MORTICIANS, MENTAL ANGUISH AND CODE PLEADING

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"One who prepares a human body for burial and conducts a funeral usually deals with the living in their most difficult and delicate moments. Bereavement has, for the time being, obliterated the gross and sordid side of human nature and brought to the surface all its tenderness and sensitivity. The exhibition of callousness or indifference, the offer of insult and indignity, can, of course, inflict no injury on the dead, but they can visit agony akin to torture on the living. So true is this that the chief asset of a mortician . . . is his consideration for the afflicted. A decent respect for their feelings is implied in every contract for his services."*

An unusual fact situation in an unusual trial has created some unusual law.¹

A trial judge erred in admitting proof beyond the pleadings. A defense attorney objected. The objection overruled, the attorney reserved his rights for appeal. For politeness or some other reason, the attorney did not repeat his objection. Liberalized code pleading exempts an appellate court from the obligation to consider this objection unless it is repeated in some other stage of the trial proceedings. The cover on Pandora's box released no more distress than this decision can bring to a law professor.

Sufficient time now has elapsed to permit an extra-judicial consideration of the Supreme Court opinion. The case had the possibilities of becoming another *Rylands v. Fletcher* or a *Palsgraf*. The Supreme Court covered it gently by suggesting that a full trial on an issue not in the Pleadings does not present an appellate question.

A law professor cannot so easily let go of a problem which involves novel issues on Contracts and a promise to perform the impossible; Breach of Contract and mental anguish; Negligence without fault; Willful wrong without exemplary damages; Deceit without a tort and the liability of a mortician for unforeseeable consequences of an unforeseeable intervening cause.

Chelini's mother died at the unusual age of 99. This was in 1943, when Chelini was well beyond middle age. Although suffering from a glandular disorder, he worked regularly for a daily wage as a skilled mechanic.

Chelini's deep affection for his aged mother was well known to friends and neighbors. When she died he wanted to render her a fitting service

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¹Chelini v. Nieri (1948), 32 Cal. 2d 480, 196 Pac. 2d 915; noted in 33 Minn. L. R. 189 (1949).
as a token of filial piety. He wished to provide the best funeral and embalming service which could be obtained in those war days.

Nieri, the undertaker, was an old acquaintance, and well aware of Chelini's feelings. To him he turned for an expensive casket. They agreed on a casket and on embalming and funeral services for $875. Nieri promised to give the best in the way of embalming service which his profession could offer.

According to the version which was believed by the jury in the trial later arising out of this transaction, this was not all. Chelini's mother had always suffered from obsessive fears of "ants and bugs." This Chelini well remembered. So he asked for assurances that the dreaded "ants and bugs" would not "get her." Nieri soothed these fears. He spoke of new and better methods of embalming and eventually assured Chelini that he would do a job "which will last forever" or which will last almost "forever." Nieri told that in the case of Lincoln and of Caruso such a job of preservation had been done.

Chelini further told Nieri that after the war he wanted a family vault as a final resting place for his mother and himself. At that future time and date Nieri should reopen the casket and place a ring and a pair of slippers on the remains of the body. This also Nieri promised to do, and accepted the further sum of $25 in consideration of these future services.

The casket was placed into a temporary receiving vault and Chelini paid almost daily visits to the resting place of his mother. On some of these occasions he noticed some ants in the vicinity of the vault. On his request the vault was opened and he now discovered that the casket was covered with cobwebs and all kinds of insects. This discovery was made about 18 months after the funeral.

Chelini's suspicions were aroused and he demanded that the casket be opened. This request was eventually complied with. The opening of the casket was attended by Chelini himself, his wife, his family physician, employees of the cemetery, and an employee of Nieri. At that time the body was in a state of complete decay, the flesh had disintegrated, and the remains were covered with insects.

On the night following the inspection Chelini fell ill. According to medical testimony he had suffered from an aggravation of existing thyroic disorders so serious that he developed high blood pressure and had to stop work. The physician ordered him to rest almost completely, and to do only very light work, if any.

Chelini went to court where he was awarded $10,000 general damages and $900 exemplary damages. He had stated breach of contract as his cause of action, alleging that the defendant had in consideration of $900 orally promised to furnish a casket and to embalm the remains of plaintiff's
mother in a good and workmanlike manner and that defendant had so “negligently, carelessly, and unskillfully” performed his part of the agreement that plaintiff suffered special and general damages (the general damages were stated to be to the amount of $50,000). The complaint did not state that there was a promise to preserve the body almost forever.

Plaintiff’s counsel relied from the beginning of the litigation on a rule laid down in the case of Westervelt v. McCullough. This rule reads as follows:

“Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach.”

The validity of this rule was never questioned during the litigation. Its applicability to the facts of the case is subject to doubt.

In an initial hearing before the trial judge, in the absence of the jury, counsel for plaintiff explained that he relied on the Westervelt rule as the basis for the recovery he was seeking for his client. He also asked for leave to amend the complaint to include the word “willful” in respect to the alleged breach of contract and this motion was granted.

During the hearing before the trial judge the question as to plaintiff’s legal theory was raised, and plaintiff explained that his theory was one of contract. However, counsel considered himself entitled to ask for exemplary damages because, as he explained, certain breaches of contract contain elements of a tort, regardless of the fact that the action sounds in contract.

It soon developed that there was real confusion in respect to the facts which, according to plaintiff’s theory, would support his right of recovery. Chelini, the plaintiff, testified first in the trial. He gave testimony to the effect that he had been promised an “hermetically sealed casket.” At this point counsel for defendant objected, because the testimony was to facts other than those alleged in the complaint.

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3. The Westervelt case involved an elderly couple who had for many years been occupying the same house and were attached to their home. The house was mortgaged and the elderly couple (plaintiffs in that case) were able and willing to redeem the mortgage. Defendant promised them that they could stay in their residence as long as they wished if they would let him buy the deed at a sheriff’s sale. Subsequently defendant ousted plaintiffs in violation of this promise. Plaintiffs fell sick as a consequence of their shock and anguish over the loss of their home. They were permitted to recover damages for injury to health to the extent of $500.
4. Reporter’s Transcript (Civ. No. 39393, San Mateo County), 1B.
5. Id., IM.
6. Ibid.
The objection was immediately overruled by the trial judge and there was throughout the trial stage no further objection by defendant's counsel in respect to departure from the cause of action stated in the complaint. This is the more astonishing since immediately after this brief incident an entirely new element was thrown into the picture.

Chelini now testified that he had been promised the use of a new embalming process which would preserve the body "practically forever" and "almost forever." This was confirmed by testimony from parties present during the talks between Chelini and Nieri.

Expert testimony by three expert witnesses was to the effect that it was impossible so to "guarantee a body," and that no undertaker was in a position to predict with any degree of safety how long it will take until inevitable disintegration of a corpse eventually will take place. No process, which could forever or even almost forever stem this disintegration, is in existence.

