"Subject to these observations I think there are certain broad principles which are quite settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."[1]

The purpose of this paper is to consider to what extent, if at all, the duty to mitigate damages applies in cases of anticipatory breach.

Cheshire and Fifoot, when dealing with the subject of mitigation of damages, state:[2]

> "Thus, to take the case of so-called anticipatory breach, if the defendant repudiates in May a contract for the delivery of coal on July 1st, the plaintiff, as we have seen, may sue for breach either at the time of repudiation or at the time fixed for performance. If, however, the market is rising steadily his duty as a prudent man is, not to wait until the market has risen further and thus to increase the damages ultimately payable by the defendant, but if a reasonable opportunity presents itself, to buy equivalent coal on the best terms possible."

It is submitted that this is not an accurate statement of the law, which cannot be supported by the authorities, and that the learned authors have failed to appreciate the importance of the distinction between accepted and unaccepted repudiation.

In support of their proposition Cheshire and Fifoot cite *Payzu Ltd. v. Saunders*[3] and *Roper v. Johnson*.[4]

Roper v. Johnson was a case where the defendant had agreed to deliver coal to the plaintiffs by instalments in May, June, July, and

1 British Westinghouse Electric Co., Ltd. v. Underground Electric Rys., [1912] A.C. 673, at 689 *per* Lord Haldane L.C.

2 LAW OF CONTRACT (5th edn.), 511.

3 [1919] 2 K.B. 581.

4 (1873) L.R. 8 C.P. 167.

August. No coal was ever delivered and the defendant repudiated the contract on 31st May and again on 11th June, and on 3rd July the plaintiffs issued a writ against the defendant. It was held by the court (Keating, Brett, and Grove JJ.) that the plaintiffs' measure of damages was the difference between the contract price and the market price at the several periods for delivery. Counsel for the defendant argued that the measure of damages should have been the difference between the contract price and the market price on the day on which the plaintiffs issued their writ and thereby treated the contract as at an end; the court rejected this argument on the grounds that there was no evidence to show that the plaintiffs could or should have gone into the market on the day when they issued their writ and thereby mitigated their loss, and that the burden of proving that they might have done so lay on the defendant. The decision in this case turned on the burden of proof, but it would seem to follow from the judgment that had the defendant been able to show that the plaintiffs could have gone into the market and obtained another contract on the day they issued their writ, and would have lessened their loss had they done so, then the measure of damages would have been the difference between the contract price and the market price at the date of issuing the writ. However, in *Roper v. Johnson* the repudiation had been accepted, and it is interesting to note that counsel for the defendant claimed that damages should be assessed with reference to the price at which the plaintiffs might have obtained coal on the day they accepted the repudiation, and not on the day that the repudiation was first communicated to them. A stronger case in support of the view taken by Cheshire and Fifoot is *Payzu Ltd. v. Saunders.*[5] In that case the defendant had contracted to sell goods to the plaintiff for delivery by instalments, payment for each instalment to be made within one month of delivery less $2\frac{1}{2}$ per cent. discount. The plaintiffs failed to make punctual payment for the first instalment, and the defendant, in the erroneous belief that the plaintiffs' failure to pay was due to their lack of means, refused to make any more deliveries unless the plaintiffs paid cash with each order. The plaintiffs refused to do this and brought an action for breach of contract, claiming as damages the difference between the contract price of the goods and the market price, which had risen since the defendant's refusal to deliver under the contract and their offer to deliver the goods if cash were paid with each order. McCardie J. held that the plaintiffs' failure to make punctual payment for the first instalment did not show an intention to repudiate the whole contract and did not justify the defendant in

[5] [1919] 2 K.B. 581.

