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Remedies

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I. Introduction

Remedial problems are best dealt with in the context of substantive law situations. However, the disparate characteristics of restitution, equitable remedies, and damages necessitate some generalized preliminary comment. We regret that the points raised in the California cases during a one-year

period do not form a tidy or cohesive pattern or adapt themselves to a symmetrical outline.

II. Restitution—Some General Principles

To obtain restitution under the common law, an action of assumpsit was utilized where the relief sought was a money judgment for benefits received by the defendant. Customarily, the claim is characterized as "quasi-contractual"; it is well established that section 537 (1) of the California Code of Civil Procedure supports an attachment in conjunction with such a claim as an "action upon a contract, express or implied, for the direct payment of money." The principal reason for choosing quasi-contract in preference to an alternative tort claim, in the fairly well defined situation where it is allowed, is to take advantage of the attachment provisions. The logic of this position is apparent when consideration is given the case of *Samuels v. Superior Court*.[1] The petitioner (defendant in the main action) unsuccessfully sought a writ of mandamus to quash an attachment as to certain moneys held by him. The factual situation is obscure, the dispute apparently arising from dealings between the parties relative to an apartment house, the plaintiff asserting a right thereto but the defendant being in position to collect the rentals from the tenants. The questioned attachment concerned the garnishment of certain of these rents (in the somewhat miniscule amount of $25 or $30) in conjunction with a complaint labeled, "Quiet Title to Real Property; Specific Performance of Contract; Damages for Breach of Contract; Rescission of Deed; Cancellation of Deed; Fraud; Abuse of Process; Declaration of Constructive Trust", followed by some 11 causes of action, the last being for money had and received as to the rental. The appellate Court described this as "hodge-podge" and "messy" and earnestly suggested that no attempt be made to go to trial without cleaning things up at a pretrial conference. The immediate point before the court, however, was the validity of the

1. 276 Cal. App.2d —, 81 Cal. Rptr. 216 (1969).

attachment. Petitioner offered two arguments. The first was that an attachment is not authorized in an "equitable action not based on contract or quasi-contract." The Court had little difficulty in rejecting this contention. Equitable claims, even when commingled with assertions of tort, do not preclude a proper concomitant assertion of a quasi-contractual remedy allowing attachment. The claim as to rents was clearly one based on an "implied-in-law" contract within the terms of Code of Civil Procedure section 537(1); the Court characterized it as one falling within those instances where a defendant, in possession of funds collected by him from a third person, is under a legal duty to account to plaintiff. While this commonly, as here, gives rise to an assumpsit count, it could also be justified as an example of an even more ancient common-law restitutionary action, that of "account." Or, if one wishes to stretch a bit, it may be recalled that mesne profits are recoverable in California by means of a common count separate from the tort action of ejectment or trespass.

The petitioner's second objection to the garnishment of the rents has an odd sort of surface logic. He asserted, correctly, that a plaintiff cannot attach his own property. Thus, since plaintiffs claimed as the real owners in equity of the property, the rents were likewise claimed and could not be garnished. The appellate Court was sufficiently intrigued by this to request supplemental briefings, but neither counsel shed any light on the point by way of analysis or authority. Nor could the appellate Court find controlling authority in this context. It solved the problem by invoking the general principle (citing authorities) that if the defendant's right to the fund garnished is such that he, as principal debtor, could have sued the garnishee in debt or assumpsit, then the garnishment of the fund is proper. Although this explanation seems to beg the question, the holding must be accepted as correct. The notion that a plaintiff cannot attach his own property has validity in terms of tangible property, but not money claims; otherwise a defendant in an action for money had and received could quash any attachment by claiming that the fund attached was indeed the very money "received." At the same time it must be admitted that the holding results in another anomaly,

i.e., that in an action for money had and received for rents to which the plaintiff rather than defendant is entitled, the plaintiff may garnish the tenants and thus attach the rents before the defendant "receives" them. While justifiable in the abstract (and useful on occasion) the principle here established was of such trifling relevance to the overall case, involving primary ownership rights in extensive real estate, that insistence upon it here seems inappropriate. The overall dispute was plainly one of equitable jurisdiction, and the quasi-contract count is of vestigial significance. In such circumstances the appellate Court was quite correct in pointing out that a more appropriate ancillary remedy would be the appointment of a receiver of the rents *pendente lite*. The Court noted with asperity the "fruitless labor of counsel and unnecessary consumption of judicial time, at both the trial and appellate levels" which could have been avoided had plaintiff originally used the ancillary equitable receivership.

The decision in *Peterson Tractor Co. v. Orlando's Snack-Mobile Corp.*[2] deserves a decided "caveat" in terms of restitutionary principles. The individual defendants were officers, directors, and dominant shareholders in a pair of corporations, Litecrete Construction and Orlando's Snack-Mobile. To bolster Litecrete's credit rating, the defendants gave to Dun & Bradstreet, on behalf of Orlando's Snack-Mobile and themselves as individuals, a statement of continuing guaranty for Litecrete's obligations. The statement further authorized Dun & Bradstreet to rely on the guaranty in furnishing a credit rating. The plaintiff, before doing business with Litecrete, obtained a credit report from Dun & Bradstreet which disclosed the relationships between the defendant and Litecrete, but did not mention the guaranty. In reliance upon the report, the plaintiff extended credit to Litecrete. Litecrete became defunct. Defendants, when sued in their capacity as guarantor, pointed out that since plaintiff did not know of the guaranty and had not been given written notice of acceptance, no basis for a contract action existed. Defendants

2. 270 Cal. App.2d 787, 76 Cal. Rptr. 221 (1969).

also suggested that the statute of frauds applied. The defendants were quite correct in this position, but the trial and appellate Court (as well as the writer) inclined toward the plaintiff. Given the perimeters of the facts stated, the remedy would apparently lie in a routine application of the doctrine of "disregard of the corporate entity." In a situation of guaranty, the related theory of "alter ego" would readily dispose of the statute of frauds problem. The appellate Court, however, justified a finding in plaintiff's favor by citing, of all things, section 90 of the First Restatement of Contracts,[3] regarding promissory estoppel (not that there was either a "promisee" or "reliance," but because there was unjust enrichment); hence, a quasi-contractual remedy was imposed by law. The implication that causes of action arising under section 90 are quasi-contractual, deriving from unjust enrichment (or vice versa), is so aberrational to either the law of contracts or the doctrine of restitution that it might be best to ignore the opinion in *Peterson Tractor,* without quarreling with the outcome.

III. Damages—General Comment on Punitive Damages

Some minor facets of punitive damage awards were polished by two California cases in the past year. The fact that tortfeasors are labeled "joint" does not mean that all will be liable for punitive damages assessed against one: so held the Court in *Oakes v. McCarthy Co.,*[4] a land slippage case in which compensatory damages were assessed against the tract developer (for negligence) and the vendor (for fraud) as joint tortfeasors. Punitive damages, however, were entered against only the vendor. The same case repeated the familiar holding that the wealth of the tortfeasor is a factor in calculating exemplary damages in California.

3. § 90 **Promise Reasonably Inducing Definite and Substantial Action.** A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

4. 267 Cal. App.2d 231, 73 Cal. Rptr. 127 (1968).

In *Carter v. Agricultural Insurance Co.*,[5] it was held that the surety on the attachment undertaking required by section 539 of the Code of Civil Procedure is not liable for punitive damages imposed upon the attachor for wrongful attachment. The decision rests upon statutory construction, though an inference may be drawn from dicta that the Court was inclined (at least slightly) toward the line of cases holding that sureties and liability insurers are not liable for punitive damages.

IV. Equitable Remedies—

A. *Enforcement of Decrees—Contempt*

The utility of the injunctive remedy must depend, in the long run, upon the effectiveness of the enforcement mechanism of contempt unless the citizenry is conditioned to respond reflexively to judicial exhortation—a situation which seems increasingly less likely. In simple form, the mandatory injunction is enforced by coercive imprisonment until performance is obtained. The more common negative or prohibitory decree poses quite different problems. If the order involves the prohibition of a single irreversible act (the usual picturesque example of ringing a bell), any contempt proceeding is perforce purely punitive in nature. If the prohibitive decree is directed against continuing conduct where repeated violations are possible, a contempt citation, while punitive as to past conduct, retains a measure of coercive, *in terrorem* overtones as to future violations. Finally, a decree prohibiting a single correctable act also has a dual aspect insofar as contempt process for violation is concerned; it is punitive in that fine or imprisonment may be imposed for the violation,[6] and coercive to the extent that a mandatory order may be issued (in replacement of the negative decree) to take corrective measures, which order is in turn enforceable by purely coercive confinement.