Strange as it may seem, the impossibility of preserving a body for an indefinite period or forever, was brought to the jury's attention by cross-examination by plaintiff's counsel. After the trial defendant took the position that the contract was void because it was directed toward an unachievable object and relied on this expert testimony. But during the trial stage plaintiff desired to demonstrate that the alleged breach of contract involved a tortious element, namely fraud, so that in his theory there was room for a punitive measure of damages. By this strategy the entire issue of impossibility was thrown wide open.

Defendant did not, however, raise the question of validity of the contract until the trial was over. In his motion for a new trial he argued that plaintiff had departed from the facts stated in the complaint and that the contract proven was a nullity.

The expert witnesses also testified that the job of embalming done in

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8Id., p. 5: "Answer: ... and I wanted a hermetically sealed casket, because ... Mr. Coleberd: I object to that testimony, on the ground that there is no allegation in the complaint to the effect that there was to be a hermetically sealed casket. The Court: The objection is overruled."

9Id., p. 6.

10Id., p. 230 (direct examination of Witness Hovious): "Q. And did Mr. Nieri say anything as to the length of time he would or could preserve it? A. No, he just said it would last forever. Q. Last forever? A. Last forever."

11See similar effect, id., p. 259, 265 (Witness: Mrs. Chelini).

12Testimony of Donal Ashworth, dean of the Morticians' College, see id., p. 395. Testimony of William Crosby, funeral director and coroner, see id., p. 426, 427. Testimony of John E. Layng, mortician, see id., p. 462.

13See note 11.

14Transcript of Motion for a New Trial (No. 39593), p. 13; Appellant's Reply to Respondent's Petition for a Hearing by the Supreme Court (S. F. 17718), p. 10; Appellant's Petition for a Rehearing in the Supreme Court (S. F. 17718), p. 37.

this case was a competent one, showing a high degree of professional skill.\textsuperscript{16} There was some debate whether there should have been a hermetically sealed casket which according to Chelini's testimony had been promised him. Cross-examination developed that hermetical sealing may have a sanitary function but that it would certainly not stem, perhaps it would even speed disintegration.\textsuperscript{17} This line of argument soon was abandoned.

The jury found for plaintiff and a motion for a new trial was denied.\textsuperscript{18} In the theory of the trial judge the Westervelt case was controlling on the law involved here. This can be clearly gleaned from his instructions reading in that respect as follows:

"You are instructed that it is the law, applicable to cases such as the one presented to you here, that where the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by the breach of contract."\textsuperscript{19}

The instructions also said that in addition to compensatory damages exemplary damages may be allowed if the jury finds that the actions or omissions of defendant were intentionally wrongful.\textsuperscript{20}

So it seems that the trial judge followed the legal theory adopted by plaintiff's counsel. The instructions also covered some facts which were not stated in the complaint and which had been developed during the trial. The judge told the jurors that they would have to "resolve the conflict" as to the "length of time a body can be embalmed."\textsuperscript{21} This hardly squares with the following instruction also given:

"Plaintiff has stated certain facts in his complaint as a basis of his action against defendant and he cannot recover by reason of any other facts if any existed."\textsuperscript{22}

Here already one finds an obfuscation of the factual issues clearly traceable to the fact that evidence foreign to the allegations of the complaint had been allowed to be heard without any amendment of the original complaint.

The case now went on appeal and the District Court of Appeals found reversible error in the instructions to the jury.\textsuperscript{23} The Court of Appeals held

\textsuperscript{16} Reporter's Transcript (Civ. No. 39593, San Mateo County), pp. 359, 386, 409, 460.
\textsuperscript{17} Reporter's Transcript (Civ. No. 39593, San Mateo County), p. 392.
\textsuperscript{18} Transcript of Motion for a New Trial (No. 39593), p. ——.
\textsuperscript{19} Supplemental Transcript on Appeal (Civ. No. 39593, San Mateo County), p. 6.
\textsuperscript{20} Id., p. 11.
\textsuperscript{21} Id., p. 7.
\textsuperscript{22} Id., p. 12.
\textsuperscript{23} Chelini v. Nieri (1948), 188 Pac. 2d 564.
that the so-called Westervelt rule stated good law possibly applicable to
the facts at hand. But the instructions had failed to properly determine what
was the province of the jury and what was for the court to find. The question
of whether the damages to health sustained by the breach of such a special
contract were within the contemplation of the parties should have been left
for the jury. In failing to do so or at least not clearly so instructing the jury,
prejudicial error was committed. 24

The Court of Appeals also struck out exemplary damages, because the
case sounded in contract. 25 On the other hand, the Court of Appeals held that
the question of variance between allegations and proof could not be given
appellate consideration, after defendant had failed to move for a dismissal
during the trial. 26

The case was never tried again. On appeal to the Supreme Court,
the Supreme Court upheld plaintiff’s recovery to the amount of $10,000,
while the exemplary damages of $900 were found severable and stricken. 27

The opinion of the Supreme Court in the case of Chelini versus Nieri
is a rather brief one if the many issues here involved are considered. It is
most astonishing considering both the apparent harshness of liability thereby
imposed upon morticians and peculiarities of the underlying set of facts.

The almost unprecedented factual setting and the irregularities of the
pleading make it necessary to present the different phases of the litigation
at somewhat greater length than may ordinarily be expected in an article
devoted to the discussion of a somewhat novel opinion of a higher court.

In many respects the decision does not, at first blush, seem to be con-
sistent with standard rules on damages for breach of contract, rules on
nonperformable contracts, and on variances and failure of proof. But an
analysis of the salient issues here presented seems so much more in place
since the opinion of the Supreme Court contains only meager and rather
cavalier statements on the points of law involved.

The question of pleadings lies at the threshold of the problems of the
case. Here we have a plaintiff alleging in his complaint a contract to embalm
a body in a good and workmanlike manner and who, without amending
this complaint, is allowed to prove a contract calling for a most unusual
manner of embalming a corpse, namely “so as to preserve it almost forever.”

The Court of Appeals 28 and the Supreme Court 29 both held that a full
and fair trial of all the issues was had, and that the departure of the facts

24 Id., p. 570.
25 Id., p. 571.
26 Id., p. 568.
27 Chelini v. Nieri (1948), 32 Cal. 2d 480, 196 Pac. 2d 915.
28 Chelini v. Nieri (1948), 188 Pac. 2d 564, 568.
29 Chelini v. Nieri (1948), 32 Cal. 2d 480, 486, 196 Pac. 2d 915, 918.
proved from the facts averred in the complaint did not on appeal entitle defendant to a reversal.

The question comes to mind whether the liberality in pleading policy reflected in this holding can be brought into line with the learning on variances and failure of proof in California.