refusing to deliver any more goods under the terms of the contract; the defendant, therefore, was liable for damages. McCardie J. further held, however, that the plaintiffs should have mitigated their loss by accepting the defendant's offer and that the measure of damages was not the difference between the contract and the market price of the goods, but only such loss as the plaintiffs would have suffered if they had accepted the defendant's offer. The plaintiffs appealed on the question of damages and the Court of Appeal upheld the decision of McCardie J. It is doubtful, however, if *Payzu Ltd. v. Saunders* is really a case of anticipatory breach. It is submitted that the defendant's offer to supply the goods if cash were paid with each order did not amount to a repudiation of the entire contract, but was merely a breach of a term of the contract. Nowhere does either the Court of Appeal or McCardie J. refer to the defendant's offer as a repudiation of the contract;[6] nor do they appear to have concerned themselves with the question as to whether anticipatory breach imposes an immediate duty to mitigate upon the innocent party, or whether the innocent party may wait until the date for performance arrives before taking steps to mitigate his loss. "The question, therefore," said McCardie J., "is what a prudent person ought reasonably to do in order to mitigate his loss arising from a breach of contract."[7] And Bankes L.J. said: "It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."[8] It would seem, therefore, that the judges in this case were considering not whether the plaintiff was under a duty to mitigate his damages, but what he should do to mitigate them. McCardie J., in his judgment, relied on *Brace v. Calder;*[9] *Brace v. Calder,* however, was not a case of anticipatory breach. In that case the plaintiff was employed as manager by a firm of four partners for a period of two years, it being a term of the contract that the plaintiff might be dismissed on one month's notice, but that in such a case he was to receive a sum equivalent to the salary which he would have received if he had been retained as manager for the full period of two years. Two of the partners retired before the two years period was up, but the remaining two partners expressed their willingness to continue to employ the plaintiff on the same terms. The plaintiff refused to continue in the employment of the remaining two partners, and brought an action

6 The only reference to the defendant's offer as a repudiation was made in the argument of the plaintiff's counsel, mentioned by McCardie J. at 585.

7 [1919] 2 K.B. 581, at 586.

8 *Ibid.,* at 588.

9 [1895] 2 Q.B. 253.

claiming that the dissolution of the original partnership by the defendants amounted to a wrongful termination of his contract of employment. The judge at first instance, Wright J., gave judgment for the defendants on the ground that the change of the firm did not amount to a breach of contract by the defendants. The Court of Appeal (Lopes and Rigby L.JJ.; Lord Esher M.R. dissenting) reversed this decision, but awarded the plaintiff only nominal damages, as they held that the plaintiff should have mitigated his damages by accepting the offer of the two remaining partners to continue to employ him on the same terms. This case should be contrasted with *Shindler v. Northern Raincoat Co.*,[10] a true case of anticipatory breach. In this latter case the plaintiff entered into a contract of employment with the defendants in April 1958, the employment to be for a period of ten years. In September 1958 the defendants informed the plaintiff that they were going to terminate his contract with them in November 1958 and offered him other employment at the same salary. The plaintiff declined the offer, and Diplock J. held that as the plaintiff had not accepted the defendants' repudiation there was no breach of the contract between the plaintiff and the defendants until the plaintiff was dismissed by the defendants in November, and that the plaintiff was under no duty to mitigate his damages by accepting the defendants' offer of alternative employment. "The position was that, on the correspondence, the defendants had, by the letter dated September 2nd, 1958, told the plaintiff that his service with them would terminate not later than November 30th, 1958. That was a wrongful repudiation of the contract which the plaintiff had an opportunity either to accept by rescinding the contract and thus entitle himself to sue for damages, or to continue to treat the contract as subsisting and to continue to serve as managing director. He elected to do the latter and there was accordingly no breach of the contract on which he could sue until his office as director was terminated on November 21st, and between September 2nd and November 21st the defendants had a locus paenitentiae in which they could have changed their minds and decided to go on employing him. It seems to me that on (*sic*) a matter of law it cannot be said that there is any duty on the part of the plaintiff to mitigate his damages before there had been any breach, which he has accepted as a breach."[11] In *Brace v. Calder* the offer of alternative employment was made after the breach had taken place, while in *Shindler v. Northern Raincoat Co.* the offer was made before the actual termination of the contract of employment.

[10] [1960] 1 W.L.R. 1038.

[11] *Ibid.*, at 1048, *per* Diplock J.

Lord Keith of Avonholm, in the course of a dissenting judgment in *White and Carter (Councils) Ltd. v. McGregor*,[12] which seems to lend support to the view taken by Cheshire and Fifoot, said:[13]

> "Yet in *Hochster v. De La Tour*,[14] from which the whole law about anticipatory breach stems, Lord Campbell plainly indicated that if the courier in that case, instead of accepting as he did the repudiation of his engagement as a cause of action, before it was due to commence, had waited till the lapse of the three months of the engagement he could not have sued as for a debt."