5. 266 Cal. App.2d 805, 72 Cal. Rptr. 462 (1968).

6. Outside of California it is common practice to award compensatory damages to the plaintiff for any pecuniary injury stemming from the violation.

In California, an attempt has been made to include all this and more in a single statutory procedure governing contempt citations. The most relevant sections are 1218 and 1219 of the Code of Civil Procedure. The latter covers the coercive power to compel compliance with mandatory equity decrees by confinement, provided the contemnor has the present ability to comply. The former, section 1218, provides for limited fine or imprisonment and covers all other contempt situations. Although, as noted, fines or imprisonment may have an indirect coercive effect in deterring further violations, section 1218 remains basically punitive. Whatever the original civil characteristics of the equitable contempt doctrines incorporated in these enactments, the California statutes have been repeatedly characterized as "quasi-criminal" in nature. The result of this characterization is that a vigorously literal compliance is frequently exacted in this state, and technicalities (perhaps overtechnicalities) hinder fast and effective enforcement of what, after all, are purely civil remedies. For example, in California, a plaintiff who has been pecuniarily damaged by the defendant's violation of an injunction must bring a separate action for such damages, because no provision for such is made in the statutory contempt sections.[7]

The decision in *Liu, In re*[8] displays a typically rigorous adherence to the letter of the statutory contempt plan of California. As a result of a separate maintenance action, child custody was awarded to the wife. On April 22, 1968, an order was issued restraining the husband from removing the child from Los Angeles without first obtaining a prior order of court or written consent of the wife. On November 7, 1968, the husband removed the child from Los Angeles County. In December the wife filed a declaration and an order to show cause was issued; in early 1969, the husband was adjudged in contempt and ordered to be confined until he complied. In the cited decision the husband was released on a writ of habeas corpus. The defects found in the procedures

7. H. J. Heinz Co. v. Superior Court, 42 Cal.2d 164, 266 P.2d 5 (1954).

8. 273 Cal. App.2d —, 78 Cal. Rptr. 85 (1969).

followed by the lower court have a bearing on the practical effectiveness of civil contempt in California.

First, the appellate Court noted that, unfortunately, the trial judge had elected not to punish the husband for past offenses (section 1218) but to imprison him to compel future compliance (section 1219). The declaration did not specifically state that he had the *present* ability to comply (the trial court expressly said he did, however), and hence he was not adequately apprised that at the hearing he might be sentenced indefinitely.

Second, the declaration did not allege a violation of the order of April 22, 1968, because it did not aver that the removal of the child was without either a prior court order or the wife's written consent. Bearing in mind the implicitness of the lack of the order or consent, and that we are dealing with the welfare of children in a purely civil case, the rigid technicality of the California approach to civil contempt becomes markedly apparent.

Third, although the contempt order itself stated that the husband had the present ability to comply, the appellate Court held to the contrary. The order was to *not* remove the child. The child was removed on the seventh of November. Said the Court: "There is no way in which the petitioner can now not remove the child on November seventh . . . . A bell cannot be unrung although a court orders it to be done." According to the appellate Court, the trial judge should have issued a new mandatory order for the child to be returned, and then repeated the whole section 1219 contempt routine.

By way of comment (avoiding as much as possible the fog which always surrounds the use of double negatives), the Court's bell-ringing analogy is inapt. The child *can* be returned. The point is whether essential matters can be summarily disposed of in the contempt proceedings without being unfair to the contemnor. The *Liu* case says it can't be done and the controlling case (*Dewey v. Superior Court,* 81 Cal. 64, 22 P. 333 (1889)) says it can't be done. In *Dewey,* the defendant was enjoined from maintaining a dam or other obstruction to the flow of a creek. The defendant obstructed

the creek. In contempt proceedings the defendant was ordered confined until the obstructions were removed. The Supreme Court reversed the contempt order, holding that a second mandatory order to remove the dam would have to be made.

The *Dewey* case, besides suggesting questions as to the mandatory order disguised in negative form, more directly raises practical issues. If a contemnor wilfully does an act in violation of a negative equity decree, which act can readily be undone, why should the plaintiff have to go back to the beginning and obtain a second mandatory order to get what he had in the first place? Why should there be a "quasi-criminal" mystique about enforcing negative equity decrees in civil cases? Is it the lesson that trial courts should word decrees in the mandatory form wherever possible to expedite enforceability? The concurring opinion in *Liu* demurred on this point:

> I do not think it is necessary to hold that where a party has violated a prohibitory injunction and the contempt power is used coercively under section 1219 . . . to compel him to undo what he has done, it is essential that the court have first made a mandatory order to that effect . . . I rather suspect that [*Dewey*] is a product of an age in which mandatory injunctions were ill favored. It seems to me that if a court enjoins a defendant not to dig a ditch and he does dig a ditch, justice does not require a second order that he fill up the ditch, before the court can order him to do so on pain of imprisonment until he does, provided, of course, he has the present ability.[9]

Interestingly enough, the same appellate Court a few weeks later, in reviewing a contempt order for violation of a negative decree, did indeed separate the punitive (quasi-criminal) elements from the civil enforcement element, and approved a corrective measure embodied in the contempt order itself.[10]

9. 273 Cal. App.2d —, 78 Cal. Rptr. 85 (1969).

10. 274 Cal. App.2d —, —, 79 Cal. Rptr. 415, 424.

The opinion is but one of many in lengthy and vigorously contested litigation, the case having reached the appellate level several times. The facts must be drastically abridged. In 1962 land was sold by Alpine Palm Springs Sales, Inc. to Green Trees, Inc. on promissory notes secured by trust deeds. When Green Trees failed to make payment, Alpine began foreclosure. Before sale was had, Green Trees sued for fraud and in 1964 had judgment for compensatory damages (which took the form of halving the amount due on the notes), punitive damages, and an injunction against foreclosing on the trust deeds for a certain period to allow Green Trees to make arrangements to pay off the balance. This negative decree (on which focus must be kept) was repeatedly extended and expired finally on November 4, 1966. On September 28, 1966 the court of appeals reversed the judgment below. Alpine waited 30 days and on October 31, 1966, four days before the injunction expired, held a foreclosure sale, purchased the property, and received foreclosure deeds. Green Trees, however, appealed to the Supreme Court which, in 1967, reversed the court of appeal and affirmed the 1964 judgment in favor of Green Trees along with the extensions of the injunction against foreclosure. The effect of this action was to put Alpine in violation of the injunction and exposed to contempt proceedings, which Green Trees, with evident relish, pushed.

The trial court found the Alpine group in wilful contempt and ordered it to revest the title acquired by foreclosure in Green Trees. In the event the order was not carried out within 30 days, the clerk of the court was empowered to act in Alpine's stead. This is the order reviewed on petition for writ of certiorari and prohibition by the court of appeal in the present case. Alpine raised numerous objections to the order, of which two need be noted here:

a) that the adjudication of contempt was barred by the statute of limitations since the contumacious act had taken place two years before;

b) that the order to retransfer title to the property obtained through the foreclosure proceedings in violation of the negative decree was beyond the jurisdic-

> tion of the court because it was not a form of punishment prescribed in either section 1218 or 1219.

