Mitigation: Sources and Applications of Rule in California; Anticipatory Breach Cases

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true in actions for breach of contract or in tort actions involving property. In such actions, settled principles of law as applied to the established facts indicate the properly recoverable amount. A jury verdict for less is improper and is not consistent with the jury's determination of liability. The jury, upon finding defendant liable, has found him liable, in effect, for the damages the law deems proper under those particular circumstances, and no less.

There is in both categories of cases a restriction of the jury function, for all practical purposes, to a determination of liability. This, however, means merely that the jury does not make a separate, discretionary finding, within limits, of the amount of recovery, as in cases where the damages are unliquidated. In the case where the damages are certain, as regards the constitutional right to a jury determination of damages, the determination of liability carries with it a determination of damages. In one category of case this result follows from the nature of the cause of action. In the other category it follows from operation of law. Hence, if there is no doubt as to the validity of the verdict regarding the right to recover, it seems additur may properly be allowed in California in cases where the damages are certain and computable.

In litigation involving commercial transactions additur would be available to correct an inadequate verdict in a case where the damages are certain. As a practical matter, additur should be kept in mind as a device which will insure a proper recovery to the successful litigant without the delay and expense of a new trial.

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24 Carlin, supra note 1, at 6.

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It is well grounded in California law that the innocent party to a breach of contract must seek to mitigate the loss which he is in danger of suffering, or suffer the expense of this avoidable loss himself. 1 "His right to compensation is limited to the amount of the harm that he cannot reasonably avoid." 2 He is under a legal disability to collect more than this for his injury. 3

Although less often the subject of definition and refinement in California law, a corollary to this rule has been established. The innocent party has a right to compensation for the injury and expense he suffers in the reasonable

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2 5 CORBIN CONTRACTS note 4 at 26 (Supp. 1959).

3 McCormick, DAMAGES 128 (1935).
attempt to mitigate his damages, even if his attempt is not successful.\textsuperscript{4} This corollary must follow if the innocent party is to be protected from the unforeseeable results of his reasonable attempt to do what the rule of mitigation of damages requires.

\textbf{Sources of Rule}

The California statutes do not make an express statement of this rule, but the courts have reasoned that it is implied from the sections of the California Civil Code which relate to damages.

In \textit{Scott’s Valley Fruit Exchange v. Growers’ Refrigeration Co.}, the court stated that, “the duty to minimize damages is predicated upon the statutory rule that a person is required to use reasonable care to prevent an unwarranted piling up of damages.”\textsuperscript{5} There is no such express statement in the codes, but section 3359 of the Civil Code states that damages must be reasonable, “... and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”

On another occasion, in \textit{Valencia v. Shell Oil Co.}, the court stated that, “the essence of the rule denying recovery for losses which could have been prevented by the reasonable efforts and expenditures of plaintiff is that his conduct rather than that of defendants proximately caused such losses.”\textsuperscript{6} If this is the case, statutory support for the rule of mitigation may be found in those sections of the Civil Code which speak of damages, “proximately caused.” The principal one among these is section 3300, which provides:

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. (Emphasis added.)

However well these sections serve as a basis for the rule of mitigation of damages, it is clear that they do little to clarify or control the application of the rule. It has been the court itself which has supplied these limits.

\textbf{Anticipatory Breach and Mitigation}

Cases of anticipatory breach of a contract raise a difficult problem in determining the application of the rule of mitigation of damages. Although the California law generally recognizes the rule of mitigation of damages, the questions whether to apply this rule from the time of the repudiation of the contract, or from the time of the acceptance of the repudiation as an anticipatory breach. Does the rule of mitigation of damages limit the right of the innocent party to elect to stand on the contract until time for performance?

A dictum in \textit{Bomberger v. McKelvey},\textsuperscript{7} an important 1950 decision by the California Supreme Court, indicates that the court is willing to hold that such


\textsuperscript{6} 23 Cal. 2d 840, 846, 147 P.2d 558, 561 (1944).

\textsuperscript{7} 35 Cal. 2d 607, 220 P.2d 729 (1950).
a limit does exist when the innocent party is interested only in the profits to be gained from the contract. However, the limit was not applied in this case because the innocent party had other interests in the contract. Earlier cases in the lower courts are not entirely convincing on this point.

