaintiff has suffered damage that could very easily have been avoided by the plaintiff. Where there was a wilful breach of contract to sell treasury stock of a corporation but it would have been very easy to avoid consequences by purchasing the same stock in the market, it was held that the plaintiff should have so acted to mitigate damages and that he could not recover for the damage that was avoidable.[39]

The American Law Institute's Restatement of Torts, Section 918, endeavors to tie up the entire subject of avoidable consequences in torts in the same strait jacket in which, perhaps properly enough, is confined, at least in theory, the entire subject of contributory negligence. While it might seem logical to do just what the Restaters have done, it is submitted that this attempt to state in rigid and exact form a rule to govern that which is not generally treated by courts as being rigid and exact, is unfortunate. An examination of the cases on avoidable consequences will reveal the fact that only in a very few instances has a court spoken as if so rigid a principle as that in the Restatement existed at all. The degree of the blameworthiness of the defendant has clearly and profoundly affected the disposition of these cases; but the mere nebula of tendency has not become solidified into the rigid substance of an exact rule. It is further submitted that to attempt the statement of such a rule as that in the Restatement will not cause the actual disposition of these cases to be at all different from what it has been in the past.

A great many cases are found in which courts have applied the avoidable consequences rule to instances of negligent torts and to those of negligent or accidental breaches of contract. Sometimes the operation of the rule is completely excluded from a case of wilful or reckless tort or of wilful breach of contract, and the operation is often closely limited in such cases. Unobtrusively, quietly, and sometimes in complete silence on the subject, there

[38]St. Louis, I. M. & S. Co. v. Bliss-Cook Oak Co., (1915) 118 Ark. 323, 176 S. W. 325.

[39]Weed v. Lyons Petroleum Co., (D. Del. 1923) 294 Fed. 725.

seems to be attached to the general rule of non-liability for avoidable consequences a kind of corollary to the effect that the rule must be relaxed to an unstated degree when it is invoked in favor of defendants guilty of wilful or reckless wrongs. The degree of defendant's blameworthiness often modifies the operation of the general rule of avoidable consequences; but this modification, it is submitted, is nearly always one resulting from tendency rather than from the application of any rigid rule.