In reviewing the order and objections, the appellate Court looked to both the punitive and "curative" aspects of the proceedings in deciding whether the statute of limitations had run.[11] Although the trial judge chose to impose no punishment for violating the order, the appellate Court still found it essential to rule on the limitation issue, since conceivably the judge had in mind the imposition of punishment if the Alpine group failed to convey, so as to require a conveyance. On this issue the court said:

> We hold the statute has run against the punishment phase of the proceeding. We do not feel however that any statute of limitations has run against the judicial step of curing the continuously operating effect of the contemptuous act.[12]

As to the second point, whether the order embodied measures not authorized under sections 1218 or 1219, the Court said:

> . . . We conclude that where a court has issued a prohibitory injunction and it has been violated and the effect of the violation can be cured by a further direction to the contemnor to perform that curative act, such an order can validly be made . . . this [remedy] can properly be applied to a real property title situation.[13]

By way of final comment on this decision, it is submitted that a welcome step has been taken in separating the purely punitive aspects of the California statutory contempt scheme from the aspects concerned with effectuating civil equity decrees. However, the curative measures taken here to rectify the result of the violation of the negative decree can be accomplished without the ultimate threat of imprisonment under

11. 274 Cal. App.2d —, 79 Cal. Rptr. 415, 425.

12. 274 Cal. App.2d —, 79 Cal. Rptr. 415, 424.

13. 274 Cal. App.2d —, 79 Cal. Rptr. 415, 425.

section 1219. If the curative measures necessary were such as required in *Liu—i.e.*, the entry of a new *mandatory* order enforceable only by threat of imprisonment—the question still remains as to whether the "quasi-criminal" gloss which has been given to proceedings under that section would compel the application of the one-year statute of limitations not only as to the actual confinement for contempt but even to the entry of the substitute mandatory "corrective" order itself.

B. *Legal Effect of Equitable Decrees*

The question of whether an equity decree has direct effect on legal title was raised in the *Alpine* opinion. The Alpine group acquired legal title through deeds issued as the result of foreclosure proceedings, which Alpine was, at the time, enjoined from instituting. The Supreme Court held the sale invalid. Does this automatically revest title in Green Trees? If so, contempt proceedings would be unnecessary, and if Green Trees desired further adjudication it would take the form of a quiet title suit. Without denying this possibility, the court stated, ". . . [W]e are not convinced that this is a practical solution and would have the clarity and strength in the chain of title as would a retransfer deed executed by Alpine Estates or by the clerk acting for the superior court."[14] This expression is in conformity with the traditional equity approach that its decrees normally operated only in personam.[15]

C. *Comments on the "Clean Hands" Maxim*

The California courts properly continue to avoid a reflexive application of the "clean hands" doctrine in equity causes,

14. 66 Cal.2d 782, 59 Cal. Rptr. 141, 427 P.2d 805 (1967).

15. In the 1967 edition of this publication the remark was made: "A rather unusual combination of remedies for deceit was sanctioned by the Supreme Court in *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates.*" York, REMEDIES, *Cal Law—Trends and Developments 1967*, p. 283, at p. 299. The remark was directed to the additional injunctive feature of the judgment. In the light of the prolonged and complex record in the litigation, there may be a warning here about "unusual" remedial combinations.

where litigants who are with personal fault abound. Two cases within the past year involve attempts to recover property transferred by the plaintiff with intent to place it beyond the reach of creditors. In *Samuelson v. Ingraham*[16] the maxim was invoked to bar a constructive trust, claimed with regard to realty transferred on oral trust, with the admitted intent to defraud creditors. That no creditors were complaining was held immaterial, since intent was the gravamen rather than accomplishment. A different result was obtained in *Hill v. Younkin.*[17] Here the plaintiff (Hill) conveyed title to separately owned property worth $89,000 to his daughter because he was "scared of lawsuits." The potential lawsuit arose from an automobile accident that was settled for $600, partially on the belief that Hill had no assets or insurance. In making the transfer, Hill was advised by counsel of the danger that his daughter might refuse to reconvey, but he insisted on the conveyance. He should have listened to counsel. The daughter did refuse to reconvey, although Hill lived on the property and paid taxes until his daughter's death. The daughter had named her mother (the divorced wife of Hill) as sole legatee and devisee and the plaintiff brought a quiet title action. The Court concluded that the trial judge was correct under the circumstances in refusing to apply the "clean hands" doctrine, noting that while "intent" is a prime factor, the equity court must nevertheless consider all the facts. The disparity between the value of the property and the settled claim was duly noted; moreover, the claimant was found not to have been actually defrauded, considering the moderate nature of the injuries, the availability of counsel, and even the suggestion of contributory negligence. Furthermore, the claimant made no later attempt to rescind the settlement.

Had the grantee (daughter) not flatly refused to reconvey prior to her death, the decision of the trial judge in plaintiff's favor would have been much easier. The appellate Court, in affirming, sanctioned a liberal exercise of discretion on the part of the trial judge in applying or refusing to apply the

16. 272 Cal. App.2d —, 77 Cal. Rptr. 750 (1969).

17. 274 Cal. App.2d —, 79 Cal. Rptr. 509 (1969).

maxim. The degree of discretion allowed suggests that "clean hands" may be used two ways—as predominately a "defense," or as predominantly a measure to protect the court itself from affront. Which emphasis will be favored in California in any given case is not predictable. For example, one line of cases tends to conceptualize the clean hands doctrine as a "defense" in the sense that it must be raised in the trial court to be available; these holdings are referred to in *Behm v. Fireside Thrift Co.*[18] The notion of "unclean hands" as a "defense" reached its culmination in the case of *Fibreboard Paper Products Corp. v. East Bay Union of Machinists,*[19] and leads promptly to the error (as it did in *Fibreboard*) of suggesting that the doctrine is applicable to law actions, presumably in derivation from the idea that equitable "defenses" are available in law actions. This confuses the inequitable with the illegal. On the other side, the *Behm* case also notes a partially offsetting line of cases in which the doctrine has been applied *sua sponte* by a trial court where the defendant's conduct has been "flagrantly unconscionable." In addition to holding that the questioned conduct in *Behm* was not "flagrantly unconscienable," the Court gave what is perhaps a more sound reason for declining to apply the doctrine in this particular litigation, stating that the plaintiff was seeking to bar the defendant from asserting a legal defense of mutual mistake.

In *Delfino v. Delfino,*[20] the Court distinguished "unclean hands" from "unclean testimony" and declined to apply the doctrine against a wife seeking to set aside a decree of annulment. Her supporting affidavits disclosed that she had committed adultery, but the Court went on to note that the other man had been secretly paid by the husband. To prevent the proof of unpleasant facts created by the inequitable conduct of the other party is not the function of the doctrine.

18. 272 Cal. App.2d 15, 76 Cal. Rptr. 849 (1969).

19. 227 Cal. App.2d 675, 39 Cal. Rptr. 64 (1964).

20. 272 Cal. App.2d 556, 77 Cal. Rptr. 526 (1969).

V. Remedies for Protection of Real Property Interests

Plaintiff turned to equitable remedies to obtain a declaration of an easement of right-of-way over a portion of defendant's land in *Miller v. Johnston.*[1] The difficulties between these neighboring parties arose over plaintiff's restricted means of access in difficult terrain. Over the course of several years, plaintiff's problem in getting home became even more complicated by reason of the loss of certain rights and privileges vis-à-vis the defendant. At the time of suit, access was nearly impossible unless plaintiff could use a small triangular area of defendant's property for turning purposes. The technique here used to afford equitable relief is of interest inasmuch as the result was placed solely and squarely on the relative hardship doctrine, the application of which was facilitated by defendant's request for a counter-injunction against plaintiff's continued trespasses. The Court's analogy was to encroachment cases in California, reasoning that the transitory passage of vehicles over another's land is different only in degree from a driveway which "encroaches" upon the land twenty-four hours a day. In thus creating an equitable easement by necessity as it were, the court required plaintiff to pay the maintenance expenses of the strip. A further judgment for $200 in damages in favor of defendant was indicated. The Court, naturally, denied that its action amounted to unconstitutional private condemnation.

VI. Remedies for Protection of Literary Property

William v. Weisser[2] represents an excellent discussion (particularly so to any academician) establishing a common-law copyright of a professor in his lectures. Defendant hired individuals to attend university classes and take lecture notes, which were then published under defendant's copyright. The remedies were an injunction, compensatory damages of $1,000, and punitive damages of $500. An accounting for

1. 270 Cal. App.2d 289, 75 Cal. Rptr. 699 (1969).