Cases involving the anticipatory breach of a contract for the sale of goods by the seller raise an additional problem. If the buyer's right of election is so limited, does his reasonable effort to mitigate his damages ever include the responsibility to make another forward contract for delivery at a future date?

In Guerrieri v. Severini, a 1958 Supreme Court decision, the buyer's damages were not limited by his failure to purchase other goods within several hours after the repudiation of the contract. It is not clear whether the court meant that it will not limit the buyer's right to elect to stand on the contract, or whether it meant that the buyer's reasonable effort does not require him to make another contract, because the court held that the lower court's findings that the buyer failed in a reasonable effort to mitigate his damages was not supported by the evidence. It is possible that the court intended to imply only that the facts of this particular case would not support such a conclusion.

Joseph Denunzio Fruit Co. v. Crane, a federal district court case decided under California law prior to the Bomberger decision, seems to take the view that the rule of mitigation of damages does not limit the buyer's right of election in contracts for the sale of goods.

In United States v. U.S. Foreign Corp., a federal district court in another jurisdiction applied the corollary to the rule of mitigation of damages and measured the innocent buyer's damages by taking the difference between the price in the broken contract and the price in a second forward contract which he made before the time for delivery under the old contract. The court rejected the argument that section 67 of the Uniform Sales Act (which is reproduced as section 1787 of the California Civil Code) applied to such a situation. The reasons given by the court for its decision echo the California Supreme Court's reasons for supporting the rule of mitigation of damages and suggest that this court might also disregard the statutory provision under similar circumstances.

**Comparative Economic Advantages**

It is the economic advantages of the rule of mitigation of damages which insures its survival. It is desirable to halt the effects of a broken contract with a minimum loss to society as a whole. Under the present rule, both of the parties to the contract, in seeking to avoid personal loss, also reduce the chance of loss to society.

The California Supreme Court has indicated that if these advantages do not apply to the case before them, they will not apply the rule.

In Bomberger v. McKelvey, plaintiff sought to recover, in addition to damages on another contract, the agreed price in a contract for the demolition and removal of a building. Defendants were planning to use the lots where the building stood as a parking lot for customers of a chain store.

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which they intended to construct nearby. In their agreement with the plaintiff, they promised to pay $3,500 to him on the demolition and removal of the building. The plaintiff agreed to destroy and remove the building as soon as practicable after it was vacated by the present tenants, and not later than twenty days before the completion of the chain store nearby.

The trial court found that the plaintiff had relied on being able to use the skylight and plate glass windows from the building in the construction of a new building at another location; that the defendants knew of this reliance; that these items could not be purchased elsewhere within 90 or 120 days; that there was an implied covenant by the defendants to allow the plaintiff to have possession of the premises for the purpose of removing the old building; and that defendants had stated that the old building had no value to them in the light of their plans.

The defendants, in August, 1946, notified plaintiff that he was not to begin work on the old building. Plaintiff replied that he intended to perform as agreed. Defendants sent him notice that he would be treated as a trespasser if he came on the land for this purpose. The court found that this was a final repudiation of the contract by the defendants.

In October, plaintiff removed the skylight and plate glass from the old building and the tenants abandoned the premises. In November, plaintiff continued to demolish and remove the building, completing the job in that month. When defendants refused to pay the agreed price for the work, plaintiff brought suit and recovered that amount, in addition to damages on another contract which was in issue. Defendants appealed.

Defendants' argument was based on the rule that either party to an executory contract has the power to stop performance of the contract by notifying the other party of this intent. In doing this they acknowledged that they became liable for damages, but they urged that the other party must mitigate the damages and could not continue to perform and recover damages based on the full contract price.

The Supreme Court emphatically supported this view as the general rule, but stated an exception to it. The reason for this rule is twofold: Ordinarily a plaintiff is interested only in the profit he will make from his contract, and if he receives this he obtains the full benefit of his bargain; on the other hand, performance by the plaintiff might be useless to the defendant, although he would have to pay the entire contract price if the plaintiff were permitted to perform, and this would inflict damages on the defendant without benefit to the plaintiff. . . . If these reasons are not present, the rule is not applied. (Emphasis added.)

The court held that an essential element in the reason for applying the rule was lacking, in that the plaintiff was not solely interested in profit, but required parts of the old building for use in his construction of the new building.