Hochster v. De La Tour, however, was a case of the right to sue immediately upon repudiation, and was not concerned with the question of damages. The plaintiff was a courier who had been engaged in April by the defendant to accompany him on a tour commencing on 1st June. When the defendant repudiated the contract in May, it was held that the plaintiff could sue immediately and did not have to wait until 1st June before bringing his action. It is true that Lord Campbell C.J. delivering the judgment of the Court (Lord Campbell C.J.; Coleridge, Erle, and Crompton JJ.) said:—[15]

> "An argument against the action before the 1st of June is urged from the difficulty of calculating the damages: but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of the trial."

Here, however, Lord Campbell was merely saying that if the plaintiff had chosen not to accept the defendant's repudiation, and had waited until the day for performance had arrived, he would have been under a duty to take all reasonable steps to mitigate his damages when the contract was broken on 1st June, and would not have been entitled to wait until 1st September; he did not say that the plaintiff was under a duty to take steps to mitigate his damages as soon as he learned of the defendant's repudiation. Moreover, Lord Campbell then went on to cite with approval *Leigh v. Paterson*[16] and *Phillpotts v. Evans*,[17] two cases which are directly against the view adopted by Cheshire and Fifoot. In *Leigh v. Paterson* the defendant had agreed to sell goods

12 [1962] 2 W.L.R. 17.
13 *Ibid.*, at 31.
14 (1853) 2 El. & Bl. 678, 118 E.R. 922.
15 (1853) 2 El. & Bl. 678, at 691; 118 E.R. 922, at 927.
16 (1818) 8 Taunt. 540, 129 E.R. 493.
17 (1839) 5 M. & W. 475, 151 E.R. 200.

to the plaintiff, delivery to be in December, and repudiated the contract in October; the plaintiff, however, did not accept the defendant's repudiation. The market price of the goods was considerably lower in October, when the contract was repudiated, than it was in December, when the contract was due to be performed, and the defendant argued that the measure of damages should be the difference between the contract price of the goods and the market price on the day of repudiation. It was held, however, that the plaintiff was entitled to the difference between the contract price and the market price when the contract was due to be performed. In *Phillpotts v. Evans* the plaintiff agreed to sell goods to the defendant and when the market began to fall the defendant gave notice to the plaintiff that he would not accept the goods when delivered. It was held that the plaintiff was entitled to the difference between the contract price and the market price on the day due for delivery, and not the difference between the contract price and the market price on the day when the defendant repudiated the contract. Lord Keith also cited the case of *Frost v. Knight*,[18] and support for the view taken by Cheshire and Fifoot might seem to be found in a passage from the judgment of Cockburn C.J., who said:—[19]

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.
>
> On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

This passage, however, is *obiter*, as *Frost v. Knight* was also a case on the right to sue immediately upon repudiation, and was not

18 (1872) L.R. 7 Ex. 111.
19 *Ibid.*, at 112.

concerned with the question of damages: moreover the Chief Justice's proviso as to the duty to mitigate damages referred only to cases where the repudiation had been accepted as it had been in *Frost v. Knight.*

A similar view to that of Cheshire and Fifoot is put forward in the twenty-first edition of Chitty on Contracts,[20] and in support of this view the editors cite *Melachrino v. Nickoll and Knight,*[21] *Roth v. Taysen,*[22] and *Millett v. Van Heek & Co.*[23] It is submitted that *Melachrino v. Nickoll and Knight* is not strictly apposite. In that case the plaintiffs had agreed to sell goods to the defendants, but repudiated the contract before the due date for delivery; the defendants accepted the repudiation, but did not buy other goods on the market. The market price of the goods was above the contract price at the time of repudiation, but had fallen below the contract price by the due date for delivery. It was held that the buyers were entitled only to nominal damages as they had not, in fact, suffered any loss as a result of the breach of contract. Support for the view taken by Cheshire and Fifoot may be found in a passage from the judgment of Bailhache J., where he said:—[24]

> "In my opinion the true rule is that where there is an anticipatory breach by a seller to deliver goods for which there is a market at a fixed date the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived the Court must arrive at that price as best it can. To this rule there is one exception for the benefit of the defaulting seller—namely, that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages."

