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# Recent Decisions on Damages In Commercial Cases in California

By JUDSON A. CRANE\*

Much attention is given by the Bar to damages in certain tort cases. There are associations of Claimants' Attorneys, of Trial Attorneys and there may be associations of Defense Counsel. How to try or defend a personal injury action, how to build up or limit recovery of damages in such actions is being well publicized. Comparatively little attention is given to damages arising out of commercial transactions. It seems appropriate to call to the notice of the Bar and of law students significant recent decisions showing trends and developments in respect to recoverable damages in actions other than personal injuries and trespasses to property. The writer in connection with teaching courses in damages in the past six years has noted a number of significant decisions by the California appellate courts which will be discussed in this article.

## *Foreseeability of Harm*

The basic rule for the recovery of damages in contract action is provided by Civil Code section 3300:

Measure of damages for breach of contract. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, 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.

This is substantially the rule laid down in the leading English case of *Hadley v. Baxendale*<sup>1</sup> if we may consider "detriment proximately caused" as including "injuries which the defendant had reason to foresee as a probable result of his breach when the contract was made."<sup>2</sup> Many cases have held that damages within the contemplation of the parties at the time of contracting are to be considered proximate.

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<sup>1</sup> 9 Exch. 341, 156 Eng. Rep. 145 (1854).

<sup>2</sup> RESTATEMENT, CONTRACTS § 330 (1932).

*Holmestake Mining Company v. Talcott*<sup>3</sup> allowed recovery of profits lost to plaintiff by defendant's breach of a contract to supply ore to be milled, as being within the contemplation of the parties and reasonably certain.

*Csordas v. United States Tile & Composition Roofers*,<sup>4</sup> allowed recovery for loss of profits on a roofing job against a labor organization which in breach of contract supplied an unskilled employee, making it necessary to do the work over again. The court treated the loss as damages which in the ordinary course of things would be likely to result, citing Civil Code section 3300.

*Arvin-Kern Company v. B. J. Service, Inc.*<sup>5</sup> allowed recovery for harm caused by use of a defective cementing tool for use in oil well drilling, citing Civil Code section 3300.

*Ely v. Bottini*<sup>6</sup> allowed recovery by a main contractor against a subcontractor for damages caused by the latter's delay in completion, the court citing Civil Code section 3300, and *Hadley v. Baxendale*, applying the "contemplation of parties" rule.

*Christensen v. Slawter*<sup>7</sup> allowed recovery by a purchaser of a tract of land for the purpose of erecting houses for damages caused by delay in making conveyance. Time was expressly made of the essence. The vendor was aware of vendee's purposes. *Hadley v. Baxendale* was cited in a discussion of the contemplation of parties rule.

A line of cases has dealt with the liability of a liability insurance carrier who in bad faith violation of its contract to defend the insurer fails to settle for an amount within the policy coverage and exposes the insured to a judgment by an injured plaintiff for an amount in excess of the policy.

*Brown v. Guarantee Insurance Company*<sup>8</sup> reversed the judgment of the superior court sustaining a demurrer to the complaint by the insured, and set forth some seven matters to be considered in passing on whether the insurer is guilty of such bad faith in dealing with proposals for settlement as to amount to breach of the contract of insurance.

*Comunale v. Traders & General Insurance Company*<sup>9</sup> upheld a finding below that the insurer in refusing a reasonable offer of settle-

<sup>3</sup> 161 Cal. App. 2d 566, 327 P.2d 59 (1958).

<sup>4</sup> 177 Cal. App. 2d. . . , 2 Cal. Rptr. 133 (1960).

<sup>5</sup> 178 Cal. App. 2d. . . , 3 Cal. Rptr. 238 (1960).

<sup>6</sup> 179 Cal. App. 2d. . . , 3 Cal. Rptr. 756 (1960).

<sup>7</sup> 173 Cal. App. 2d 325, 343 P.2d 341 (1959).

<sup>8</sup> 155 Cal. App. 2d 679, 319 P.2d 69, 66 A.L.R. 2d 1202 (1958); See also *Ivy v. Pacific Automobile Insurance Co.* 156 Cal. App. 2d 652, 320 P.2d 140 (1958).