2. 273 Cal. App.2d —, 78 Cal. Rptr. 542 (1969).

defendant's profits would seem possible under the circumstances, but apparently was not pursued.

VII. Malicious Prosecution—Consequential Damages

An unusual case of malicious prosecution led to an unusual award of special damages in *MacDonald v. Joslyn*.[3] The malicious "prosecution" was a pre-probate will contest, and the "victim" was the executor of the will of Marcellus L. Joslyn. In the course of the will contest, the plaintiff, who had supervised the estate plan, had been charged, unjustly it was found, with undue influence, fraud, and conspiracy and "gratuitously" subjected to a demand for punitive damages. The publicity in the newspapers from these charges allegedly affected the plaintiff both socially and in his business relationships. His bank called a loan for $100,000; he lost business positions; his health suffered. General damages of $10,000 for injury to reputation and for mental anguish were found by the trial court.

Special damages of $123,052.91 were also found. As the result of the pre-probate contest, the public administrator was designated as special administrator of the Joslyn estate. He received ordinary and extraordinary commissions that the plaintiff would have otherwise received. Plaintiff also lost fees as testamentary trustee of certain trusts under the will, interim trustees having been appointed.

In addition, $50,000 punitive damages (as to which the wealth of the defendant was considered) were found. The appellate Court affirmed all elements of damage, to the penny.

VIII. Remedies for Personal Injuries—Damages. Excessive Awards and the Collateral Source Doctrine

Excessive damage awards in personal injury cases continue to raise the problem of whether the solution is to be by retrial on the damage issue, usually conditioned on nonaccept-

3. 275 Cal. App.2d —, 79 Cal. Rptr. 707 (1969). For further discussion of this case, see Hill, TRUSTS AND ESTATES, in this volume.

ance of a remittitur, or by retrial on all issues because the size of the award suggests passion and prejudice infecting even the findings of basic liability. *Gordon v. Strawther Enterprises, Inc.*[4] is an example of the former; *Collins v. Lucky Markets, Inc.*[5] of the latter.

A curious twist has been given to the remittitur question in a Supreme Court decision, *Sabella v. Southern Pacific Co.*,[6] because of trial tactics which have been employed to counter the application of the collateral source doctrine in personal injury cases. The doctrine operates, in the usual case, to exclude evidence of reimbursement of the defendant through insurance, pensions, or other forms of disability compensation. The defendant frequently proffers evidence, particularly of disability pensions being drawn by the plaintiff, as relevant to an issue of plaintiff's motivation to indulge in malingering. The possible impact of this evidence on the jury's ultimate calculation of damages need not be pursued here. In any event, the decisions in California this past year deem the admissibility of such evidence to be within the proper discretion of the trial judge (section 352 of the Evidence Code), the probative value being balanced against the potential prejudicial effect. In *Sabella,* a case arising under the Federal Employers' Liability Act, the trial judge excluded evidence of plaintiff's application for a disability pension, but thought better of it after the verdict.[7] The solution adopted was to effect a remittitur, reducing the damages from $115,000 to $80,000, which plaintiff accepted. The railroad, which in this instance appears as a beneficiary of the holding, objected that remittitur is an improper device to remedy the error of exclusion of relevant evidence and argued that "having de-

4. 273 Cal. App.2d —, 78 Cal. Rptr. 417 (1969).

5. 274 Cal. App.2d —, 79 Cal. Rptr. 454 (1969).

6. 70 Cal.2d 311, 74 Cal. Rptr. 534, 449 P.2d 750 (1969).

7. The reason for the judge's change of mind is understandable. In addition to the usual "probative" ground regarding plaintiff's motives, there were two other bases for admissibility: (1) the plaintiff himself had introduced as evidence one part of his application for a disability pension, and (2) plaintiffs' counsel had in strong terms claimed the defendant had turned its back on the plaintiff, which assertion would be rebutted by the admission of the entire application.

prived defendant of a full hearing by the jury on all evidence," a new trial is necessary. The Supreme Court rejected this as "untenable" because the evidence was relevant to the damage issue alone—a conclusion consistent with legal concept, although not, perhaps, with the folklore of certain trial lawyers.

IX. Remedies for Deception

A. *Damages*

The basic out-of-pocket measure of damages for fraud in connection with the sale of property required by the Civil Code[8] has been considered unduly restrictive. Therefore it was said in *Hartong v. Partake, Inc.*, "the courts have tended toward a liberal computation of 'additional damages' . . . which include the reasonable value of time fruitlessly expended by a plaintiff in reliance on the representation of a defendant."[9] In *Hartong*, various plaintiffs were fraudulently induced to acquire franchise distributorships. In the end they were saddled with the necessity of getting rid of merchandise stocks by covering the routes and making additional sales. Compensation for the time spent in such attempts (actually pursuant to the duty to minimize) was affirmed by the appellate court. A point of minor interest here is that the four successful plaintiffs, all without experience in the particular franchise business, came from different backgrounds and had different skills. Thus their "additional damages" (although all plaintiffs did the same thing in consequence of the fraud) varied in accordance with their previously established hourly earning capacity. Hartong, a college student earning $3 per hour as a savings and loan officer, therefore sustained less "additional damage" than Botemiller, a driver for Union Oil, at $3.40 per hour.

B. *Trmacing—Constructive Trust*

If money obtained by fraud is used to acquire title to property or is applied to improvements thereon (subject, of course,

8. C.C. § 3343.

9. 266 Cal. App.2d 942, 966, 72 Cal. Rptr. 722 (1968).

to the evidentiary requirements of tracing), the equitable remedies of a constructive trust on, or lien against, the property may be had. These remedies are commonly invoked when the money is traced to property otherwise exempt from levy and execution on ordinary money judgments. The case of *Schoenfeld v. Norberg*[10] indicates that the principle will not be overextended. Schoenfeld defrauded Norberg of over $13,000 in 1956; of this amount, $274.42 was traced to homestead property and was repaid to Norberg before judgment, ultimately entered in an amount exceeding $19,000. In 1965 Norberg caused a writ of execution to be issued and levied on the homestead. Norberg's position was that if any ill-gotten moneys are traced to a homestead, the property loses its exempt character and becomes subject to any judgment. The court disagreed and affirmed an injunction against the sale of the property by the sheriff. It reasoned that, because the small sum traced was repaid before judgment, the homestead stood as one obtained and declared in a lawful manner, in which no tainted money appears. On the facts, this appears to be an equitable result, but the decision raises a troublesome question of whether, for instance, an embezzler can protect exempt property by making partial restitution and electing to apply it to the satisfaction of that portion of the misappropriated money which has been traced, rather than to that which has not.

C. *Rescission Plus Punitive Damages*

Two cases[11] in California in 1968–69 confirm the trend toward a firm rule that an election to disaffirm a contract and seek restitution on grounds of fraud does not preclude a claim for punitive damages. The 1967 edition of this publication noted some previous uncertainty on the point.[12]

10. 267 Cal. App.2d 496, 72 Cal. Rptr. 924 (1968).

11. Mahon v. Berg, 267 Cal. App. 2d 588, 73 Cal. Rptr. 356 (1968). Horn v. Guaranty Chevrolet Motors, 270 Cal. App.2d 477, 75 Cal. Rptr. 871 (1969). For further discussion of the latter case, see Moreau, TORTS, in this volume.