In a rather general way the codes distinguish between variances on the one hand and failure of proof on the other. An immaterial variance, too slight to affect the position of the defendant, is a defect in pleading which will always be disregarded. Of a material variance which takes defendant by surprise or prejudices him, advantage must be taken during the trial stage. The question of a material variance cannot be raised on appeal. If the Supreme Court (and earlier the Court of Appeals) were of the opinion that there was a mere variance between the allegations of the complaint and the proof offered, the holding on the pleading issue would be entirely consistent with these rules.

But California courts have hitherto energetically striven not to blur the clear line of distinction between mere variances and failures of proof. Failure of proof means that the case as found and proved left the allegations unproved in their "general scope and meaning." It entitles defendant to a nonsuit or to a reversal of the judgment against him, "even though the objection might have been obviated by amendment."

Failure of proof means a departure from the allegations of the complaint in its essentials, not in particulars. The departure presented in the case of Chelini v. Nieri is rather drastic. There are, to be sure, cases on the books where the difference between the case alleged in the complaint and the case as developed during the trial would strike the reader as less obvious than the difference between an ordinary contract calling for funeral

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22 Von Goerlitz v. Turner (1944), 65 Cal. App. 2d 425, 431, 150 Pac. 2d 278, 281. To the same effect: Schirmer v. Drexler (1901), 134 Cal. 134, 139, 66 Pac. 180, 183 ("it would be going too far to hold that such a variance as this should be deemed to be waived by failure to object to evidence at the trial"); Riverside Water Co. v. Gage (1895), 108 Cal. 240, 245, 41 Pac. 299, 300 (the evidence was outside of the scope of the issues raised by the complaint and it was held that objections to that defect could be raised for the first time on appeal).
and embalming services and one calling for a job to preserve a corpse forever, yet apparently there was no hesitancy with the courts to find that there was failure of proof.33

It is, of course, to some extent a matter of degree and of judgment to tell what constitutes a departure from the complaint so essential that the complaint remains unproved in "its general scope and meaning": perhaps the Supreme Court felt that a contract calling for unusual and very special embalming methods implied the alleged more general contract for funeral services and workmanlike embalming of a corpse, and that there was mere variance and no failure of proof. But unfortunately the Supreme Court does not give any indication of the rationale which guided it by denying the issue of pleadings appellate consideration.

It is true, the Supreme Court rededicates itself in rather general terms to the principle of liberality of pleadings as long as a full and fair trial of all the issues was had.34 But, by this may be meant that discrepancies between allegations and proof, once essential enough to be held failures of proof, will henceforth more readily be considered as mere variances. It could also mean that even with failure of proof the defect will no longer entitle a defendant to reversal of the judgment against him, if there was "a full and fair trial" of such factual issues as were developed by the evidence.35

The question seems to be important enough and it is regrettable that the Supreme Court so carefully failed to commit itself in either direction.

33Discrepancies great enough to be failure of proof existed in the following cases: Stout v. Coffin (1865), 28 Cal. 67 (contract to ship goods and contract to carry goods to destination) ; Gillin v. Hopkins (1915), 28 Cal. App. 579, 153 Pac. 724 (personal services to be compensated in money and compensation by stock in a corporation) ; Weinreich v. Johnson (1889), 78 Cal. 254, 20 Pac. 556 (action on a note executed to partnership and proof that it was executed to plaintiff individually) ; Owen v. Meade (1894), 104 Cal. 179, 37 Pac. 923 (undecommission of appointment fee and contingent fee) ; Bailey v. Brown (1906), 4 Cal. App. 515, 88 Pac. 518 (promise to marry plaintiff at her request and promise to marry her at the death of plaintiff's mother) ; McCord v. Seale (1880), 56 Cal. 262 (allegation of individual contract and proof of partnership contract) ; Gray v. Farmer's Exchange Bank (1895), 105 Cal. 60, 38 Pac. 519 (allegation of a special contract and proof of involuntary constructive trust) ; Fox v. Norcross (1895), 108 Cal. 369, 424, 41 Pac. 308, 325 (allegation of fraud against directors of a corporation and proof of negligence) ; Schirmer v. Drexler (1901), 134 Cal. 194, 66 Pac. 180 (allegation of prescriptive title to water rights and proof of user under an oral license) ; Van Goerlitz v. Turner (1944), 65 Cal. App. 2d 431, 150 Pac. 2d 278 (allegation of conversion of ores taken from plaintiff's property and proof to the effect that plaintiff was never in the possession of the mining property concerned).

34The Supreme Court relies on Grossetti v. Sweesy (1917), 176 Cal. 793, 795, 264 Pac. 246, 249, and Martin v. Pacific Gas & Electric (1928), 203 Cal. 291, 298. But these cases are not concerned with variances and failure of proof. They stand for the proposition that negligence can be properly pleaded by general averment only. And this on the broad principle that matters of pleading become unimportant "where a case is fairly tried."

35The Supreme Court argues as follows in Chelini v. Neciri, 32 Cal. 2d 480, 486, 196 Pac. 2d 915, 918: "If, as defendant now urges he was of the view that the allegations . . . were unproved, not in some particular or particulars only, but in (their) general scope and meaning so as to constitute 'a failure of proof' (Code of Civil Procedure, sec. 471), then defendant could have moved the trial court to dismiss the action. . . ."

This sounds as if the Supreme Court felt that even "failure of proof" must not any longer be
There is ample room for the question whether the policy here adopted was of help in disentangling the issues raised by the facts of the case.

Already a cursory examination of the issues here presented will show that there are two versions of plaintiff's story, the one which was alleged in the complaint and the other one which was proved during the trial. Each of these versions presents problems of its own. In the first version the degree of contractual liability for a mortician's breach of contract and the question whether the consequences of Chelini's inspection of the decayed corpse were contemplated by the parties, must of necessity require attention. In the second version there is a contract which according to the weight of evidence was nonperformable and the legal consequences of such an undertaking will call for some scrutiny.

The inconsistencies necessarily springing from such a dualism only would be avoidable if there was some consistent theory on which the jury could be bindingly believed to have based its verdict. But the instructions of the trial judge reflect, as was already pointed out, the shift in the trial strategy and the resulting coexistence of the two versions. The judge told the jury that they must base their finding on the facts alleged in the complaint and he likewise told them that they must resolve any conflict in the testimony relative to the length of the preservation of a body. The former instruction would mean that the testimony in respect to the "guarantee" of the body would have to be disregarded and the latter instruction clearly makes the facts proved an issue to be solved by the jurors.\textsuperscript{36}

The opinion of the Supreme Court reflects the dualism. The case is being discussed as one sounding in contract. It is stated that a promise to preserve the body almost forever was made and testimony relating to the impossibility of such an undertaking is being given much emphasis.\textsuperscript{37}

We find in the opinion of the Supreme Court no attempt to reconcile the theory of a recovery \textit{ex contractu} with the rule that a nonperformable contract is void. Perhaps it was assumed that the jury found against the weight of evidence that the contract was performable. There was no evidence to the effect that defendant was unskilful or negligent. Whether the Supreme Court assumed that the jury, against the evidence, also believed there was a negligent job, remains a matter of conjecture.