<sup>9</sup> 50 Cal. 2d 654, 328 P.2d 198, 58 A.L.R. 2d 883 (1958); *Accord Bell v. Commercial Insurance Co.*, 280 F.2d 514 (3rd Cir. 1960).

ment within the amount of the policy was guilty of bad faith and breach of contract, and was liable for the full amount of the recovery by the injured person. The loss to the insured was held to have been proximately caused by the breach of contract, under Civil Code section 3300.

*Davy v. Public National Insurance Company*<sup>10</sup> affirmed a judgment of the superior court to the effect that there was no sufficient proof of bad faith. It was held that negligence alone on the part of the insurer is not conclusive of bad faith. It seems clear that the insured who tries to impose liability on the insurer for more than the amount of his policy must prove something more than the refusal to make a compromise settlement for an amount within the policy limits. He has to establish that the refusal to settle was unreasonable. As that depends on what information was gained by the insurer from its investigations and a guess as to what a jury might find on the issues of liability and damages. The insured who does not carry enough coverage is seemingly in a risky position.

*Navarro v. Jeffries*<sup>11</sup> was an action for breach of a contract to supply the plaintiff with castings to be made into finished truck oil pans and returned to defendant. The defendant ceased to supply castings. Plaintiff was allowed to recover lost profits on the unfinished portion of the contract and also depreciation of special equipment procured by plaintiff for the purpose of performance, the court citing Civil Code section 3300.

*Reynolds v. Bank of America National T. & S. Association*<sup>12</sup> sustained recovery by the bailor of an airplane not only for cost of replacement, but also for loss of use during the time it took to procure a replacement. Plaintiff was in the business of renting airplanes. Defendant's testator had by negligent operation been compelled to ditch the plane in the ocean and it was a total loss. The loss of use was held to be a proximately caused detriment whether it could have been anticipated or not, under Civil Code section 3333, which provides a rule for damages for obligations not arising out of contract. It would seem the same result might have been reached in an action for breach of the bailee's contract to return the plane in good condition.

Often where the plaintiff has an election to treat his cause of action as a tort or a breach of contract, greater damages may be recovered under tort measures of damages. In *Acadia, California, Ltd. v. Herbert*<sup>13</sup> the cause of action was a breach of an agreement to supply

<sup>10</sup> 181 Cal. App. 2d . . . , 5 Cal. Repr. 488 (1960).

<sup>11</sup> 181 Cal. App. 2d . . . , 5 Cal. Repr. 435 (1960).

<sup>12</sup> 53 Cal. 2d 49, 345 P.2d 926 (1959).

<sup>13</sup> 54 Cal. 2d . . . , 353 P.2d 294, 5 Cal. Rptr. 686 (1960).

water. Treating the wrong as a tort, damages were allowed for the mental suffering of the plaintiff, occupying a dwelling dependent on the water supply; moreover, the wrong being malicious, punitive damages were also recoverable.

### *Avoidable Consequences*

A victim of a breach of contract cannot recover damages for harm he could have avoided by reasonable effort after knowledge of the breach. It is sometimes stated in judicial opinions that the plaintiff is under a duty to mitigate damages. This is incorrect. He is rather under a disability to recover compensation for harm he could have avoided.<sup>14</sup> He is not held at his peril to take the safer course, but, only having a choice of conduct, he must use ordinary diligence and adopt a course which is reasonable as of the time he acts.<sup>15</sup> If defendant indicates that he desires to cancel an executory contract, but the manifestation is not clear and explicit, the plaintiff may be acting reasonably in going ahead with full performance, rather than take the risk of liability for non-performance if there was found to have been no repudiation.<sup>16</sup> If, however, there is a clear and definite repudiation, the plaintiff is barred from recovery for the breach to the extent of savings that would have resulted from his cessation of performance.<sup>17</sup>

On breach by a subcontractor on a construction contract where time of completion is essential, the main contractor need not re-advertise and seek other bids, but may award the work to the next highest bidder at an additional cost, the difference showing the amount of damage.<sup>18</sup>