12. York, REMEDIES, *Cal Law—Trends and Developments 1967*, p. 283 at pp. 300–301.

X. Rescission—Discharge for Value as a Defense to Restitution from a Broker

Attorneys for the purchasers of realty should be alerted to a provision that may appear in escrow instructions relating to broker's commissions. In *Holmes v. Steele,*[13] a contract to purchase a tavern business was entered into, an escrow was opened and cash deposits made. Although not requested by either the buyer or the seller, the following appeared in the escrow instructions:

> It is expressly agreed and understood that the seller is presently obligated to pay to Jack Steele & Associates a brokerage commission of the sum of $2,000.00 for services rendered and completed. Seller and buyer authorize and instruct said broker to retain and apply from buyer's deposit of $3,000.00 the sum of $2,000.00 as payment in full of seller's obligation. Seller shall credit buyer on account of the purchase price for said payment on his behalf.[14]

The sum of $2,000.00 was paid to Steele outside of escrow, and thereafter the buyer rescinded the transaction because of misrepresentations made by the seller that constituted a breach of warranty. The action was against the broker, Steele, for restitution of the $2,000.00. The majority of the Court held that the defense of discharge for value would be available depending on the further determination of certain facts by the trial court. (A concurring and dissenting opinion favored the broker on agency rather than restitutionary principles.) The Court quoted a Comment from section 17 of the *Restatement of Restitution,*

> . . . if the creditor beneficiary has an existing right against the third person and receives the property in discharge of the duty of the third person, the rule stated in § 14 is applicable. As there stated, he is protected against rescission of the transaction unless, at the time of receiving the property, he had notice of a defect in

13. 269 Cal. App.2d 675, 75 Cal. Rptr. 216 (1969).

14. 269 Cal. App.2d 675, 676, 75 Cal. Rptr 216, 217.

> the original contract which would permit rescission as against the promisee.

Thus, unless the broker is shown to have knowledge of the breach of warranty as would allow rescission against the seller, the buyer here, as a result of the escrow provision, is left with a presumably unsatisfactory remedy against the seller in tort or restitution.

XI. Remedies for Mistake

Where a mistake has occurred in a bargaining transaction, usually the mistake is raised as an affirmative defense to an action for specific performance, or the mistake is used as a basis for rescission and restitution. An exposition of some of the California law in this area is contained in *Lawrence v. Shutt*,[15] where specific performance was sought by plaintiff, and defendant counter-claimed for rescission. The Court avoided the rescission of a land sale, but decreed an equitable adjustment of the rights of the parties. The ultimate result seems both fair and reasonable, although the rationale may not satisfy purists.

The case arose out of the sale of 1280 acres of land to developers, the balance of the purchase price being secured by deeds of trust. There is no question as to the adequacy of consideration at the time of the making of the contract. The dispute centers about the "release" clause in the escrow instructions and deed of trust. As is not uncommon in this type of land development, the land is released from the deed of trust in parcels as payments are made. As development proceeds, the resultant income enables the developers to obtain the release of other parcels. Here the topography of the land in question varied, some being well suited for development, the remainder being rough and uneven. To avoid piecemeal selection by the developers, the clause provided for the release, upon specified payments, of lands in parcels "next contiguous" to those already freed. The sellers' understand-

15. 269 Cal. App.2d 749, 75 Cal. Rptr. 533 (1969).

ing was that following the release of an initial 80-acre tract, rectangular parcels of 40 acres would be released, "each proceeding from one boundary of the property parallel to adjacent boundaries towards the center." The developers' interpretation, upon which they were acting, was stated in open court: "the word 'contiguous' . . . gave them [the developers] the unrestricted 'right to select for release a piece of property that merely touches' and hence they could take that portion of the property suitable for development and leave the [sellers] with hills and gullies."[16] Under this interpretation the sellers could well visualize an ultimate denouement of a development winding through the prime areas of the whole tract, with a substantial portion of the unpaid purchase price secured only by worthless land. It is important to note that the sellers began expressing dissatisfaction with the release clause before the close of escrow, and, through counsel, intimated that it was unenforceable. They did not, however, object to the closing of the escrow, and sometime after the close, when it became apparent what tack would be taken by the developers, they did serve a notice of rescission for mistake (and other grounds later abandoned). In the meantime, the sellers physically interfered with the developers to the point that one of the sellers was jailed for contempt in violating an injunctive decree.

When the case reached the litigation stage, it had this posture: the developers were seeking specific performance (particularly of the release clause), declaratory relief, and to quiet title; the sellers counterclaimed for rescission. The trial court decreed rescission. On appeal, the first issue considered, however, was the existence of a defense to specific performance of the release clause. The conclusion was that the clause was unenforceable because of uncertainty and unreasonableness, with the qualification that there was no requirement that the entire contract be invalidated. This alone would necessitate reversal.

At this point, it might appear that everything had been

16. 269 Cal. App.2d 749, 762, 75 Cal. Rptr. 533, 540.

decided that needed to be decided, since the developers could have accepted the equitable qualification, inconvenient as it might have been to the future financing of their project, or else acquiesce in the proffered rescission. (Actually, the developers proved content with the declaration of unenforceability of the clause.) However, the Court, for some unspoken reason, proceeded to deal with the counterclaim for rescission in detail. The somewhat puzzling aspect is that the same release clause held unenforceable for uncertainty was next reexamined in terms of "mistake." As has been said, any further analysis seemed unnecessary, but if there is a compulsion to do so within the "mistake" concept, it at least could be short; there was simply no ground for rescission since there was no mistake as to any fact constituting the basis of the bargain. At most there was a misunderstanding as to the meaning of words embodied in a nonintegral part of the contract, which had already been remedied by excision on terms favorable to the sellers and acceptable to the buyers. Misunderstandings raise problems as to contract creation, but not as to rescission. There was never any suggestion that there was not a contract here, in either a subjective or objective sense. In all fairness, there is a passage in the opinion to the effect that contractual obligations will not be set aside merely because of unilateral misunderstandings, but the main thrust of the opinion is clear. It runs as follows: sellers were unilaterally mistaken; California law allows rescission for unilateral mistake; section 1577 of the Civil Code, however, limits relief to those mistakes not caused by a neglect of a legal duty. The sellers, having expressed dissatisfaction with the release clause (the focal point of the "mistake") before close of escrow but then failing to raise their objection at escrow, being thus on inquiry as to the meaning of the word "contiguous," neglected their legal duty. Besides, rescission for unilateral mistake will not be allowed where it would impose substantial hardship on the other party. Since the writer has expressed the opinion that this exposition is unnecessary to the correct result, no further comment will be made except to express the hope that resolution of problems of "misunder-

standings" or lack of communication or uncertainty will not enter into the "mistake" area, which is boggy enough.

From *Gibbons v. Travelers Ins. Co.*,[17] we learn that "extrinsic mistake," when applied to a court judgment, means something different from "extrinsic mistake" in making a contract in California. Here a personal injury settlement was effected on the basis of a skull fracture, with apparent complete recovery. Later a permanent impairment of hearing developed. Such personal injury settlements and releases are often the subject of litigation aimed at rescinding them because of a mistake of fact (different injury) going to the basis on which the settlement was made, that is, mistake as to an "extrinsic fact."

Such a contention was advanced in *Gibbons* and for present purposes may be assumed to have had merit. However, in *Gibbons* the injured party was a minor and the settlement had court approval. Of course a mistake in a court judgment can also be set aside for an "extrinsic mistake," but such a mistake is one "which prevents the litigant from knowing he has a day in court . . . [it] is not concerned with the nature or quality of the presentation which the litigant can make, so long as he is given an opportunity to make it." Moral: litigants make basic extrinsic mistakes; judges don't.

XII. Remedies for Breach of Land Sale Contract

A. *Buyer in Default—Damages—General Principles*

Remedial problems concerning executory land sale contracts in California are somewhat acute, considering our antideficiency statutes, and our distinctions between routine transactions through escrow and instalment contracts with retained title as security. In addition, there is a generalized antipathy toward enrichment even at the expense of wilful contract defaulters.

Prior case law has established the right of the wilfully de-

17. 274 Cal. App.2d —, 79 Cal. Rptr. 438 (1969).

faulting buyer to restitution in an affirmative action,[18] and has defined enrichment as the excess of the price advanced over damages[19] as measured by the rule in *Royer v. Carter*.[20] Applying these principles, the defaulting purchasers of a snack shop were denied restitution in *Sweet v. Relis*[1] because there was no net enrichment. The "benefit of the bargain" damages alone exceeded the payments made.