Here, however, Bailhache J. was referring to cases where the repudiation had been accepted; and earlier he had said:—[25]

> "It is also settled law that when default is made by the seller by refusal to deliver within the contract time the buyer is under

20 Volume I, 434; Volume II, 669. The editors of the 22nd edn. have adopted the opposite view (Volume I, 593).

21 [1920] 1 K.B. 693.

22 (1895) 12 Times L.R. 100, (1896) 12 Times L.R. 211.

23 [1920] 3 K.B. 535, [1921] 2 K.B. 369.

24 [1920] 1 K.B. 693, at 699.

25 *Ibid.*, at 697.

no duty to accept the repudiation and buy against him but may claim the difference between the contract price and market price at the date when under the contract the goods should have been delivered."

Roth v. Taysen and *Millett v. Van Heek and Co.* were also cases where the repudiation had been accepted. In *Roth v. Taysen*[26] there was a contract for the sale of goods, which was repudiated by the buyers. The sellers accepted the repudiation, but did not attempt to sell the goods on the market until the date for performance arrived. The market was falling, and the price of the goods on the market was lower on the day when performance became due than on the day when repudiation was accepted. It was held by Mathew J. that the sellers' measure of damages was the difference between the contract price and the market price on the day when the repudiation was accepted, and not the difference between the contract price and the market price on the day when performance became due; this decision was upheld by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.). In this case, however, the repudiation had been accepted; and both Mathew J. and Lord Esher M.R. indicated in their judgments that the sellers were under a duty to mitigate their damages because they had accepted the repudiation. Mathew J. said:—[27]

"The authorities seemed to him to establish that where, in a case like the present, a seller *treated the repudiation as a wrongful ending of the contract, and brought his action,* he would be entitled to damages, subject to abatement in respect of circumstances which might have afforded him the means of diminishing the loss."

Lord Esher M.R. said:—[28]

"The sellers need not have accepted that repudiation, but it gave them a right to treat the repudiation as a breach of the contract. The sellers by bringing the action treated the repudiation as a breach. There was therefore a contract and a breach of it, and the appeal failed. Then as regards the cross-appeal, which raised the question of damages, the rule was that when there was a repudiation of a contract of purchase and sale of goods *treated as a breach* the difference between the contract price and the market price of the goods on the date of the breach was the measure of damages, subject to this, that if the date of the breach was not the day of delivery another rule applied. In this latter

26 (1895) 12 Times L.R. 100, (1896) 12 Times L.R. 211.
27 (1895) 12 Times L.R. 100. Italics added by author.
28 (1896) 12 Times L.R. 211, at 212. Italics added by author.

case the repudiation *when accepted* was treated as a breach of the contract before the day of delivery, and the damages would not be the difference between the contract price and market price on the day of the breach, but must be assessed by the jury having regard to the future day of delivery. But this latter rule was qualified by this, that the plaintiffs, *who had treated the repudiation as a breach,* were bound to do what was reasonable to decrease the damages."

In *Millett v. Van Heek & Co.*[29] the plaintiff agreed to sell goods to the defendants, but repudiated the contract before the date for performance arrived; the repudiation was accepted. The Divisional Court (Bray and Sankey JJ.) held that the buyers' damages should be the difference between the contract price of the goods and the market price at the time when the contract should have been performed, subject to the buyers' duty to mitigate damages. This case, however, was also one where the repudiation had been accepted; and the duty to mitigate arose when and because the repudiation had been accepted, as appears from the judgment of Bray J., who said:—[30]

"We hold that *prima facie* the damages should be the difference in price between the contract price and the price at which the goods should have been delivered according to the terms of the new contract as decided by us. Deliveries will have to be made at different times, and this rule must apply to each delivery. This is however only a *prima facie* rule. If it can be shown by either party that the reasonable course for minimizing the damages would be otherwise, this *prima facie* rule should not be applied. For instance, if it could be shown that the reasonable course to be pursued would be for the buyer to enter into a forward contract on the date *when the repudiation was accepted,* the damages should be assessed according to the difference between that price in that forward delivery and the contract price, and so, if it could be shown that the reasonable course to be pursued would have been to enter into a forward contract at some later date."[31]