On breach by a seller of a contract to deliver a quantity of specific wine, approved by the buyer, the latter need not accept an offer by the seller to substitute wine of an inferior quality.<sup>19</sup>

On notification by a shipper of intention to ship cotton to be carried from the West Coast to India of a lesser quantity than had been contracted for with the carrier, the latter made other contracts for other kinds of goods to be carried in the vacated cargo space. Damages recoverable from the shipper for his breach were mitigated to the extent of the net amount received for substitute cargo, with allowances for expenses saved in connection with cargo not shipped by defendant

<sup>14</sup> RESTATEMENT, CONTRACTS § 336 (1), comment *d* (1932).

<sup>15</sup> McCORMICK, DAMAGES § 35 (1935); quoted in *Hogland v. Klein*, 49 Wash. 2d 216, 298 P.2d 1099 (1956).

<sup>16</sup> *Schmidt v. New Plastic Corp.*, 144 Cal. App. 2d Supp. 849, 301 P.2d 131 (1956).

<sup>17</sup> *Bomberger v. McKelvey*, 35 Cal. 2d 607, 220 P.2d 729 (1950).

<sup>18</sup> *Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.* 135 Cal. App. 2d 40, 286 P.2d 825 (1955).

<sup>19</sup> *Guerrieri v. Severini*, 51 Cal. 2d 12, 330 P.2d 635 (1958).

and allowance for additional expenses in connection with the substitute cargo.<sup>20</sup>

### *Certainty as to Amount of Damages*

It was recently held that a judgment obtained in a federal district court for breach of contract to buy timber must be reversed as being based on speculation.<sup>21</sup> It was stated by the court of appeals, that "the law is well settled that the burden of proof is upon the party claiming the damage to prove the elements thereof with reasonable certainty."<sup>22</sup>

Not exactness but only reasonable certainty is required. Many recent cases have cited and quoted the language of the California Supreme Court in *Zinn v. Ex-Cell-O Corp.*,<sup>23</sup> "one whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages cannot be measured with exactness." There are numerous cases applying this doctrine.<sup>24</sup>

One of the most recent and somewhat unusual is *Southern California Disinfecting Co. v. Lomkin*.<sup>25</sup> The plaintiff hired a salesman to solicit business in the sale of sanitary supplies, assigning to him a specific route and providing him with information in the files as to a large number of plaintiff's regular customers. After a few years of service the salesman was hired by defendant, a competitor, and before and after leaving plaintiff's employ he made use of the confidential information in the files to secure for the defendant business which plaintiff would otherwise have gotten. Damages were recovered from the employer and the salesman, in part for the loss of the files abstracted by the salesman and in part for the loss of the business and profits therefrom. This was proved by evidence of volume of business from the salesman's route and by a showing that plaintiff's regular customers diverted to defendant before and after the defection. Inability to estab-

<sup>20</sup> *Isbrandtsen Co. v. Producers Cotton Oil Co.*, 158 Cal. App. 2d 712, 322 P.2d 1005 (1958).

<sup>21</sup> *Peters v. Lines*, 275 F.2d 919 (9th Cir. 1960), *reversing* 168 F. Supp. 420 (N. D. Cal. 1958).

<sup>22</sup> 275 F.2d at 930.

<sup>23</sup> 24 Cal. 2d 290, 297-298, 149 P.2d 177, 181 (1944).

<sup>24</sup> *Perry v. Lambourne*, 177 Cal. App. 2d. . . , 2 Cal. Rptr. 441 (1960) (breach of agreement for a joint venture in real estate development); *Tomlinson v. Wander Seed & Bulb Co.*, 177 Cal. App. 2d. . . , 2 Cal. Rptr. 310 (1960); *Hildebrand v. Stonecrest Corp.*, 174 Cal. App. 2d 158, 344 P.2 378 (1959) (breach of agreement by shopping center lessor of contract with lessee, a pharmacy, that no other tenant of center would be permitted to sell drugs, medicines or cosmetics); *Israel v. Campbell*, 163 Cal. App. 2d 806, 330 P.2d 83 (1958) (breach of contract to sell lumber); *Siquig v. West Coast Pickle Co.*, 161 Cal. App. 2d 254, 326 P.2d 596 (1958) (breach of contract to buy a crop of peppers); *Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 397, 313 P.2d 936 (1957) (contract to supply automobiles to a dealer).