\textsuperscript{36}See note 21 and note 22.

\textsuperscript{37}Chelini v. Nieri (1948), 32 Cal. 2d 480, 483, 196 Pac. 2d 915, 916.
The Supreme Court finds itself in a dilemma and this becomes all the more noticeable when, by way of dictum, the Supreme Court discusses whether plaintiff could have recovered (to the extent of punitive damages) in an action sounding in tort had he chosen so to frame his action. In this context it is being said that an action in deceit would lie in favor of Chelini, because Nieri had promised things "which he did not intend to (since he knew he could not) perform."88

This demonstrates that the nonperformability of the contract as proved did not altogether escape the attention of the Supreme Court. But even in this dictum part of the opinion the Supreme Court weakens its position by arguing that "a jury may well have believed that the defendant's representations, although knowingly false, were motivated by friendship or compassion for plaintiff and a desire to comfort him."88a

If the case had been retried a clear theory of facts would have emerged. Due to the extreme liberality in point of pleading, the opinion as it stands reflects the coexistence of two versions each of which poses problems of its own. In order squarely to meet the problems here presented, a process of simplification suggests itself. Be it, for the sake of discussion of the issues, assumed that the contract called for ordinary workmanlike embalming services, or at least that the extraordinary services promised were performable so that there was no question of the validity of the undertaking. Be it then assumed that the contract called for preservation of the body forever and that this in the light of evidence could not be achieved. In both cases the action sounded in contract alleging breach of a valid contractual undertaking:

Starting with the first version—a performable contract—it must still be assumed that the jury believed the allegation of the complaint that the undertaking was negligently and willfully breached. The question must then arise whether detriment to health flowing from such breach would create a cause of action for the promisee. The Supreme Court has so held on the authority of the rule in Westervelt v. McCullough.89 The Court of Appeals had, in broad principle, done likewise.40

The Westervelt rule is a refinement of the basic learning on liability for damages in cases of breach of a contract as it is stated in the famous case of Hadley v. Baxendale.41 That English case determined in 1854 that a promisee can ask for damages which arise "naturally, i.e., according to

88Chelini v. Nieri, 32 Cal. 2d 480, 487, 196 Pac. 2d 915, 919.
88aChelini v. Nieri (1948), 32 Cal. 2d 480, 487 (footnote), 196 Pac. 2d 915, 919 (footnote).
40Chelini v. Nieri (1948), 188 Pac. 2d 564, 570; citing Westervelt v. McCullough (1924), 68 Cal. App. 198, 208, 228 Pac. 734, 738.
41Hadley v. Baxendale (1854), 9 Exch. 341, 156 E. R. 145.
the usual course of things" from the breach. But if "special circumstances . . . were communicated by the plaintiffs to the defendants and thus known to both parties," this would be a special contract and the following rule was formulated to determine damages for the breach of such a special contract:

"The damages resulting from the breach of such a contract, which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."42

The general validity of this formula has never been questioned by California courts and on occasions Hadley v. Baxendale has been described as the source for the proper rule of damages for breach of special contracts.43

In its literal meaning the rule thus stated requires that there was an act of actual communication of the special circumstances: California learning treads lightly on this requirement and the cases reflect flexibility as to the manner in which the promisor was made aware of the special circumstances.44 But under all cases the special circumstances must have been contemplated by both parties: there is recovery only for damages for breach of contract which the parties may be "reasonably supposed . . . to have considered as likely to follow in the ordinary course of things, from a breach. . . ."45

According to an equally well-settled general principle, California courts are in a general way opposed to granting recovery for detriment to health flowing from a breach of contract. Damages to "health, reputation, or feeling" were held to be not ascertainable in their nature and remote. The allowance of damages of that nature would "fill the courts with useless and injurious litigation."46

43Mitchell v. Clarke (1886), 71 Cal. 163, 11 Pac. 882; Wallace v. A'Ham (1886), 71 Cal. 197, 12 Pac. 46; Hunt Bros. v. San Lorenzo Co. (1906), 150 Cal. 51, 87 Pac. 1098; Overstreet v. Merritt (1921), 186 Cal. 494, 200 Pac. 11.
44All that is actually required is that promisor knows or has reasonable notice of the special circumstances: Mitchell v. Clarke (1886), 71 Cal. 164, 166, 11 Pac. 882, 883; (“and such purpose was known to the other party”); Hunt Bros. v. San Lorenzo Co. (1906), 150 Cal. 51, 56, 87 Pac. 1093, 1095 (“in the light of all the facts known or which should have been known to them”); Hale Bros. v. Milliken (1907), 5 Cal. App. 344, 352, 90 Pac. 365, 368 (“special circumstances . . . if known to both parties”); Grosse v. Petersen (1916), 30 Cal. App. 482, 485, 158 Pac. 511, 513 (“special circumstances known to both parties”); Cohn v. Bessemer G. E. Co. (1919), 44 Cal. App. 85, 89, 186 Pac. 200, 203; Overstreet v. Merritt (1921). Cf. also, Taber Lumber Co. v. O'Neal (8 C. C. A., 1908), 160 Fed. 597, 613; Jordan v. Patterson (1896), 67 Conn. 473, 35 Atl. 521. See 15 Am. Jur. 457
45Hunt Bros. v. San Lorenzo Co. (1906), 150 Cal. 51, 56, 87 Pac. 1093, 1095; see further cases in notes 43 and 44. Also to the same effect Schnierow v. Boutagy (1917), 33 Cal. App. 335, 337, 164 Pac. 1152; California Press Manufacturing Co. v. Stafford Packing Co. (1923), 192 Cal. 479, 483, 221 Pac. 345, 346.
46Westwater v. Grace Church (1903), 140 Cal. 339, 342, 73 Pac. 1055, 1056. Plaintiff was employed as a choir singer by defendant church. She was dismissed without good cause before the
It would now be a moot question whether this policy of denying damages to health, reputation or feeling was originally formulated in respect to both general and special contracts. Westervelt v. McCullough\(^47\) has in effect limited that rule to the former category, namely, to general contracts. In the Westervelt case an elderly couple had been validly promised permanent residence in their home, if they would abandon their intention to redeem a mortgage and allow the promisor to buy the deed to the house at a sheriff’s sale. The breach of this contractual promise so deeply affected the mental and physical well being of the promisees that they fell ill. The particular feelings of the promisees in respect to their home were well known to the promisor. On the strength of the rule in Hadley v. Baxendale\(^48\) recovery for this injury to health arising out of a breach of a contract was allowed.