In *Barton v. White Oak Realty, Inc.*,[2] the defaulting buyer sued to recover her deposit, the sellers cross complaining for damages. The purchase price was $199,500 and the broker's commission totaled $11,970. Benefit-of-bargain damages were $4,500.[3] The trial court allowed the cross-complainants these damages plus the broker's commissions; thus, the simple question posed on appeal was whether benefit-of-bargain damages *plus* the broker's commission on the original sale can be recovered by the *sellers*. After a careful analysis, the reviewing Court held this not necessarily so. If the seller recovers his expectancy damages plus the expenses, including commissions, that he would have had to pay on the sale *if consummated*, he is prima facie placed in a better position by the buyer's default. Therefore, the Court points out, the *Royer* rule states that the additional expenses allowed the seller (in addition to the general expectancy damages) are those in connection with a *hypothetical* resale at market value at the time of breach. If the contract price and market value are the same (*i.e.*, no recoverable expectancy damages), the expenses of the hypothetical resale would normally be the same as actually incurred in conjunction with the broken

18. Freedman v. The Rector, Wardens & Vestrymen of St. Mathias Parish, et al. 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1 (1951).

19. Honey v. Henry's Franchise Leasing Corp. of America, 64 Cal.2d 801, 52 Cal. Rptr. 18, 415 P.2d 833 (1966).

20. 37 Cal.2d 544, 233 P.2d 539 (1951).

1. 275 Cal. App.2d —, 79 Cal. Rptr. 829 (1969).

2. 271 Cal. App.2d 579, 76 Cal. Rptr. 587 (1969). For further discussion of this case, see Bernhardt, REAL PROPERTY, in this volume.

3. The sellers claimed $39,500 as the difference between the contract price and the market value at the time of breach. Justice Kaus, exercising his characteristic gift for the apt phrase, remarked, "the court found that the owners had not overreached themselves as much as they had thought."

contract. But if the actual market value is lower, presumably the recoverable expenses in connection with the hypothetical resale, particularly with respect to commissions, would also be lower. (And, of course, a prompt actual resale at actual market price might disclose additional recoverable expenses.) However, a buyer is to be credited with any savings of actual expense in connection with the broken contract. In *Royer* the seller saved $780 in commission expense that he would have had to pay if the sale had gone through.

Applying these propositions to the present case, the buyer is liable (in addition to benefit-of-bargain damages) for expenses, including commissions, on a hypothetical resale, offset by any savings in commissions by reason of the failure of the first sale to go through. Thus, the issue becomes not whether the seller gets the broker's commission for the first sale, but whether he can avoid their offset because he may not be liable for them. In this connection the seller argued that by bringing an action for damages, liability is automatically incurred for the broker's commission on the broken contract; that if the seller recovers the benefit of the bargain, the broker should be paid. The court rejected this proposition by pointing out that this would be in direct conflict with *Royer*,[4] where the seller also sued, but the court offset the $780 commission actually saved. To accept the seller's proposition would make that $780 saving illusory. Accordingly, the case was remanded for further findings as to (1) the expenses of a second hypothetical sale and (2) whether the brokers had actually earned the commission at the time of breach (in contrast to the assumption that the mere filing of this action entitled them to the commission, as urged above). In case the reader is wondering why there was such concern as to whether the broker earned the commission and whether the seller could recover it, it should be pointed out that the seller was also one of the brokers.

4. The court also declined to be bound by any intimations to the contrary in Lesser v. W. B. McGerry & Co., Inc. 121 Cal. App. 193, 8 P.2d 1058 (1932).

Again, *Sutter v. Madrin,*[5] the defaulting buyer sued for restitution of deposits in escrow ($20,000), and again the question of offsets for damages incurred by the seller under *Royer* was presented, here, however, with certain amplifying interpretations of *Royer* in mind. These interpretations are contained in a 1964 case, *Allen v. Enomoto,*[6] where the seller traded the property within the shortest possible time after the buyer's breach. There were no benefit-of-bargain damages, but the court quoted the qualifying language from *Royer:* "[A]dditional expenses [which] are the natural consequences of the breach . . . may be recovered." In the circumstances of *Allen,* these were held to include fire insurance, mortgage interest, and property taxes during the interim period between breach and resale (a trade in this case), as well as certain costs connected with the resale (trade) such as refinancing the loan and obtaining title insurance on the property received in trade.

In *Sutter,* there were no benefit-of-bargain damages, and, more importantly, there had been no resale. The trial court found "additional expenses" of operating and maintaining the property in excess of the buyer's deposit in escrow. The state of the record, with conflicting and vague findings and conclusions, was deemed such that a remand was necessary in any case. The concurring opinion should be read first, as it offers a novel observation about benefit-of-bargain damages as well as specific guides to the interpretation of *Royer.* First of all, according to the concurring opinion, it is wrong to conclude that a finding of fact that the market value of the property did not change during the period of escrow imparts no damage. A two-month delay in the right to receive the purchase price damages the vendor, and interest on the purchase price at the legal rate during this period of delay should be allowed as damage. The second element of damages is the seller's actual expenses incurred in performance—in this case broker commissions and legal fees incurred in connection with the abortive sale. (Note that this approach varies

5. 269 Cal. App.2d 161, 74 Cal. Rptr. 627 (1969).

6. 228 Cal. App.2d 798, 39 Cal. Rptr. 815 (1964).

from the calculation of expenses of a hypothetical second sale as analyzed in *Barton v. White Oak Realty,* supra.) Expenses of operating and maintaining the property are not allowable, since they are offset by the value of its possession.

The majority opinion was less concerned with the specifics than with the problems suggested by an application of the *Allen* language to the situation in the case at bar. Without adequate findings, a resolution of the issues presented was impossible, so judgment was reversed. Because the opinion states, better than any summary could, the doubts and uncertainties about the 1969 state of the law of damages in favor of a seller upon a buyer's breach of a land sale contract, the following extensive quote is made for such illumination as the practicing lawyer may gain therefrom:

> To permit items of fire insurance, taxes, mortgage interest and numerous other expenses implicit in the ownership and possession of the property as such 'additional expenses' opens the door to many difficult questions. Does a seller have the right to hold indefinitely and sue for loss incurred on expenses as enumerated in *Allen,* as such expenses are incurred or paid or may such expenses be permitted to accumulate? For example, if the owner never resold and held the property at a loss, does a cause of action accrue at his election within the statute of limitations and does he have more than one such action? Must the owner, in order to collect such items of damage, sell within a reasonable period after the breach? To what extent, then, could the defaulting vendee offset the value of the use of the subject property? What would be the effect of an interim increase or decrease in value over the market value on the date of the breach? Is a seller entitled to interest on the agreed purchase price, as suggested in the concurring opinion, for the period of an aborted escrow? Doesn't every seller implicitly waive interest on every purchase price for the duration of every escrow unless explicitly otherwise pro-

vided? Does a defaulting vendee assume all the expenses and obligations of unprofitable ownership?[7]

B. *Damages v. Rescission v. Foreclosure of Vendor's Lien v. Suit To Quiet Title*

1. In General. All the cases in the foregoing subsection except one[8] were land sale transactions through the normal escrow process. *Gantner v. Johnson,*[9] on the other hand, involved an instalment land sale contract, with title retained by the vendor. This, of course, is recognized in California as a form of security transaction subject to the antideficiency statutes.[10] For purposes of discussion, only certain rounded-off dollar figures will be utilized, and the community property aspects of the case, along with some consequential damages and repair costs, will be ignored. Assume a contract price of $68,500. The buyer, over the course of years, has made payments on principal of $42,500, leaving a balance of $26,000. The property is now worth $38,000. The buyer defaults; the seller re-enters. What are seller's remedies *if he wants the property?*[11]
2. Foreclosure of Vendor's Lien. The seller may bid in the property at the current market if he desires to go through this procedure.
3. Rescission. This obviously holds little appeal in a falling market, as it means here a restoration of the $42,500 received, less any consequential damage.
4. Suit for Damages. A straightforward action for benefit-of-bargain damages, with the usual contract rule

7. 269 Cal. App.2d 161 at p. 170, 74 Cal. Rptr. 627 at p. 633 (1969).

8. Honey v. Henry's Franchise Leasing Corp., 64 Cal.2d 801, 52 Cal. Rptr. 18, 415 P.2d 833 (1966).

9. 274 Cal. App.2d —, 79 Cal. Rptr. 381 (1969).