<sup>25</sup> 183 Cal. App. 2d. . . , 7 Cal. Rptr. 43 (1960).

lish the loss with exactness was no bar to the modest recovery of 1500 dollars for loss of the files and 3500 dollars for loss of business.

The court also sustained an award of punitive damages, the case being one of fraud, although the tort incidentally involved a contract of employment. Punitive damages appear appropriate in such a case as mere restitution to plaintiff of defendant's unjust gain, which probably is the equivalent of plaintiff's loss, and would have no adequate deterrent effect.

The fact that the plaintiff asking for compensation for loss of profits has an established business and record of success is helpful in proving his loss with a requisite degree of certainty.<sup>26</sup>

### *Interest as Damages\**

A person entitled to a promised performance is entitled, if it is not forthcoming when due, to damages in an amount which will compensate him for the detriment proximately caused thereby. If it is not promptly paid, if it is necessary to recover damages by litigation over a period of months or years, the injured plaintiff suffers a detriment by reason of the delay, the deprivation of the power to make economic use of the compensation which is due him. The defendant receives a corresponding enrichment through his ability to make use of a monetary asset which he should turn over to the plaintiff. The usual method of compensating the plaintiff for the loss caused by the delay is by allowing him interest on the principal sum due him. There is a difficulty in a situation where the principal sum due is not exactly ascertainable until settled by trial and judgment. It may be contended that a debtor who does not know what to pay is guilty of no wrong in withholding payment until the amount due is judicially determined. Accordingly the right to interest as provided by Civil Code section 3287 is limited to "damages certain or capable of being made certain by calculation."

The leading recent case applying this code provision is *Lineman v. Schmidt*.<sup>27</sup> That was an action for breach of contract to sell a quantity of flour of specified quality. It was in the courts for ten years. The plaintiff at first sought to collect liquidated damages in accordance with a provision of the contract. This was unsuccessful, the court ruling that the liquidated damages provision was invalid under Civil Code sections 1670 and 1871, it appearing that it was not impracticable or extremely difficult to fix the actual damages.<sup>28</sup> But when the plaintiff

\* The author wishes to acknowledge the assistance of Gerald R. Schmelzer, member, Second Year Class, in researching this section.

<sup>26</sup> *Mann v. Jackson*, 144 Cal. App. 2d 6, 296 P.2d 120 (1956).

<sup>27</sup> 32 Cal. 2d 204, 195 P.2d 408, 4 A.L.R. 2d 1380 (1948).

<sup>28</sup> *Rice v. Schmidt*, 18 Cal. 2d 382, 115 P.2d 498, 138 A.L.R. 589 (1941).

sought to fix the actual damages it was found that there was no established market price for the brands of flour involved, therefore the damages caused the buyer could not be "made certain by calculation." Recovery of interest was refused.

It is submitted that the result was an injustice to the plaintiff. In defending the code provision, section 3287, the court cited and quoted Restatement of Contracts section 337(a). It neglected to quote or cite section 337(b) which, in cases not within 337(a) (established market prices being unavailable), permits the court in its discretion to allow interest if justice requires it. This more liberal rule applies under Civil Code section 3288 in tort actions and specifically in cases of fraud, oppression or malice. The New York Civil Practice Act section 480, as amended in 1927, provides that in actions for breach of contract, express or implied, "interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated."<sup>29</sup> This is a matter of right, not of discretion. Such an amendment to the Civil Code should be submitted to the California Legislature.<sup>30</sup>

*Lineman v. Schmidt* has been followed in a number of cases denying interest on unliquidated claims, such as contracts for services, no rate of pay being fixed;<sup>31</sup> and for loss of profits on breach of contract to deliver goods sold.<sup>32</sup>