Chelini v. Nieri leans heavily, almost exclusively, on that Westervelt case. Nieri, this is the gist of the argument as far as it is discernible in the opinion of the Supreme Court, knew of Chelini’s particular feelings in respect to his late mother and he was told of obsessive fears concerning insects. Thus the breach of the contract, if breach there was, was the breach of a special contract the subject matter of which affected self-esteem and tender feelings. Under these circumstances the case came under the Westervelt rule, and there was place for recovery for injury to health.

The Westervelt case involved no burial and the case of Chelini v. Nieri does not rely on any case material involving breaches of contract on the part of morticians. It is, however, of interest to notice that Westervelt v. McCullough relied on two cases from other jurisdictions where morticians had failed to take proper care of bodies of deceased persons. In both these instances near relatives had been allowed to recover, not for injury to their health, but for the harrassment and mental anguish they had suffered.\(^49\)

\(^{47}\)Westervelt v. McCullough (1924), 68 Cal. App. 198. Note that this case involves a mortgage of a home. To what extent the court is protecting a mortgagor from forfeiture is not clear. The tradition is well established to give such protection.

\(^{48}\)Hadley v. Baxendale (1854), 9 Exch. 341, 156 E. R. 145.

\(^{49}\)In Renihan v. Wright (1890), 125 Ind. 536, 25 N. E. 822, undertakers had promised to keep the remains of plaintiff’s daughter safely in a vault; the remains disappeared through the negligence of the undertakers. Recovery for mental anguish was allowed on the following considerations: “When the appellants contracted with the appellees to safely keep the body of their daughter until such time as they should desire to inter the same, they did so with knowledge of the fact that a failure on their part to comply with the terms of such contract would result in injury to the feelings of appellee.”
The so-called Westervelt rule strikes us as being an enlargement, by judicial fiat, of the measure of damages in cases of breach of a certain type of special contract. It had for almost a quarter of a century gone unheralded, but also entirely unchallenged. It states, at least for California, good law on the subject.

The Supreme Court found that Nieri's promise was a contractual obligation answerable to the type of contract required by the Westervelt rule and as far as this general proposition goes, there need be no misgivings about the decision.

This first proposition being established the Supreme Court evidently had no hesitancy to sanction recovery for illness contracted by inspecting the remains of the body after 18 months had elapsed and being shocked by the view of decayed flesh.

In other words, the opinion stops exactly at the point where curiosity is aroused, namely, to know whether the Westervelt rule is broad enough to allow recovery for injuries sustained as the immediate sequel of a most uncustomary conduct.

As the decision stands it would appear that the rule in Westervelt v. McCullough was given singularly wide sway. Implicitly, the Supreme Court seems to hold that the visit to the vault, the inspection of the remains and the sickness resulting from the inspection, were not supervening in the general sense, or that, under the Westervelt rule, recovery is allowed even if the chain of causation was interrupted by supervening acts, provided only that the breach of contract was the conditio sine qua non of injury to health.

It is submitted that there is no authority for so holding. Hadley v. Baxendale and its offspring, the rule in the case of Westervelt v. McCullough, clearly require that the injury for which recovery is being sought, is proximately caused by the alleged breach of contract. There is only the proviso that in special contracts damages include detriment flowing from the breach of a special duty contemplated by the parties.\(^{50}\)

In other words, the standard test for recovery in these cases is both objective and subjective. The objective test calls for proximate causation embalm the body of plaintiff's child. Plaintiff was allowed to recover for the "mental pain and anguish ... suffered because of the decomposition of the body prior to the burial."

The opinion in Westervelt v. McCullough (1924), 68 Cal. App. 198, 207, 228 Pac. 734, 737, also leans on Lewis v. Holmes (1903), 109 La. 1030, 34 So. 66, 61 L. R. A. 274 (failure to furnish dress needed for wedding trip—bride allowed to recover for mental suffering), and Browning v. Fies (1912), 4 Ala. App. 580, 58 S. E. 931 (bridegroom delayed on way to own wedding, because stable keeper failed to dispatch a carriage—recovery for mental harassment).

\(^{50}\)See material in notes 42 to 45; cf. Civil Code, section 3300, stating that the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom ...."
of the injury, but the scope of recovery can be both widened and narrowed by the knowledge of special circumstances.

Looking at the objective aspects first, the rule has clearly emerged that in an action for breach of contract damages which flow from supervening causes cannot be allowed. There must be something "immediately connected" with the breach of duty. Mere connection through a "series of causes intervening between the immediate consequences" and the injury complained of is insufficient to sustain recovery.

This general rule has been given recognition in California for almost a century. Nothing would indicate that a departure therefrom has ever been attempted or suggested.

The objective approach must fail if the facts of the case at hand are tested against it. Chelini's request, after a period of 18 months, to have the casket reopened, and his inspection of the corpse in the presence of his wife and his physician, are supervening acts which broke the chain of causation. It is difficult to imagine that a jury, upon proper instructions, would see this situation in a different light.

A rather striking situation is presented in Burton v. Pinkerton (1867), L. R. 2 Exch. 340, where a sailor was hired for a trip with ordinary hazards, but found himself on a ship carrying contraband to South American republics engaged in warfare. Under these circumstances he left ship in Rio, and by a mistake of local authorities was temporarily held in jail there. He could not recover for this imprisonment because defendant shipowner's breach of contract was not the efficient cause of the imprisonment. In a Canadian case, Price v. International Harvester, 8 W. W. R. 712 (1915), plaintiff was thrown off a harvesting machine which under violation of a contractual duty was not properly repaired by defendant. On account of the injuries sustained by the fall the crop could not be harvested in due time and was destroyed by a snowstorm. The destruction of the crop was held to be remote as stemming from supervening cause.

The principles indicated in above cases are well integrated in the law on recovery of damages for breach of contract in California: Yonge v. The Pacific (1850), 1 Cal. 353 (no recovery ex contractu for "remote and contingent damages"); Hartman v. Rogers (1886), 69 Cal. 643, 11 Pac. 581; Smith v. Los Angeles & Pacific (1893), 98 Cal. 210, 214, 33 Pac. 53, 54, states that the breach "must be the efficient cause, the one that necessarily sets the other causes into operation"; Lacy Mfg. Co. v. Los Angeles Gas & Electric Co. (1909), 12 C. A. 37, 106 Pac. 413; Savings Bank of Southern California v. Ashbury (1897), 117 Cal. 96, 48 Pac. 1081 ("consequential" damages not recoverable); Pacific Union v. Commercial Union Ass'n. (1910), 12 C. A. 503, 107 Pac. 728 (waterpipes were broken through an earthquake; this favored the spread of a fire. In action on insurance policy to recover for fire damage it was held that the earthquake was not the efficient cause of the fire damage); John Brunner Co. v. Western Union (1930), 108 Cal. App. 243, 291 Pac. 445; McGregor v. Wright (1931), 117 Cal. App. 186, 3 Pac. 2d 624; Reliance Acceptance Corp. v. Hooper Holmes Bureau (1934), 139 Cal. App. 607, 34 Pac. 2d 762; Norton v. Lyon Van & Storage (1935), 9 Cal. App. 2d 199, 49 Pac. 2d 311.

