

The Court decided that there was an infringement. The fact that one's memory has failed is no defence. Therefore there was an absolute right in the plaintiff to recover, although there was no evidence of bad faith on the part of the defendant.

Since there was no evidence of damages having been sustained on account of the infringement, the Court allowed the plaintiff minimum damages.

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INTERNAL REVENUE—ADVANTAGEOUS PAYMENT OF A DEBT IN GERMAN MARKS AT A PREVIOUSLY LOWER RATE OF EXCHANGE, DOES NOT CONSTITUTE TAXABLE INCOME.

*Kerbaugh-Empire Co. v. Bowers*, 300 Fed. 938.

This action is brought by the plaintiff to recover an amount paid under protest as first and second quarterly installments of a corporation income tax for the year 1921. The defendant at all times material, was collector of internal revenue, second district, New York.

The plaintiff borrowed money for certain construction work, from a German bank, in marks, at the then prevailing rate of exchange, in 1913. A settlement of both principal and interest was reached and payment to the Alien Property Custodian made in 1921. The result of the transaction was that, by reason of the fall in the value of the mark the difference between the principal amount borrowed and the amount paid in settlement was \$684,456.18. The income tax paid on this amount is now sought to be recovered.

Held that this difference is not taxable as income under Constitutional Amendment 16, nor Revenue Act of November 23, 1921, since it was not derived from employment of capital, labor or both, or from sale or conversion of capital assets resulting in profit.

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SALES—FLUCTUATION IN PRICE OF GOODS HELD NOT TO RENDER PERFORMANCE OF CONTRACT "COMMERCIALY IMPRACTICABLE" — DUTY TO MINIMIZE DAMAGES — BREACH OF CONTRACT.

*Edgar & Son v. Grocers' Wholesale Co.*, 298 Fed. 878.

Held, that under a contract for sale of sugar to a wholesale grocery company, made at a time when the price was abnormally high and subject to wide fluctuations, a provision that the contract was "subject to strikes, fires, transportation and business conditions, and other extraordinary causes which render performance commercially impracticable" did not justify the buyer in refusing to accept shipment because of a drop in the market price of three cents a pound, where it continued to buy sugar from others and sell in the ordinary course of its business. On absolute repudiation of a contract by the buyer before performance, it is the duty of the seller to minimize his damages from the breach, and where the sale is of a commodity, such as sugar, which is as readily obtainable at shipping point as at the destination, he is not justified in making shipment and incurring large expense of transportation and storage, and is not entitled to recover such unnecessary expense as part of his damages.