Interest is recoverable as a matter of right where the amount due is capable of exact ascertainment, as where compensation to an employee is based on a share of clearly ascertainable profits of the enterprise.<sup>33</sup> Likewise, it is recoverable in a judgment of restitution to employer of "kickbacks" received by advertising manager from printers and engravers,<sup>34</sup> on damages suffered by a contractor for a public work due to delays caused by fault of defendant municipal corporation, authenticated by detailed statements furnished defendant from which the loss could readily be computed.<sup>35</sup>

Where plaintiff's claim, in a liquidated amount is met by a set-off or

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<sup>29</sup> See discussion of this amendment and present New York law as to recovery of interest in *Flamm v. Noble*, 296 N.Y. 262, 72 N.E. 2d 886 (1947).

<sup>30</sup> For a good critical comment on the California law as to recovery of interest, see Comment, 5 U.C.L.A. L. REV. 262 (1958).

<sup>31</sup> *Parker v. Maier Brewing Co.*, 180 Cal. App. 2d . . . , 4 Cal. Rptr. 825 (1960); *Garrie v. McCauley*, 163 Cal. App. 2d 273, 328 P.2d 1013 (1958); *Brown v. Friesleben Estate Co.*, 148 Cal. App. 2d 720, 307 P.2d 388 (1957).

<sup>32</sup> *Tomlinson v. Wander Seed & Bulb Co.*, 177 Cal. App. 2d . . . , 2 Cal. Rptr. 310 (1960).

<sup>33</sup> *Huntton v. Hurlay*, 137 Cal. App. 2d 33, 290 P.2d 14 (1955).

<sup>34</sup> *Sears Roebuck & Co. v. Blade*, 139 Cal. App. 2d 580, 294 P.2d 140 (1956).

<sup>35</sup> *Maurice L. Bein, Inc. v. Housing Authority*, 157 Cal. App. 2d 670, 321 P.2d 753 (1958). This case also applies an amendment to CAL. CIV. CODE § 3287 permitting the recovery of interest against state agencies.



counterclaim, unliquidated, the amount of which defendant establishes, interest is recoverable on the net amount awarded to the plaintiff.<sup>36</sup>

A purchaser of real estate, induced by fraudulent misrepresentations, who gives notice of rescission and demands restitution of payment, is entitled to interest from the date of notice of rescission.<sup>37</sup>

### *Damages for Fraud*

Civil Code section 3343, as amended in 1935, provides as follows:

One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted with and the actual value of that which he received, together with any additional damage arising from the particular transaction.

Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.

This adoption of the "out of pocket rule" has been said to change the law previously applied, under which the plaintiff might recover the difference between the value of the thing bought and the value it would have had if as represented, the "benefit of the bargain rule."<sup>38</sup> It has, however, been maintained that the latter rule is not excluded and should not be, as otherwise, the defendant loses nothing by his fraud.<sup>39</sup>

Value is not necessarily market value as of the time of the wrong. Intrinsic value may be shown, such as in the case of one fraudulently induced to sell shares of stock.<sup>40</sup>

There have been several cases of fraud by real estate brokers, often in misrepresenting the price at which property is obtainable. In *Crogan v. Metz*,<sup>41</sup> the buyer recovered from the broker the latter's secret profit, it being treated as an action for breach of contract. As such no exemplary damages were recoverable.

In *Ward v. Taggart*,<sup>42</sup> defendant, a broker, claimed falsely to have an exclusive listing of property desired by the plaintiff. Plaintiff offered to buy at a price of 4000 dollars per acre which in fact was the owner's

<sup>36</sup> *Pan Pacific Sash and Door Co. v. Greendale Park*, 166 Cal. App. 2d 652, 333 P.2d 802 (1958); *Muller v. Barnes*, 139 Cal. App. 2d 847, 294 P.2d 505 (1956).

<sup>37</sup> *Smith v. Rickards*, 149 Cal. App. 2d 648, 308 P.2d 758 (1957).

<sup>38</sup> *Shonts v. Hirliman*, 28 F. Supp. 458 (S.D. Cal. 1939).