Support for the view put forward by Cheshire and Fifoot may be found in the case of *Nickoll & Knight v. Ashton, Edridge & Co.*[32] In that case the defendants agreed to sell a cargo of cotton-seed to the plaintiffs, the cargo to be shipped from Egypt to the United King-

29 [1920] 2 K.B. 535, [1921] 2 K.B. 369.
30 [1920] 3 K.B. 535, at 543. Italics added by author.
31 This passage was approved of by the Court of Appeal in Millett v. Van Heek & Co., [1921] 2 K.B. 369, at 376.
32 [1900] 2 Q.B. 298.

dom in January. In December the defendants informed the plaintiffs that they could not deliver the cargo, as the ship which had been chartered to carry the cargo had been stranded and was too badly damaged to arrive in time. The price of cotton-seed was rising, but the plaintiffs made no attempt to buy another cargo, although they could have done so. When the cargo was not delivered the plaintiffs sued the defendants for breach of contract, claiming as damages the difference between the contract price and the market price at the end of January, when the contract was due to be performed. It was held that the contract had been frustrated by the stranding of the ship which had been chartered to carry the cargo from Egypt to the United Kingdom. Mathew J., however, went on to say:—[33]

> "There is one other matter which was much discussed in argument, and to which, although it is unnecessary for the purposes of my judgment, I should like to refer, and that is the question as to what would have been the proper measure of damages if the plaintiffs had been entitled to recover. It appeared that towards the end of December the plaintiffs might have obtained another cargo at the then market price which was much lower than the price at the end of January. But it was insisted for the plaintiffs that they were entitled to wait and watch the rising market until the end of January, and then claim their damages on the footing of the then market price. In my opinion that contention was wholly untenable. Having regard to the decision in *Roth & Co. v. Taysen,*[34] I think the plaintiffs were bound to endeavour to mitigate the loss by acting as ordinary men of business would have acted, that is to say, by determining the liability at the earliest date at which they were able to obtain another cargo."

This passage, however, is *obiter,* and it is submitted that it is of no authority in view of the decision of the Court of Appeal in *Tredegar Iron and Coal Co. (Limited) v. Hawthorn Bros. & Co.*[35] In this case the plaintiffs agreed to sell a quantity of coal to the defendants for 16/- a ton. The defendants repudiated the contract, but procured for the plaintiffs an offer from another purchaser to buy the coal for 16/3 a ton. The plaintiffs refused this offer, and when the time for performance arrived the market price of the coal was 15/- a ton. It was held by the Court of Appeal (Collins M.R., Mathew and Lindley L.JJ.), reversing the decision of Phillimore J., that the

33 *Ibid.,* at 304.

34 (1895) 12 Times L.R. 100, (1896) 12 Times L.R. 211.

35 (1902) 18 Times L.R. 716.

plaintiffs were entitled to the difference between the contract price and the market price when the contract was due to be performed, notwithstanding the fact that they would have suffered no loss, and indeed made a profit, if they had accepted the offer procured for them by the defendants. The Master of the Rolls said:—[36]

> ".....the question really came to this, whether, upon an act which amounted to a repudiation of the contract and which entitled the plaintiffs to treat the repudiation as a final breach of the contract by the defendants, the defendants were entitled to say to the plaintiffs that the latter must against their will accept the repudiation as putting an end to the contract for this purpose, that the plaintiffs were debarred of their rights under the contract, and were bound to accept the contract as broken on a day before the date named in it for performance so as to be bound by the measure of damages on the day of repudiation and no other. That was a strong proposition, and was directly in the teeth of the authorities. The plaintiffs could not maintain an action for damages except upon the footing that the contract had been broken. It was clear law that the repudiation was a nullity unless it was accepted by the other party to the contract. If the other party chose to treat the repudiation as a breach, then matters proceeded on the footing that there had been a breach and the damages must be assessed as for a breach on that date, and he would be bound to act reasonably in the circumstances, that was to say, to take advantage of any mitigating circumstances there might be. All the discussions as to how the damages were to be mitigated rested on the foundation that there had been a breach of the contract. The argument came to this, that the plaintiffs ought to have treated the repudiation as a breach and that it was unreasonable in them not to have so treated it, seeing that the market was then a rising one. There was no foundation in the authorities for that proposition. There were two decisions of Mr. Justice Mathew which were relied upon. In *Roth and Co. v. Taysen, Townsend and Co.* (1 Com. Cas., 240) there was an anticipatory breach of contract by the other party. In *Nickoll v. Ashton, Edridge and Co.* ([1900] 2 Q.B. 298) there were some *obiter* observations of Mr. Justice Mathew, but when looked at those observations referred back to and were based on *Roth and Co. v. Townsend and Co.*"