Drawing an analogy between plaintiff's possible grounds for specific performance under these facts, and his justification for continuing performance, the court refused to apply the rule of mitigation of damages. On this basis, the Supreme Court upheld the decision of the lower court for the plaintiff.

13 Id. at 614, 220 P.2d at 733.
The Supreme Court indicated that it would apply the rule of mitigation in cases of anticipatory breach of contract from the time that notice is given of the repudiation, so long as the basic reasons for the rule apply. It seems justified to conclude that later decisions by this court are not based on a refusal, as a matter of law, to apply this limit on damages unless the contrary is expressly stated.

Two previous decisions by the District Court of Appeal for the Second District also support this view.

Atkinson v. District Bond Co.14 involved a controversy between a construction company and a bond company. On March 16, 1931, the construction company agreed to bid for certain street improvement work in Santa Barbara and to perform the work if the contract was awarded. The bond company agreed to buy the bonds issued in payment of the work at ninety-six per cent of their par value and to loan the builders up to seventy-five per cent of the price to be paid for the work at seven per cent per annum.

The builders submitted a bid for $44,174.80. The defendants then gave notice that they withdrew from the contract. Through a mistake made on the signing of the bid, the contract was awarded to R. C. Atkinson instead of the firm of Atkinson and Reish, which had made the bid.

On April 18, 1931, in response to a request by the builders, the bond company made a definite statement of their intention not to perform the contract, which the builders refused to accept as a breach of the contract.

The city council rescinded its award of the contract and re-advertised for bids on the work. The builders submitted a bid in the firm name for $49,009.32 which was accepted on June 18, 1931.

The builders, on June 20, 1931, made an agreement with another bond company in which they were to perform as before. The bond company agreed to buy the bonds at eighty-three per cent of their par value and to loan the money at a higher rate of interest.

The builders' position was that they had a right not to accept the repudiation by the bond company until after they had acted in reliance on the contract by submitting their second bid. The trial court found for the builders on this basis. It awarded damages based on the difference between the contracts with the bond companies.

The district court of appeal reversed this decision. It pointed out that at the time of their second bid on June 18:15

"... [P]laintiffs were under no obligation to defendants to perform the agreement by again bidding for the work, as defendants had repudiated it, and they had no right to go on and thereby increase the damages for such breach. Nor were plaintiffs under any legal duty to bid again for the work. It therefore becomes manifest that it was error to assess damages on the basis of evidence of the subsequent bid and awards and bonds issued thereon. The damages, if any other than nominal, which will compensate plaintiffs must be ascertained under the theory of repudiation and not under that of subsequent performance.

The court stated as a matter of law that "after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance."16

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15 Id. at 745, 43 P.2d at 870-71.
16 Id. at 745, 43 P.2d at 870.
In *Richardson v. Davis*, relied on in the *Atkinson* case, the plaintiff agreed to run thirty feet of advertising film three days a week in the Southern Pacific and Key Route waiting rooms for two years. The defendant agreed to pay fifteen dollars a week for this service. The contract was made on February 27, 1928. On April 26, 1928, the defendant notified the plaintiff that the contract was to be terminated on May 1, 1928. The plaintiff continued to show the film after this time and sued on the contract at the end of the two year period. The trial court awarded him damages based on the rate of fifteen dollars a week for the balance of the period.

In reversing this decision, the district court of appeal held that the notice of April 26 was a repudiation of the contract. It stated that "when such is the case, the order must be for damages for the breach and not for services rendered under the contract after the repudiation." The court quoted a Utah case, which stated that "it is true that the damages may equal the amount stipulated in the contract under certain circumstances, but if that be so, then the fact must be established by proper evidence. It cannot be established by merely proving that the plaintiff proceeded to perform after the renunciation had been made."

The *Atkinson* case would stand more strongly for the proposition that the innocent party's right to compensation is limited by his failure to mitigate his damages from the time of repudiation, if the court had stressed the differences between the two cases. In the *Richardson* case the repudiation made the failure to pay the next monthly bill a present material breach. Damages figured from the time of repudiation, or from the material breach would amount to the same thing. This differs at a critical point from the *Atkinson* case, where the principal issue concerns the conduct of the plaintiff between the time of the repudiation and the time at which he elected to treat it as a breach by contracting with the second bond company.