<sup>39</sup> *Ward v. Taggart*, 51 Cal. 2d 736, 744, 336 P.2d 534, 539 (1959) (Schauer, J., concurring and dissenting); *Bagdasarian v. Gragnon*, 31 Cal. 2d 744, 764, 192 P.2d 935, 947 (1948) (Schauer, J., dissenting); see also 5 WILLISTON, CONTRACTS § 1392 (3rd ed. 1957). Justice Schauer maintains that the out-of-pocket rule as stated in CAL. CIV. CODE § 3343 is not exclusive.

<sup>40</sup> *Zin v. Ex-Cal-Lo Corp.*, 24 Cal. 2d 290, 149 P.2d 177 (1944).

<sup>41</sup> 47 Cal. 2d 398, 303 P.2d 1029 (1956).

<sup>42</sup> 51 Cal. 2d 736, 336 P.2d 534 (1959); comment 11 HASTINGS L.J. 183 (1959); see CAL. CODE CIV. PROC. § 580 as to flexibility of relief under facts known at time.

asking price. The defendant, authorized to transmit the offer, falsely said it was declined. Plaintiff then offered 5000 dollars per acre, which defendant said was accepted. The defendant purchased at 4000 dollars per acre, taking title through a straw man, and then conveyed to plaintiff who paid him 5000 dollars per acre. After prolonged court proceedings it was ultimately held by the supreme court that the plaintiff could recover, on the basis of waiver of tort and restitution for money had and received, in the amount of the net profit acquired by defendant through his fraud. The tort action for deceit would not have been so advantageous, as it appeared that the land was in reality worth 5000 dollars per acre. However, in restitution the plaintiff could recover the defendant's unjust enrichment. It not being an obligation arising out of contract, but one based on fraud, exemplary damages were recoverable. The case demonstrates effectively the advantage in some situations of basing one's case on quasi-contract or restitution rather than deceit in cases where the defendant's gain exceeds the plaintiff's out of pocket loss.

*Garrett v. Perry*<sup>43</sup> applies the statutory measure of damages to the case of a sale of a ranch induced by seller's fraud, followed by foreclosure, with no deficiency award, of a purchase money mortgage which, as to the unpaid balance of the price, "took the buyer off the hook." Plaintiff had agreed to buy for 700,000 dollars property actually worth 530,000 dollars. Plaintiff initially paid 100,000 dollars in cash, 59,000 dollars on account of mortgage notes, and 30,400 dollars in expenditures for care and attempted improvement of the property until it was taken from him on foreclosure. This actual outgo of 189,400 dollars was his recoverable loss, since the foreclosure operated to relieve him from any duty to pay further on the amount deferred.

There are other recent cases permitting recovery of expenses incurred in the operation of a business, sold by fraud, as consequential damages.<sup>44</sup>

Fraud by a fiduciary seems, without difficulty, to entitle the defrauded principal to the enrichment acquired by the fiduciary. This was the basis of recovery in *Simone v. McKee*<sup>45</sup> where a broker induced his principal to sell to a straw man at a price of 13,000 dollars not disclosing that another party had offered 17,000 dollars, to whom the property was later sold at that price by the straw man. The secret profit was recovered.

<sup>43</sup> 53 Cal. 2d. 178, 346 P.2d 758 (1959).

<sup>44</sup> *N. J. K. Corp. v. Pacific Vital Food Stores, Inc.*, 159 Cal. App. 2d 522, 324 P.2d 96 (1958); *Lawson v. Town & Country Shops, Inc.*, 159 Cal. App. 2d 196, 323 P.2d 843 (1958).

<sup>45</sup> 142 Cal. App. 2d 307, 298 P.2d 667 (1956).

In *Prince v. Powers*<sup>46</sup> a partner in a firm engaged in dealing in water softening equipment imposed upon his inexperienced partner, the plaintiff, by inserting between the firm and its suppliers a dummy corporation in which defendant and his brother were the parties in interest. Large profits were made by billing the firm prices largely in excess of those actually paid to the real suppliers, these profits being split between defendant partner and his co-conspirator. In an action for dissolution of the partnership, which naturally became insolvent, defendant partner was held jointly and severally liable together with his accomplice for the entire amounts of which the firm was fraudulently deprived.