This judgment shows clearly that the duty to mitigate damages in the case of anticipatory breach arises only when and because the

[36] *Ibid.*, at 716.

repudiation has been accepted. It is interesting to note that in the same case Mathew L.J., as he had then become, said:—[37]

> "Repudiation was of no effect unless it was acted upon by the other party."

It will be seen, therefore, that all the cases which are cited in support of the view put forward by Cheshire and Fifoot, with the exception of *Payzu Ltd. v. Saunders*[38] and *Nickoll & Knight v. Ashton, Edridge & Co.*,[39] are cases where the repudiation had been accepted. *Nickoll v. Ashton* was a case which was decided on the question of frustration, and the *obiter dictum* of Mathew J. was disapproved by the Court of Appeal in *Tredegar Iron and Coal Co. v. Hawthorn.*[40] *Payzu Ltd. v. Saunders,* which was a decision of the Court of Appeal, gives stronger support to the view of Cheshire and Fifoot; but, as has already been argued, it is doubtful whether *Payzu Ltd. v. Saunders* was really a case of anticipatory breach;[41] if, however, it was a case of anticipatory breach, then it is submitted that it is a maverick case in direct opposition to a long line of authority.

Of the cases which are opposed to the view adopted by Cheshire and Fifoot, *Leigh v. Paterson,*[42] *Phillpotts v. Evans,*[43] *Tredegar Iron and Coal Co. v. Hawthorn,*[44] and *Shindler v. Northern Raincoat Co.*[45] have already been referred to. Two other cases which oppose the view taken by Cheshire and Fifoot are *Brown v. Muller*[46] and *Michael v. Hart.*[47] In *Brown v. Muller* the plaintiff agreed to buy 500 tons of iron from the defendant, the goods to be delivered in three equal instalments in September, October, and November. The defendant repudiated the contract in August, but the plaintiff did not accept the repudiation, and in December he sued for damages. The market price in December was considerably higher than it was when the contract

37 *Ibid.*, at 717.

38 [1919] 2 K.B. 581.

39 [1900] 2 Q.B. 298.

40 (1902) 18 Times L.R. 716.

41 It is submitted that the defendant's action amounted merely to a breach of warranty, entitling the plaintiffs to sue for damages but not to repudiate the contract: clearly, therefore, the defendant could not be said to have "repudiated" the contract if the plaintiffs did not have the option of accepting or rejecting the defendant's "repudiation", but had to carry out their part of the bargain, being left only with their remedy in damages.

42 (1818) 8 Taunt. 540, 129 E.R. 493.

43 (1839) 5 M. & W. 475, 151 E.R. 200.

44 (1902) 18 Times L.R. 716.

45 [1960] 1 W.L.R. 1038.

46 (1872) L.R. 7 Ex. 319.

47 [1902] 1 K.B. 482.

was repudiated in August. It was held (by Kelly C.B., Martin and Channell BB.) that the plaintiff's measure of damages was the sum of the difference between the contract and market price of one-third of 500 tons on 30th September, 31st October, and 30th November, respectively. Kelly C.B., referring to the argument of the defendant's counsel that the plaintiff's measure of damages should be the difference between the contract price and the market price at the time the contract was repudiated, said:—[48]

> "It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or at all events when the first breach took place, and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favourable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise."