10. See Code of Civ. Proc. § 580(b).

11. Parenthetically, if the vendor wishes to be rid of the property, the attempted remedy of an action for the purchase price or for specific performance might well encounter the rule in Venable v. Harmon, 233 Cal. App.2d 297, 43 Cal. Rptr. 490 (1965), that the antideficiency statute would operate as a bar.

limiting recovery of specials to those within the contemplation of the parties, poses an anomaly. The vendor assumes the burden of proving damages. To the extent, as here, that the proof falls short of the sum received, he is merely establishing a credit that must be refunded. Should he perchance succeed in establishing benefit-of-bargain damages in excess of payments received, a judgment for such excess would apparently be contrary to the California antideficiency statutes. Of course the statement of facts excludes this as a practical, if not hypothetical, possibility.

5. Do Nothing. In view of the foregoing, the temptation to avoid action has a measure of attraction, although the hiatus may be an uneasy one. Suppose the buyer serves a written offer for a mutual rescission. Acceptance is unthinkable; a rejection, on the other hand, may be regretted if there is a sudden rise in land values, in which event the buyer may be encouraged to incur the imposition of damages as a condition of resuming performance. An opportune resale is inhibited by the outstanding contract, broken though it may be. At best, the vendor may expect some assertion of a restitutionary claim, but the situation is not exactly under his control.
6. Suit to Quiet Title. This was the remedy chosen by the vendor in *Gantner* and will probably become the common remedy in California. The filing of such a suit naturally prompts the buyer to cross complain, alleging that a forfeiture of interests in the property would result in unjust enrichment. This puts the defendant in the posture of a wilfully defaulting vendee seeking restitution. Applying the *Honey* rule, benefit-of-bargain damages (per *Royer*) are subtracted from the sum paid on the purchase price, and the balance returned by way of restitution. This approach has the advantage of clearing title as well as resolving the ultimate restitution problem on conditions of convenience to the seller. Although this appears to be

> but a disguised action for damages, there are doctrinal aspects which favor it. The vendor seeks to impose no personal judgment and therefore has no burden of proving damages (including any by-play as to what was in the contemplation of the parties); on the contrary, the burden is on the wilful defaulter to prove that the seller has sustained a net enrichment. Proper restitution principles, in the case of a wilful defaulter, would not limit the detriment sustained by the innocent party to rigid contract damages, but would include other injury proximately sustained, whether foreseeable or not. (Maybe this is what *Allen v. Enomoto,* (supra) was trying to say.)

Speaking of doctrinal aspects, an anomaly exists in the use of a quiet title suit in the situation under discussion. In theory, such a suit by the vendor seeks to cut off the buyer's equity. It is contract-terminating, and, as such, close to rescission. Should it actually be called that, it would be fatal to the seller's case. The decision in *Gantner* (following *Honey*) meets the problem head on: "A vendor does not elect to rescind by bringing a quiet title action or by going into possession of the property after default by the vendee." So be it, the vendor has not elected to terminate the contract. He certainly hasn't elected to affirm it either. What has he done?

C. *Contract for the Sale of an Interest in Land—Seller in Default—Specific Performance v. Damages*

Brandolino v. Lindsay[12] presents one of the classic dilemmas of the law-equity dichotomy. Implicit in the application of the benefit-of-bargain rule of damages at law is a statement that one party quite discernibly got the worst of the deal. The standard equity rule has been that hardship or inadequacy of consideration (absent fraud, mistake, undue influence, etc.) constitute defenses to the equitable remedy of specific performance but are not grounds for rescission of the contract; it is

12. 269 Cal. App.2d 319, 75 Cal. Rptr. 56 (1969).

thus permissible to dismiss the specific performance action, and with a residue of good conscience, leave the plaintiff to pursue his legal remedy. The procedural merger of law and equity sharpens the dichotomy, since a court sitting as chancellor may be called upon to deny specific performance as inequitable, only to be requested, as judge, to order payment of damages. In California, the equitable rule is strengthened by statute,[13] rendering specific performance unenforceable against a party where consideration is not adequate or the contract is not, as to him, just and reasonable. Plaintiff must allege that the contract is fair and reasonable. (It may also be noted that in California the buyer must establish that the vendor's breach was in bad faith to get benefit-of-bargain damages.)

In *Baran v. Goldberg*,[14] specific performance was denied the buyers because the market value of $16,500 was markedly greater than the contract price of $11,000. In-lieu damages were refused because the complaint, seeking only specific performance, stated no facts (naturally) to sustain an award of damages. Other cases, relying on *Baran,* have summarily stated that if specific performance is denied because of inadequacy of consideration, damages cannot be awarded. A reasonable inference may be drawn from this that would lead a lawyer to counsel a vendee client (understandably elated about a "fantastic" deal) to be content with a damage action, rather than to hazard drafting a complaint for specific performance, no matter how badly the client wanted the property. In close cases, with uncertain market values, it is probable that many California lawyers have been troubled about their advice to clients.

Counsel for the vendees in *Brandolino* did not hesitate. According to the statement of facts, a land sale contract for $50,000 was signed. Three days later the seller canceled the escrow, saying he could "get twice as much." Plaintiffs then filed suit and recorded a notice of *lis pendens.* Two causes of action were stated in the verified complaint:

13. Civ. Code § 3391(1), (I).

14. 86 Cal. App.2d 506, 194 P.2d 765 (1948).

1) specific performance, alleging the agreed price of $50,000 and that this amount was the "fair and reasonable" value of the property.

2) damages for breach "in the amount of $25,000 which is the difference between the agreed price, $50,000, of the property, and the value, $75,000." (An allegation that the breach was in bad faith must be assumed.)

The parties proceeded to trial. When the vendee's own witness testified that the property was worth over $80,000, the judge stated that specific performance would be denied. Plaintiff's counsel thereupon announced abandonment of that cause of action. Damages in the amount of $25,000 were then awarded. The seller's reaction to this award of damages, "in equity" as he called it, was predictably sharp.

> To permit them to falsify their own allegations to seek damages under the circumstances makes a mockery of equity' and that 'the greater the discrepancy in the sworn allegation as to value, the greater would be their reward of damages.' He asserts further that charging him with bad faith and loading him with heavy damages for refusing to perform the unfair agreement while he was prevented by the *lis pendens* notice from salvaging anything from the property rendered meaningless the equitable rule against enforcing performance of an unjust agreement.[15]

The appellate Court, nonetheless, affirmed the judgment for damages, holding merely that a plaintiff in California is allowed to pursue alternative remedies and plead inconsistent causes of action and also that the decision as to an election need not be forced until after the evidence is taken. While filing a *lis pendens* in conjunction with specific performance is proper, in a pure damage action it might be considered abuse of process. However, the Court went on to hold that the recording of the *lis pendens* does not here "preclude plaintiffs from recovering damages in the event specific performance could not be decreed." If any criticism of *Brandolino* is in

15. 269 Cal. App.2d at 324, 75 Cal. Rptr. at 59 (1969).

order it is not that the plaintiff has pleaded inconsistent causes of action or remedies but that he may have come dangerously close to pleading "contradictory or antagonistic facts,"[16] which is another matter. In any event, the decision, as long as it holds, allows more room for maneuver with regard to the vendee's remedial possibilities than has formerly been thought to be the case.

XIII. Remedies for Breach of Contract

A. *Construction Contracts—Breach by Owner—Damages*

According to *Stephan v. Maloof*,[17] the measure of damages for breach, by the owner, of a construction contract, is the lost profits even thought the contractor never began performance. The defendant in *Stephan* urged reduction of damages (1) by the amount of the value of the contractor's own services which it was claimed was part of cost of performance; and (2) by an amount equivalent to plaintiff's release from care, trouble, risk, and responsibility which would have attended full performance. The appellate Court rejected the argument, properly noting that this application of the doctrine of avoidable consequences, while perhaps applicable to a breach of contract for personal services (where the employer has the exclusive right to plaintiff's work), is inapplicable to the present case.