### *Contracts for the Sale of Real Estate*

Damages recoverable on breach by the vendor of a contract to sell real estate are determined under Civil Code section 3306. Excepting cases of bad faith by the vendor, the detriment caused by his breach is deemed to be the price paid and expense properly incurred in examining the title and preparing necessary papers, with interest.

If the vendor is guilty of bad faith in failure to perform the contract, as by selling to another purchaser, he is liable in damages for the loss of the bargain, based on the excess of the value of the property above the sale price.<sup>47</sup>

*Fox v. Aced*<sup>48</sup> presented an interesting problem as to what is bad faith on the part of the vendor. The contract contemplated that a building in course of construction should be completed before performance. It was not completed within the time specified. The vendor was advised by his attorney that the completion was a condition and not having occurred the deal was off, consequently the vendor refused to perform. The majority of the supreme court held that acting on advice of counsel precluded any implication of bad faith, although the advice was erroneous. A strong dissent<sup>49</sup> by Carter J., in which Gibson and Traynor JJ. concurred, viewed the evidence, as did the trial court, as not showing a full and fair disclosure of the facts to defendant's counsel, and so good faith was lacking.

The defaulting vendee is liable for the difference between the contract price and whatever lesser value the property has at the time of breach.<sup>50</sup>

<sup>46</sup> 177 Cal. App. 2d . . . , 2 Cal. Rptr. 545 (1960).

<sup>47</sup> *Crag Lumber Co. v. Crofoot*, 144 Cal. App. 2d 755, 301 P.2d 9 (1956); *Rasmussen v. Moe*, 138 Cal. App. 2d 499, 292 P.2d 226 (1956).

<sup>48</sup> 49 Cal. 2d 381, 317 P.2d 608 (1957).

<sup>49</sup> 49 Cal. 2d at 386, 317 P.2d at 611.

<sup>50</sup> *Bouchard v. Orange*, 177 Cal. App. 2d . . . , 2 Cal. Rptr. 382 (1960); *Van Buskirk v. McClenahan*, 163 Cal. App. 2d 633, 329 P.2d 924 (1958).

### *Liquidated Damages and Penalties*

A significant decision as to the validity and enforceability of a liquidated damage clause in a contract is *McCarthy v. Tally*.<sup>51</sup> A lease of summer resort property contained a provision that in the event of termination of the lease by the lessor for cause, or abandonment by the lessee, the sum of 10,000 dollars was fixed as liquidated damages. There was a non-payment of rent during the off-season and abandonment by the lessee. The superior court had denied recovery under the liquidated damage clause as actual damage at the time of the breach was not shown.

In reversing the judgment, the supreme court doubted that the clause was intended to apply to the breach during the off-season, or if it was, whether the amount fixed was reasonable. But final disposition of the case could not be made in the absence of findings on these points. The significant part of the decision is a ruling that if the agreement for liquidated damages was valid when entered into, as a reasonable effort to determine damages which would be impracticable or extremely difficult to ascertain with certainty, it would be valid and enforceable even though there was no proof of actual damage caused by the breach. This may be in accordance with the weight of authority in other jurisdictions,<sup>52</sup> but it seems questionable whether such a ruling is in accord with the purpose of damages, which is compensation.<sup>53</sup> To allow recovery by one who has not been harmed seems like judicially collecting a bet.

In *Los Angeles City School District v. Landier Management Corporation*<sup>54</sup> a question was presented of liquidated damages or penalty. By statute the district was entitled to recover amounts in excess of 1,500,000 dollars paid for transportation of pupils because members of the governing board of the school district had an interest in the transporting company. A suit having been instituted and prepared for trial, it became apparent that if successful the company would be thrown into bankruptcy. An executory accord agreement was entered into and embodied in a stipulation to the effect that 264,000 dollars should be paid in eight annual installments, and in the event of a thirty day period of default in payment of any installment, after thirty days notice, judgment should be entered for twice the unpaid balance. Default occurred four years later and an application was made by the company to avoid the stipulation on the ground of mistake of law, it

<sup>51</sup> 46 Cal. 2d 577, 297 P.2d 981 (1956).