In *Michael v. Hart & Co.*[49] the defendants, who were stockbrokers, had bought stocks for the plaintiff on his account and had agreed to carry them over for settlement until the end of May; before the end of May, however, they closed the plaintiff's account by selling the stocks. The market price of the stocks at the end of May was considerably higher than it was when the defendants closed the plaintiff's account and sold the stocks. It was held by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) that the plaintiff's measure of damages should be calculated with reference to the market price of the stocks at the end of May, when the contract was due for performance, and not with reference to the market price of the stocks when the contract was repudiated by the sale of the stocks and the closure of the plaintiff's account.

The importance of the distinction between accepted and unaccepted repudiation has been clearly demonstrated by the House of Lords in the recent case of *White and Carter (Councils) Ltd. v.*

[48] (1872) L.R. 7 Ex. 319, at 322.
[49] [1902] 1 K.B. 482.

McGregor;[50] a decision which, it is submitted, clearly supports the contention that there is no duty to mitigate damages in cases of anticipatory breach where the repudiation has not been accepted. In this latest case the pursuers agreed to place advertisements for the defender's business on litter bins which they supplied to local authorities; the advertisements to be displayed for a period of three years. The defender repudiated the contract very shortly after it had been made, and before anything had been done under it; the pursuers, however, refused to accept this repudiation, and displayed advertisements for the defender's business for a period of three years in accordance with the contract. The pursuers sued for the money due to them under the contract, and it was held by the House of Lords (Lord Reid, Lord Tucker, and Lord Hodson; Lord Morton of Henryton and Lord Keith of Avonholm dissenting) that the pursuers were entitled to carry out the contract and claim the full contract price, and were not obliged to accept the repudiation and sue for damages. It is true that the pursuers in *White and Carter (Councils) Ltd. v. McGregor* were claiming for a debt due under the contract, and not suing for damages for breach of contract, but it is submitted that the reasoning of the majority in that case is equally applicable to cases of anticipatory breach where the repudiation has not been accepted and no steps have been taken to mitigate damages. The majority of the Law Lords in *White and Carter (Councils) Ltd. v. McGregor* based their decision on the grounds that an unaccepted repudiation is meaningless and of no effect. As was said by Lord Hodson:—[51]

> "It is settled as a fundamental rule of the law of contract that repudiation by one of the parties to a contract does not of itself discharge it. See Viscount Simon's speech in *Heyman v. Darwins Ltd.*[52] citing with approval the following sentence from a judgment of Scrutton L.J. in *Golding v. London and Edinburgh Insurance Co. Ltd.*[53] at p.488: "I have never been able to understand what effect the repudiation of one party has unless the other party accepts the repudiation." "

In that speech Viscount Simon said:—[54]

> "The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so."

50 [1962] 2 W.L.R. 17.
51 *Ibid.*, at 36.
52 [1946] A.C. 356, at 361.
53 (1932) 43 LL. L. Rep. 487, at 488.
54 [1946] A.C. 356, at 361.

Lord Hodson also cited with approval the following passage from the judgment of Asquith L.J. in *Howard v. Pickford Tool Co. Ltd.*:—[55]

> "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind."

While Lord Reid said:—[56]

> "The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."

If, therefore, an unaccepted repudiation is meaningless and of no effect, it follows that there is no duty to mitigate damages in the case of anticipatory breach where the repudiation has not been accepted: for a person cannot be under a duty to mitigate his damages until a right to damages has arisen, and as the right to damages arises out of breach of contract there can be no right to damages until there has been a breach of contract, and as an unaccepted repudiation is meaningless and of no effect there has been no breach and therefore no right to damages and therefore no duty to mitigate. This argument is further supported by the fact that in *White and Carter (Councils) Ltd. v. McGregor* both Lord Reid and Lord Hodson cited with approval the case of *Howie v. Anderson*.[57] In that case the defender agreed to sell shares to the pursuer, delivery to be on 8th January, but repudiated the contract on 31st October; the pursuer did not accept the repudiation, and it was held that the pursuer's measure of damages was the difference between the contract price of the shares and the market price on 8th January, and that the pursuer was under no obligation to go into the market and buy other shares on 31st October.

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55 [1951] 1 K.B. 417, at 421.

56 [1962] 2 W.L.R. 17, at 20.

57 (1848) 10 D. 355.

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