A standard definition of what constitutes a supervening or intervening cause can be found in Hayden v. Paramount Productions, Inc. (1939), 33 Cal. App. 2d 287, 293, 91 Pac. 2d 231, 236, reading as follows: "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion."
The Supreme Court may have felt that in the light of the subjective approach the injury to health sustained was within the contemplation of the parties, so that in this special contract the scope of proximate causation was widened by the application of the subjective test.

This would amount to about the following argument: Here is a special contract the subject matter of which affects the comfort and the happiness as well as the tender feelings of the promisee. These sentimental factors were known to the promisor and contemplated by both parties. This brings the contract within the Westervelt rule. Thus recovery for injury to health is allowed as a possible result of its breach and therefore contemplated. Thus plaintiff can avail himself of the Westervelt rule, regardless of his supervening act.

Such an interpretation of the law applicable to the case at hand would be in direct contradiction to the rule of law properly relied on by the court. It would also be against the weight of authority which nowhere went to the effect that in special contracts a "sine qua non" principle could be substituted for the general requirement of proximate cause. Even in special contracts there is no room for doubt that damages must flow naturally and proximately from the breach.\footnote{Overstreet v. Merritt (1921), 186 Cal. 494, 505, 200 Pac. 11, 15, contains the following language on recovery for losses contemplated by parties to a special contract: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation." See, also, notes 43, 44, 45.}

Acts of a promisee which were not contemplated by the parties when they entered into the contract are remote and cannot be the basis of a recovery: so a sacrifice sale in reliance upon a promise to give plaintiff a lease for more suitable premises, did not entitle that party to recover for loss sustained by the sacrifice sale.\footnote{Schnierow v. Boutagy (1917), 33 Cal. App. 336, 337, 164 Pac. 1132, 1133 ("certainly the parties, when they made the contract, did not contemplate that plaintiff in reliance upon their agreement should give his property away or sell it at a sacrifice"); cf. Calif. Press Mfg. v. Stafford Packing Co. (1923), 192 Cal. 479, 483, 221 Pac. 345, 346.}

It causes surprise, therefore, to see that no attempt was made by the Supreme Court to reconcile these well recognized rules with the holding in Chelini v. Nieri. It means straining the facts and being oblivious of ordinary human conduct to force Chelini's opening of the casket within the limited ambit of special circumstances contemplated by the parties.\footnote{The Court of Appeals had come much closer to the issue here involved by holding in Chelini v. Nieri (1948), 186 Pac. 2d 564, 568, that it was a matter to be determined by the jury whether the circumstances giving rise to the injury were in the "contemplation of the parties."}

It is true that in special contracts certain outwardly independent acts by promisees or even third parties are no longer intervening acts, because under the special circumstances known or communicated to the promisor the
occurrence of such an act was contemplated by the parties. This may even be a criminal act by a third party, where the promisor knew that such an act might occur, if the duties assumed under the contract were not properly fulfilled. It can also be that it is within the contemplation of promisor and promisee that in case of a breach of contract the promisee may have to do a certain thing, i.e., resort to public welfare if the terms of a private health insurance contract were not properly met.

The fact situation presented by the Chelini v. Nieri case bears no analogy to these situations: Chelini's act of reopening the casket was not one which had so come within the contemplation of the parties. And under the true rule special damages, even if the type of injury itself was contemplated by the parties (i.e., injury to health) the injury must have "in fact resulted as a proximate consequence of the breach of covenant." The Supreme Court, in its recital of the facts, gives some prominence to Nieri's duty to open the casket at some indefinite date "after the war" and to put a ring and a pair of slippers on the body. The only thing contemplated by the parties here was that the undertaker should reopen the casket and this only if some uncertain contingencies were present. Such an agreement, not to speak of its validity in view of the uncertainty, envisaged a reopening only as far as Nieri was concerned. It was not even agreed that Chelini would be present at this occasion.

Chelini asked the mortician to do certain things with the corpse at a later date: this was all, and could not by any stretch of the imagination have meant that Chelini at a later date would ask for an inspection of the contents of the casket and be present himself. At the time of making the agreement Nieri had no knowledge of any intention to do such an unusual thing. In allowing recovery for injury to health under the circumstances of this case, the Supreme Court certainly departed widely from established authority on recovery of damages for breach of contract. It has failed to give us the benefit of the reasons for so doing. Heretofore, we have discussed the case on the simplifying assumption that there was no question of the performability of the promise. Actually the evidence offered was to the effect that Nieri undertook to do an embalming job which would be very exceptional and last at least almost forever.

According to the expert testimony such a thing would be unachievable under all standards known to the profession of morticians. The alleged

56 De la Bere v. Pearson (1908), K. B. 280.
57 Coffey v. Northwestern Hospital Assn. (1920), 96 Ore. 100, 189 Pac. 407.
promise raises a highly interesting legal problem, namely, the problem of absolutely nonperformable contracts. Closely confronted with the potentialities of this question, the Supreme Court neatly bypassed it. Merely by way of dictum is it being stated that the promise so made could have been deceit, if the case would have been framed in tort, because the promisor knew he could not do the thing promised. But it is further suggested that it may merely have been an exercise of professional tact to promise that the embalming would last forever. The Court of Appeals had contented itself to say that Nieri had by an unusual contract obligated himself beyond his professional duties.

This action very clearly sounded in contract and not in tort. There is wide unanimity on the general proposition of law that a contract calling for a performance impossible of achievement is void. The type of impossibility here of interest is absolute or preexisting impossibility, or as it is widely called, natural impossibility.

This *impossibilitas rei* must be distinguished from mere *impossibilitas facti*, the inability of the promisor to do a thing which can be done. For this latter type of impossibility there is ample learning. Here, however, we are not concerned with frustration by supervening events, nor with a promisor's personal inability to achieve what he engaged himself to do, but solely with the former type, namely, impossibility in the nature of things.

The rule according to which an obligation calling for a nonperformable duty is void has been frequently stated and affirmed, but rare indeed, are good illustrations of the rule. Its soundness, as far as natural justice goes, has not been put into doubt. As was stated by a New York court in respect to such a contract "it would be unfair to attempt to exact its performance. A very great bard has written a very cogent play about that."