**Breach by Seller**

In cases involving the anticipatory breach by the seller of a contract for the sale of goods, it is not the performance of the innocent party which is in question but rather the nonperformance. In the cases discussed above, the innocent party is accused of proceeding in the face of the repudiation with the direct result that he suffers greater damage from the broken contract. In the innocent buyer's case, the injury is indirect. Determining that the injury could have been avoided requires a more complex analysis. Was it possible to make a new contract at all? If so, was the plaintiff unreasonable in not making it? Setting aside the economic factor, how may the contract breaker fairly question the right of the innocent party not to enter into contractual relations with someone else?

The indirectness of the economic loss, the difficulty of measuring the reasonableness of the buyer's action, and the fairness of the contract breaker's demands are factors which naturally make the courts hesitant to put the buyer under a greater risk of doing the wrong thing. But this does not determine if the courts are ever willing to so limit the innocent buyer's recovery.

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18 Id. at 391, 2 P.2d at 861.
Guerrieri v. Severini involved the anticipatory breach of a contract for the sale of goods by the seller. The seller, on March 27, 1953, agreed to deliver 200,000 gallons of wine before August 1, 1953. The buyers agreed to pay thirty-six cents a gallon in cash for the wine. Several days later, the seller called the buyers' agent and told him that he would not be able to deliver the wine. The trial court found that this was an anticipatory repudiation of the contract, and that this repudiation was not withdrawn later in the conversation. The Supreme Court cast serious doubt on the sufficiency of the evidence to support this latter conclusion, but assumed that this was true in order to reach a further point.

The buyers did not accept the repudiation as final at this time and the parties made an unsuccessful attempt to negotiate for delivery of at least part of the wine. By April 29 the buyers also had bought 74,000 gallons of wine of this quality on the open market. On that date, they bought a winery in order to get the quantity and quality of wine which they required to make up the 200,000 gallons contracted for. The Supreme Court held that this purchase by the buyers constituted an election by the repudiatees to treat the repudiation as an anticipatory breach of the contract.

The trial court found that, on the day of the seller's repudiation, there were over 200,000 gallons of wine on the open market of a similar quality and at the same price as that contracted for by the buyers. On this basis it held that the buyers' damages were nominal. The Supreme Court held that the evidence did not support this conclusion. The evidence showed that the wine was only on the market for a few days; that the buyer had previously examined the wine and rejected it in favor of the seller's wine; and that the wine on the market was "unfinished" wine, while the wine contracted for was "finished" wine. This was a difference in processing which cost about two cents a gallon. The trial court had supported the seller's argument that the buyer was obligated to seek to mitigate his damages from the time of the repudiation. The Supreme Court reversed, stating:

If we were to hold, as contended for by the defendant, and as found by the trial court, that plaintiffs were required, on the day Severini repudiated the contract, to buy immediately within the hour, wines of lesser quality than that contracted for, and which had been previously rejected by them, we would be depriving the promisee of his election to treat the repudiation as a breach or continue to stand on the contract and would be forcing him to accept the repudiation as a breach of contract in violation of the rules of law [on anticipatory breach] heretofore set forth.

The Supreme Court fixed the buyers' damages as the difference between the purchase price he had paid for the wine and the contract price. There was evidence that there had been an unseasonable frost in the early part of April and that wine of the same quality was selling for as high as fifty-five cents per gallon after this time. The court cited section 1787 of the California Civil Code which states in part that the measure of damages is "... the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver." The court concluded, "It

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20 51 Cal. 2d 12, 330 P.2d 635 (1958).
21 Id. at 18, 330 P.2d at 638-39.
would be unreasonable and unpracticable, under the facts here presented to require plaintiffs, within an hour of the breach by anticipatory repudiation by Severini, to buy unfinished wine inferior in quality which had previously been rejected by them, in order to mitigate the damages caused by defendant's breach."

In this decision the Supreme Court did not definitely hold as a matter of law that it would not limit the right of election by the innocent party. The court only refused to do this under the facts herein. But in the light of the dictum in the Bomberger case, it is not likely that the court intended to limit the rule of mitigation of damages in this way.

It is more difficult to predict whether the Supreme Court would, under the proper facts, hold that the buyer must make another forward contract in the reasonable effort to mitigate his damages. However, it may be argued that the court would not have considered the sufficiency of the evidence on this point, if they believed that it was clearly not possible as a matter of law.