<sup>52</sup> Note, 4 U.C.L.A.L. REV. 126 (1956).

<sup>53</sup> Note, 61 HARV. L. REV. 113, 130 (1947).

<sup>54</sup> 177 Cal. App. 2d. . . , 2 Cal. Rptr. 662 (1960).

being invalid as a penalty. The court denied relief from the stipulation because the application was not timely and entered judgment pursuant to its terms. As a dictum the court indicated the stipulation was originally vulnerable as a penalty.

This seems questionable. If an executory accord is not performed the original claim should be considered revived in full force.<sup>55</sup> An agreement to accept much less than what might have been recovered, but for the stipulation by way of compromise, does not seem to involve a penalty.

Related to the problem of liquidated damages is that of forfeiture by the defaulting buyer of property; where his payment already made exceeds the actual damages caused to the seller. *Barkis v. Scott*<sup>56</sup> and *Baffa v. Johnson*<sup>57</sup> allowed recovery of the excess by a vendee of real estate whose default was neither wilful, fraudulent, nor grossly negligent under Civil Code section 3275. *Freedman v. Rector of St. Mathias Parish*<sup>58</sup> went further and enforced a duty of restitution of unjust enrichment on the seller, even though the buyer's breach appeared to be wilful, citing Civil Code sections 1670, 1671, 3294, and 3369. This decision has been followed in later cases.<sup>59</sup>

This principle was extended to a default by the vendee in a conditional sale of a chattel, in *Bird v. Kenworthy*.<sup>60</sup> But in that case the rental value of the chattel while in the possession of the vendee exceeded his payment; consequently there was no forfeiture suffered by him nor unjust enrichment received by the vendor, therefore no recovery.

In a quiet title action brought by a vendor, the defaulting vendee, seeking a return of his payments or a portion thereof, has the burden of proving that his payments exceed the damages to the vendor, and to what extent.<sup>61</sup>

### Conclusion

The writer's impressions from examining the decisions heretofore noted are several. The plaintiff's theory of his case does not limit his measure of recovery. The court may sustain a recovery on any theory which fits the facts, whether in breach of contract, quasi contract or

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<sup>55</sup> RESTATEMENT, CONTRACTS § 417(c) (1932).

<sup>56</sup> 34 Cal. 2d 116, 208 P.2d 367 (1949).

<sup>57</sup> 35 Cal. 2d 36, 216 P.2d 13 (1950).

<sup>58</sup> 37 Cal. 2d 16, 230 P.2d 629 (1951).

<sup>59</sup> *Fry v. George Elkins Co.*, 162 Cal. App. 2d 256, 327 P.2d 905 (1958); *Crofoot v. Wager*, 109 Cal. App. 2d 839, 241 P.2d 1017 (1952).

<sup>60</sup> 43 Cal. 2d 656, 277 P.2d 1 (1954).

<sup>61</sup> *Pasteur Realty Corp. v. LaFleur*, 154 Cal. App. 2d 5, 315 P.2d 374 (1957); *Peterson v. Ridenaur*, 135 Cal. App. 2d 720, 287 P.2d 848 (1955).

trespass, and an appellate court will adopt whatever appropriate theory sustains the award of a trial court. Under the heading of detriment proximately caused by breach of contract, foreseeable damages, as for loss of profits, are recoverable. The proof of the harm caused need not be more than with a reasonable degree of certainty, it being the defendant's fault that exact proof is impossible. The statutes dealing with interest prior to judgment on claims for breach of contract are unduly severe, resulting in injustice to the plaintiff and should be made more liberal as to damages incapable of precise liquidation. The determining of the validity and the applicability of a liquidated damage clause in a contract in the light of circumstances and harms capable of anticipation at the time of contracting, when the actual harm resulting from the breach is merely nominal, is illogical as applied in an action seeking compensation.