In California, courts have at frequent occasions stated by way of dictum that inability to perform does not excuse nonperformance, but that a contract inherently impossible of performance is void. Actual instances of such

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60Chelini v. Nieri (1948), 188 Pac. 2d 564, 569.
62As suggested by Pollock on Contracts (12th ed., 1946), 220, the terminology "in the nature of things" possibly goes back to the Roman Law, see DIG. 45, 1, 38: "Si stipulor ut id fiat quod natura fieri non concedit, non magis obligatio consistit quam cum stipulor ut detur quod dari non potest."
64Bellom v. Schindler (1927), 224 N. Y. S. 429.
65Peterson v. Hubbard (1885), 2 Cal. Unrep. 607, 9 Pac. 106; Klauber v. St. Diego Street Car (1892), 95 Cal. 353, 30 Pac. 553; Fresno Milling Co. v. Fresno C. & J. Co. (1899), 126 Cal. 640, 59 Pac. 140; Sample v. Fresno Flume Co. (1900), 129 Cal. 222, 61 Pac. 1065; Wilmington Trans-
inherently impossible contracts cannot be found in California cases; indeed, the Supreme Court missed a great opportunity in the Chelini case.

The few California cases where defendant was held to be excused for his nonperformance, on grounds of impossibility, deal, in spite of some generalities in their language, with largely different situations. The defense of impossibility was there permitted to be raised on grounds of supervening destruction of the subject matter by *vis major*, on grounds of bilateral mistake about the existence of the subject matter, and because the terms of a contract did not bind a promisor to go into certain unforeseen expenses to achieve the promised result.

Nieri's position was a different one: his obligation was directed toward something which could not be done "in the nature of things." It was true inherent impossibility, one which is said to render the contract void.

It stands to reason that contracts of that nature seldom will be entered into by parties who after all will seek to bind themselves on matters of some practicability. For this very plain reason even the few instances which are being cited in support of the doctrine are often enough simply cases of bilateral mistake on the existence of the subject matter rather than typical instances of natural impossibility.

Nullity, on the ground of bilateral mistake on the existence of the subject matter, was present where parties agreed on the assignment of a life annuity in ignorance of the fact that the annuitant had died, or where parties sold corn which at the time of the transaction had been destroyed en route to England. However much in these English cases absolute impossibility was urged as ground for relieving the promisor, nevertheless these precedents do not deal with nullity predicated on the nonperformability of the promise.

Closer akin to the situation at hand are those cases where the promise called on its face for a patent absurdity, so that a ship should sail at a date


"Potts Drug Co. v. Benedict (1907), 156 Cal. 322, 104 Pac. 432 (leased premises destroyed by fire and earthquake).

"Dairy Food Store Inc. v. Alpert (1931), 116 Cal. App. 670, 3 Pac. 2d 61 (bilateral mistake about municipal regulations on widening of a street: under the actually existing regulations there was not enough space left to erect a certain type of building).

"Mineral Park Land Co. v. Howard (1916), 172 Cal. 289, 156 Pac. 458, involved a promise by defendant to take certain quantities of gravel from plaintiff's land. Defendant could not do the requisite digging by ordinary and contemplated means, but only at "prohibitive costs" and it was found that such was not the "fair intent" of the parties.


well past the date when the charter-party was executed,70 or where a party promised to light a city for the 275 remaining nights of the year and there were not that many nights left during that year.71 The same is true of a promise made on April 28th to convey some land on April 23rd,72 or an agreement to distribute 5,000 shares among 16 persons each receiving 400 shares.73

Even in these situations the undertaking is rather nugatory and contradictory in itself rather than inherently impossible in the true sense.

Had the Supreme Court chosen to go more deeply into the matter, it would have been aided, however, by cases holding that a contractor’s promise to build a ditch according to some strict specifications which were technically absolutely impossible of achievement was void;74 the same being held concerning a physician’s undertaking to cure a sickness which, under known medical standards, was absolutely incurable.75 This latter fact situation bears some analogy to the case at hand. Here a jury might likewise have believed that the promise was nothing but an exercise of professional tact.

With this obvious lack of good precedents for the rule concerning the nullity of inherently impossible contracts, the promise of Nieri to preserve a body forever had all the earmarks of becoming a casebook classic, had the litigation and the decision developed the issue with greater clarity. There can be little doubt that in the light of available learning the situation as it was developed during the trial would have come under the rule. This is even true if heed is paid to some recent modifications or refinements which courts have developed in respect to inherent impossibility.

These refinements are in deference to an age of technological progress. Thus it has been said by way of dictum that a man “may have contracted to do something which in the present state of scientific knowledge may be utterly impossible” and yet have warranted the possibility of doing so by some new discovery.76 There is nothing in the Chelini case to bring it within this exception. Nieri did not promise that he would seek to make a new discovery in the field of embalming, but he told plaintiff that a method to preserve the body forever was available.

70Hall v. Cazenove (1804), 1 Smith K. B. 27, 102 E. R. 913 (by Lord Ellenborough, C. J.): “The stipulation, therefore, had then become wholly nugatory and cannot be understood as having formed any part of the contract between the parties, without imputing to them the most manifest absurdity.”


72In Le Roy v. Jacobosky et al. (1904), 136 N. C. 448, 48 S. E. 796, 67 L. R. A. 977, a co-defendant, Weisel, owned land as co-owner with his guardian. Sale of the land by guardian could not impose binding duty upon Weisel, a minor, because it was ultra vires. The unauthorized contract by the guardian called for a conveyance of the land on April 23d. On April 28th of the same year the minor reached majority and signed the instrument. Contract held void on grounds of inherent impossibility.

73Bennett v. Morse (1894), 6 Colo. App. 122, 39 Pac. 582.

74State v. Hillis (1919), 189 Ind. 170, 124 N. E. 515.


Scientific progress also is responsible for a recent trend to formulate differently what constitutes inherent impossibility. Formerly and now in California it is said that the thing must be impossible in the "nature of things." But more recently courts are inclined to speak rather of an inherent impossibility according to the standards of the day or "according to the state of knowledge at the date of the contract." The need for this somewhat more careful formulation is illustrated by the fact that in 1904 a court considered a promise to travel from London to New York in one day as a fitting instance to explain what would be meant by absolute impossibility.

The now prevalent standard for inherent impossibility allows us, in the Chelini case, to dispense with all speculation as to whether at some future date "bigger and better" morticians would be able to guarantee a body: it is sufficient to know that at the day of the contract the performance was impossible by all known standards.