An earlier case, U.S. Trading Corp. v. New Mark Crain Co., in the district court of appeal, while not touching directly on the issue of mitigation, implies that the rule is limited as a matter of law. As in the preceding case, no specific date was set for the delivery of the goods. The court, without the aid of section 1787, which was added to the Civil Code in 1931, held that the damages should be measured from the date that the repudiation became a present total breach.

In this case, plaintiff sued on two contracts, made in June 1919, whereby defendant agreed to deliver 3,000 tons of barley within a reasonable time on board railroad cars in Southern California for shipment to New Orleans. Pursuant to this agreement, defendant had delivered all but 500 tons of barley. The federal government then issued an order requiring every shipper of barley from Southern California to ports on the Gulf of Mexico to obtain a permit from the Southern California Export Committee as a condition precedent to shipment. This order remained in force until about November 1, 1919.

Both parties tried unsuccessfully for a permit. After considerable correspondence, defendant sent a telegram to plaintiff on October 7, 1919. In this telegram, defendant offered to give plaintiff warehouse receipts for an amount of barley equal to that which remained to be delivered under the contract. He warned that if such a tender should not be accepted by the plaintiff before noon of the following day, the contract would be treated as cancelled. There was no tender of the receipts by the defendant and there was evidence which indicated that defendant was not in position to make good on this offer. Plaintiff did not accept.

On November 12, 1919, plaintiff requested a delivery of the balance of the barley and defendant made a definite refusal to proceed under the contract. The plaintiff bought 500 tons of barley soon after this time at a cost greater by $5,816.34 than that set in the contract.

The defendant argued that there was a repudiation of the contract on October 7,1919; and since the date of delivery was indefinite, the damages should be determined on the basis of the market price of barley at that time. If there was a repudiation, the plaintiff's position was that he had the right

22 Supra note 20 at 23, 330 P.2d at 642.
23 56 Cal. App. 176, 205 Pac. 29 (1922).
to elect to ignore any such repudiation on defendant’s part until the time when the necessary permits became available, or the embargo expired. Therefore, the damages should be measured on the basis of the market price of barley at the time the embargo expired.

In supporting the decision of the trial court for the plaintiff, the district court of appeal stated:24

\[\text{...[T]he rule is that if, before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be determined by the buyer will govern, and not the market price on the date of such notice of anticipatory breach.}\]

The Supreme Court denied a hearing to the defendant.

This case cannot be weighed heavily on the question of limiting the application of the rule of mitigation of damages. It is not clear that the defendant raised the question of mitigation at all, and no evidence was offered that plaintiff could have bought other barley during the embargo. It is not even clear that there was a definite repudiation of the contract on October 7. It is not disputed that the rule for measure of damages is stated correctly by the court in the absence of facts which give rise to the possible application of the rule of mitigation of damages.

The application of the rule was directly put in issue by the defendant in Joseph Denunzio Fruit Co. v. Crane.25 There, the buyer sought to recover damages for the failure of Crane and Kazonjian to deliver three carloads of grapes which had been contracted for by the plaintiff. Crane appealed to the federal district court from an order of the Secretary of Agriculture which affirmed the award of the board in favor of the buyer, dismissing the case against Kazonjian. (Counsel stipulated that the substantive law of California should control.)

The fruit company accepted the offer made by Crane to sell three carloads of grapes on October 3, 1944. Shipment was to be made to the buyer in Kentucky on approximately December 10, 1944. Payment, excepting a small down payment, was to be made at this time. In a letter dated October 10, 1944, Crane and Kazonjian repudiated this agreement. Between this time and the date set for delivery, the buyer made several attempts to get the sellers to comply with the contract, which they refused to do. As soon after December 10 as possible the buyer purchased other grapes. The price paid exceeded the contract price by $5,723.50 and the board awarded the buyer this amount in damages.

The sellers argued that when they made the repudiation of the agreement, the buyer was required “to go out and secure grapes and he had no business waiting until December 10.”26 They urged that plaintiff’s unreasonable failure to mitigate its damages in this way should place it under a disability to collect more than the difference between the market price at the time of repudiation and the contract price. The buyer’s position was that it was under no such disability and that damages should be measured as set forth in section 1787 of the California Civil Code.