B. *Employment Contracts—Breach by Employee—Specific Performance and Damages*

California Labor Code, section 2855, allowing enforcement of unique services contracts for a term not exceeding "seven years from the commencement of service under it," does not enlarge the remedial rights of an employer beyond the actual termination date of employment. Rick Barry was employed

16. See, e.g., Beatty v. Pacific States Savings & Loan Co., 4 Cal. App.2d 692, 695, 41 P.2d 378, 380 (1935).

17. 274 Cal. App.2d —, 79 Cal. Rptr. 461 (1969).

by the San Francisco Warriors under a one-year professional basketball contract with a unilateral option for another year if the player failed to sign a renewal contract. At the end of the term, Barry failed to renew his contract with the Warriors and signed with a rival team, the Oakland Oaks. He was enjoined from playing for the Oaks for the year during which the reserve clause operated in the Warriors' favor. He did not play out the option with the Warriors but sat out the season pursuant to the injunction. In *Lemat Corp. v. Barry*,[18] the Warriors contended that under the Labor Code, an injunction for up to seven years should be granted. The trial court blew the whistle on this attempted double dribble. Although it found that the Warriors lost $356,000 in gate receipts by reason of Barry's absence (it would have been even greater had Barry actually played for the cross-bay rivals), it declined to award damages, while at the same time limiting the final injunction to the contract term.

The appellate Court agreed as to the injunction. The Labor Code section was held to embody a limitation upon enforcing these contracts of adhesion, rather than permitting enforcement beyond the termination of the contract period. On the issue of damages, the appellate opinion said that a detailed discussion was not required, because it was clear that the request for relief was in the alternative and that damages would be of significance only if the equitable relief (as limited) had been denied. Having disposed of the issue in the case at bar, the opinion proceeded to include some questionable dicta. Describing plaintiff's contention as "unique," the court, citing California cases, recited a general rule limiting a plaintiff to an injunction against future injuries and damages for past injuries. Such a rule, however, overlooks the dual aspects of these Lumley-Wagner type cases. Whereas an injunction ordinarily precludes future damage, this is not so in the case here presented. Barry was enjoined (the negative aspect) from playing for Oakland for the final year of the contract. But the equity decree did not accomplish the affirmative aspect

18. 275 Cal. App.2d —, 80 Cal. Rptr. 240 (1969).

of performance; Barry did not play for the Warriors. Such damage is not prevented by an injunction. The so-called general rule does not apply. On the contrary, the more relevant maxim that equity will not do justice by halves, or the principle that equity having taken jurisdiction will proceed to give full relief, should be invoked to sanction both an injunction and damages.

Commenting that "damages" in a situation of this kind are speculative and uncertain and practically impossible to ascertain, the appellate Court questioned, in passing, the evidentiary and logical basis for the trial court's finding that the Warriors had incurred a gate loss of $356,000 by reason of Barry's absence. This argument is fast losing persuasiveness in the modern era of professional athletics and electronic entertainment. Speculation as to amount remains, but the fact of damage is apparent to everyone. Enormously remunerative contracts are negotiated in hard-nosed business sessions between lawyers and agents, the gate-draw potential of a high draft choice being a dominant factor. Patronizing solicitude for the businessman-athlete seems curiously out of place. Conceding the necessity of some "speculation," it seems that modern courts are lagging behind the times in failing to deal adequately and realistically with prime business considerations in what are, with increasing frequency, million-dollar transactions.

XIV. Contracts Normally Unenforceable by Reason of the Statute of Frauds or the Statute of Wills

California courts continue a liberal use of the "estoppel" principle in negating the statutory requirements of a writing both as to contracts and wills, and in fashioning suitable remedial devices to enforce oral agreements. In *Di Salvo v. Bank of America*,[19] the reviewing Court reversed a judgment of dismissal and held that a constructive trust might properly be claimed as to one-half of the Smith estate, then in probate.

19. 274 Cal. App.2d —, 78 Cal. Rptr. 838 (1969).

According to the allegations, the women had trouble with the menfolk in decedent's family. The plaintiff here is Granddaughter Smith. Some years prior to the action Grandfather Smith had been living with another woman. A family arrangement was made, represented by the oral agreement in question, whereby Grandmother Smith agreed to allow Grandfather to dispose of the community property by will. Grandfather agreed to see that his wife and granddaughter were taken care of. Father Smith was to receive the community property and he in turn agreed to care for his mother for life and leave one-half of whatever property he had at death to the plaintiff. Father Smith, however willed the property to his third wife, with only a contingent interest to the plaintiff. In holding that these allegations stated a cause of action sufficient to impose a constructive trust in plaintiff's favor, based on estoppel against the estate to assert the statute of frauds, the Court took particular care to caution the lower court on retrial to accept only clear and convincing evidence. Of interest here is that the grandmother, who, as promisee, gave up her community interests, is not a party to the suit; the estoppel runs in favor of the donee beneficiary, who gave up nothing.

It is fairly obvious that the more expansive rationale of "estoppel to assert the statute of frauds" has largely supplanted the "part performance" doctrine to bring about the enforcement of oral land sale contracts in California. Without the restrictive requirement of the part performance doctrine—that buyer's change of position be unequivocally related to the contract or in pursuance of the contractual objectives —the estoppel approach offers much broader evidentiary possibilities of detrimental reliance or unjust enrichment, the prevention of which, of course, underlies both theories. In *Carlson v. Richardson*,[20] buyer sued for specific performance of an oral contract for the sale of an acre of ocean-front property. Unless the contract were enforced, he alleged, the seller would be unjustly enriched because the land had risen

20. 267 Cal. App.2d 204, 72 Cal. Rptr. 769 (1968). For further discussion of this case, see Rohwer, CONTRACTS, in this volume.

in value since the contract, and, in addition, he [the buyer] would suffer detriment from the loss of the bargain and from "lost opportunities" to purchase the land. Buyer also averred detrimental reliance based upon his purchase of adjacent property for use as a temporary residence while he built on the property in dispute. None of these averments, it will be observed, would support a part performance theory. The trial court sustained a demurrer, which was reversed on appeal. The reviewing Court held that while the assertion of "lost opportunities" cannot support a claim of reliance in detriment, nor can the fact of rising land values sustain a claim of unjust enrichment, the allegation of purchase of the neighboring property for temporary residence states a cause of action. Since the decision merely overrules a demurrer, too much should not be made of it. However, the cases in which "estoppel" has been invoked have in the main been those where the plaintiff has given up lucrative work and moved. Such forms of detrimental reliance are hard to remedy without enforcing the contract. Here the facts pleaded disclosed the detriment to be a failure to purchase property in an area of rising land values—not inevitably an irreversible detriment. Perhaps the message from this liberal handling of estoppel in California is that out West we consider that a man's word ought to be as good as his bond.

XV. Illegal Contracts—Equitable Remedies

Although courts nominally will afford no remedy, either by way of enforcement or restitution, to parties to an illegal transaction (absent certain well-established exceptions), California courts in recent years have avoided summary disposition of these cases in favor of equitable adjustment which avoid outrageous unjust enrichment and without, as a practical matter, condoning or encouraging illegal bargains.

In *Griffis v. Squire*,[1] the plaintiff, an entryman on 320 acres under the Desert Land Entries Act (43 U.S.C. § 32), con-

1. 267 Cal. App.2d 461, 73 Cal. Rptr. 154 (1968).

tracted with defendants to convey 178.46 of the acres in consideration of development work that would enable plaintiff to complete the entry requirements. Such executory contracts prior to execution of the patent are illegal, and the illegality is not to be regarded as trivial. Defendants, however, had labored mightily and spent $90,000, and the work necessary for plaintiff's patent, and more, had been completed. Having obtained the patent, plaintiff sued to quiet title and defendant sought specific performance of the contract. The illegality was not called to the trial court's attention and it found for defendant. The reviewing Court reversed. While declining to grant specific performance of the illegal bargain (thereby depriving the defendant of the enhanced value of the land), it remanded for retrial on the issue of whether an equitable lien should be imposed against the land for the moneys expended in making the improvements (thereby precluding a large measure of unjust enrichment) plus taxes and insurance paid by the defendants.[2]

2. This equitable result was based squarely on the case of Hainey v. Narigon 247 Cal. App.2d 528, 55 Cal. Rptr. 638 (1966), which was favorably commented upon by the author in *Cal Law—Trends and Developments 1967* at p. 314.