On the other hand the general yardstick, as to how impossible a thing must be to come within the rule of dispensation, has not been lowered. It is a well settled rule of law that difficulties will not avail the defendant. As has been said: "no principle is better settled than that, where a party by his own contract creates a duty or a charge upon himself, he is bound to make it good, no matter what the cost or difficulty if performance be not absolutely impossible." The same strict standards apply also in California. But in the Chelini case, there was, according to expert testimony, a case where the

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77See notes 61 and 64.
78Le Roy v. Jacobosky (1904), 136 N. C. 443, 48 S. E. 796, 801, 67 L. R. A. 977, 983, says: "physical impossibility means here practical impossibility according to the knowledge of the day."
See also, State v. Hillis (1919), 189 Ind. 170, 124 N. E. 515.
80"The Harriman" (1869), 9 Wallace 161, 172.
81Leavitt v. Dover (1892), 67 N. H. 94, 32 Atl. 156. To the same effect, Reid v. Alaska Packing Co. (1903), 43 Ore. 429, 73 Pac. 337, 339 ("there is a marked distinction . . . between a mere disability or inability of a party to perform a contract and the absolute and inherent impossibility of performance in the true sense").
82An early illustration of this principle is found in Berbe v. Johnson (1838), 19 Wend. 500, 32 Am. Dec. 518, where promisor had undertaken to obtain patent rights in Canada for promisee's invention. This would have required an act of Parliament. Promisee was held liable because a patent might be secured, even if it is beyond the powers of the promisor.
83See further: Sup't of Public Schools v. Bennett (N. J., 1859), 3 Dutcher 513, 72 Am. Dec. 373; Runyan v. Culver (1916), 168 Ky. 45, 181 S. W. 640; Hansen v. Dodwell Dock and Warehouse (1918), 100 Wash. 46, 170 Pac. 346; City of Montpelier v. National Surety Co. (1923), 97 Vt. 111, 122 Atl. 484 (impossibility must lie in the nature of the thing to be done, but not in the "inability" of the party to do it).
84Even if there is only a remote possibility that the contract could become performable within a reasonable period, it will be considered a valid contract: so in Wild v. Harris (1849), 7 C. P. 999, 137 E. R. 395, defendant, a married man, had promised to marry plaintiff and plaintiff was ignorant of the fact that defendant was already married. Under these circumstances there was judgment for plaintiff in an action on breach of promise, because defendant's wife might have died within a reasonable time.
85Coulter v. Sausalito Bay Water Co. (1932), 122 Cal. App. 480, 10 Pac. 2d 780; see also, Graham Loftus Oil Co. v. Mountain View (1940), 37 Cal. App. 2d 315, 99 Pac. 2d 357; cf. note 64.
promise was absolutely impossible under the standards of the day and therefore void.

There is only one thing unambiguously standing out in the entire story of this litigation, the plaintiff was seeking to recover on a theory of breach of contract and the action did not sound in tort. This theory was consistently adhered to by plaintiff. Quite properly the Supreme Court disallowed punitive damages as being improper in an action *ex contractu.*

A contract, which is absolutely void, cannot be the basis for an action for damages based on breach of that contract. Here we have the Supreme Court’s dilemma. By necessity the Supreme Court must have assumed that the jury founded its verdict on a set of facts consonant with the validity of the contract and on a breach of such valid contract. Which version this would be, the allegations of the complaint or the contract proved (the jury believing either that the object was achievable or that the promise of everlasting preservation was professional tact) cannot even be guessed. None of the possibilities is clearly followed through. The *obiter dictum* of the tort aspects of the case seems to assume that the promise was found to be unfulfillable.

If an inherently impossible contract cannot be the foundation of an action *ex contractu,* this will not under all circumstances leave the purported promisee without a remedy. If the necessary conditions are met, a tort action based on deceit may lie in favor of such a party.

The Supreme Court bases its somewhat poorly integrated *obiter dictum* on the possible liability in tort of Nieri on such an assumption. The Supreme Court did not have any doubts that, had Chelini chosen to sue in tort, he would have recovered a punitive measure of damages. May it be said that under the rules governing recovery for the tort of deceit in California, the position of Chelini in such a hypothetical situation appears much less favorable than the Supreme Court apparently suggests.

The hurdle in the light of these rules would lie in the requirement that the false statement was made with intent to induce the party to enter into the

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83Chelini v. Nieri (1948), 32 Cal. 2d 480, 488, 196 Pac. 2d 915, 919. The Court of Appeals had done likewise in Chelini v. Nieri (1948), 188 Pac. 2d 564, 571.
84Chelini v. Nieri (1948), 32 Cal. 2d 480, 487, 196 Pac. 2d 915, 919.
85VI Williston on Contracts (Rev. ed., 1938), 5414; Pollock on Contracts (12 ed., 1946), 229.
87Ever since the case of Roseman v. Canovan (1872), 43 Cal. 110, the courts of this state are committed to Lord Brougham’s rule on recovery for the tort of deceit, as stated in Atwood v. Small (House of Lords, 1838), VI Clark & (? ) 232, 444, 7 E. R. 684, 764: “If two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time that he stated it not to be true, and if upon that statement of what is not true, and what is known by the party making it to be false, the contract is entered into by the other party, then generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contract, an action of damages grounded upon the deceit . . .”

contract. The plaintiff would have had to overcome a possible tendency to consider the misstatement as professional tact to quiet down an excitable man. But even more difficult would it be to show that the false statement was material for plaintiff to enter into the contract. Chelini needed the services of an embalmer and he probably had no time on hand to "shop" for morticians. Even if he had known the truth, he would, just the same, have been compelled to avail himself of the services of Nieri, since, by law, he was obliged to use the services of a licensed mortician to inter his mother.

Moreover it has been expressly said in respect to tort actions based on fraud that only such damages can be recovered as "proximately and reasonably resulted from the fraudulent representation." It is a matter of justified doubt whether a properly instructed jury would have found that the supervening opening of the casket by Chelini was reasonably foreseeable. On the contrary, it stands to reason, that a tort action based on the facts presented in the case at hand would have brought the issue of proximate cause much more clearly into the picture than the contract action. It is not too likely that Chelini's injuries could have been shown to be "the proximate result of the alleged false representations," even if stricter rules on proximate cause obtain in the law of torts than in contract actions.

Inasmuch as this case was not dealt with from the point of view of possible tort liability and all the issues actually raised are questions of contract law, there is here no need to follow up these points at any great length.

The confusion reigning in the Chelini v. Nieri case is in our mind a consequence of extreme liberality in pleading matter which was not conducive to the formulation of clear issues. If the proof of the pudding is in the eating, the appellate disregard of this enormous departure from the allegations of the complaint was not a fortunate policy decision.

It is submitted on the strength of the reasons presented in this paper that the decision of the Supreme Court could not and would not have sustained a recovery by Chelini for detriment to his health, were it not for the fact that through defects of pleading the issues had become clouded and out of focus.

In any case, it is difficult to assign logical reasons for the decision of this case. One is quite naturally tempted to look for a teleological explanation. No effort to give such a reason can be found in the pages of the opinion.

88See note 87 and cases cited therein.
91White v. Gordon (1929), 130 Ore. 139, 279 Pac. 289.
of the Supreme Court. The factual background involves a ghoulish element. There may have been a desire to impose a strict measure of liability on undertakers handling bodies entrusted to their care by near relatives.

Morticians serve the public in matters highly affecting tender feelings, piety, religion, good taste. Their profession is licensed in this state. There are good reasons to impose upon them a special degree of care. If such a desire is at the bottom of the decision, one must regret that this policy was not expressed by the court. And one may still wonder whether the Chelini case, with its strange background, and its total absence of any proved negligence, would have been the right starting point for a new doctrine.

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