24 Id. at 191, 205 Pac. at 36.
26 Id. at 130.
The district court held that the measure of damages for anticipatory breach is to be computed on the basis of the time fixed for performance, and not on the basis of the time notice of the repudiation was received. The court quoted section 1787 and section 3354 of the Civil Code. The latter section provides that the value of property to the buyer shall be the purchase value, "... at such a time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase." In upholding the decision of the board, the court stated that the buyer "... was not obligated to anticipate, at his peril that the cost of grapes would be less prior to December 10, 1944 than afterwards; in other words, that he could wait until delivery time and then purchase at the best price obtainable and recoup his loss by way of damages."27

The district court took the view that the California Code sections on measure of damages cover the point. However, there is no reason why the code provisions on measure of damages should be to limit the mitigation of damages. The district court did not have the decision by the California Supreme Court in the Guerrieri case before it at this time. It is significant that the Supreme Court, in the later case, makes no such automatic application of the code provisions. Full consideration of the defendant's case for mitigation of damages is given before section 1787 is applied.

Nevertheless, section 1787 of the California Civil Code continues to loom as an important factor in these decisions.

In United States v. United States Foreign Corp.,28 a federal district court in another jurisdiction stated that the same provision (originally section 67 of the Uniform Sales Act) does not apply to the corollary of the rule of mitigation of damages. This court allowed the buyer to make another forward contract without taking the risk that the price would fall by the date of delivery. He was protected from this limitation so long as the new contract was reasonable at the time it was made. The problems in applying this rule are not the same as those in applying the rule of mitigation, but the relationship of these rules to the codifications of the measure of damages is similar.

In the United States v. United States Foreign Corp. case, defendant seller committed an anticipatory breach of a contract with the government for the sale of grain. The government, in seeking to mitigate its damages, re-advertised for bids and let a new contract to the low bidder. At the trial, the government offered no evidence of loss except the difference between the old and new contract prices.

The defendant urged that the government was not entitled to this difference, but should have submitted evidence of the price of the grain on the open market on the delivery date. The court ruled that section 67 of the Uniform Sales Act did not apply and found the amount of damages based on plaintiff's argument. In reaching this decision the court stated:29

"... [T]he commercial necessities are clear. In situations in which supply arrangements must be made in advance of need, the buyer must look elsewhere for his goods when his seller repudiates the contract prior to delivery. He cannot wait until the delivery date before making other arrangements without incurring additional losses for lack of the needed item."

27 Ibid.
29 Id. at 660-61.
The government had to have flour for export at certain ports at a certain time . . . .

For these reasons, the ability to make and rely upon contracts for future performance is essential. To hold that such contracts may be breached before the time for performance without liability for the higher cost of alternative arrangements would seriously affect the reliability of this type of contract, and with it, the efficiency of our economy.

This realistic evaluation of the economics of the situation was reflected by the California court in the Bomberger case. Both courts have the same reasons in mind for applying these rules. Faced with the same commercial necessities, it is not unlikely that the California court would reach the same conclusions with regard to the application of section 1787 of the Civil Code. There is certainly no absolute barrier to holding that section 1787 does not limit the application of the rule of mitigation of damages.

**Conclusions**

The rule of mitigation of damages is part of the California law. Because it is not defined by the Civil Code, the courts must make their own limits for the application of the rule. These limits are not fully defined by the present cases, but it is clear that the courts give great weight to the economic forces behind the rule.

At the present time it has been established that the rule of mitigation of damages limits the right of election in cases of anticipatory breach where the innocent party makes a further performance in reliance on the contract.

The courts have not yet decided in favor of a defendant who argued that the buyer had a responsibility to make another forward contract, but the cases presented have not been the strongest.

The decision in the Denunzio case takes an approach which is not followed by the California Supreme Court in the Guerrieri case, although both courts found in favor of the buyer.

Section 67 of the Uniform Sales Act, reproduced in the California Code as section 1787, has not prevented a federal court from applying the corollary of the rule of mitigation and it is not likely to stop the California courts. The restriction of the Supreme Court on its rulings of law to the facts at hand in the Guerrieri case, make it likely that the court will entertain further cases where the law is more clearly in issue.

This decision, together with that in the Bomberger case, indicates that the Supreme Court is balancing the administrative difficulties of extending the rule to a new area, and the economic justice which would result from applying the rule in a case where the reasons behind the rule come squarely into play.

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