Florida Law Review

Volume 4 | Issue 2 Article 5

July 1951

Liquidated Damages Clause in Real Estate Contracts

George W. Wright Jr.

definite, with a dictum stating that the child can attack, and with recognizably distinguishable cases possibly indicating that he cannot. Since this uncertainty is present, was the Supreme Court justified in upsetting the interpretation of Florida law advanced by the New York Court of Appeals?[60]

Johnson v. Muelberger is a further extension of the full-faith-and-credit clause toward prevention of attacks on foreign divorces. The current policy of the Supreme Court leads in effect to the conclusion that, if both parties appear in the divorce proceedings, full faith and credit prevents any attack on the decree by any person in another state. That such finality of marital status is an admirable conclusion would probably be admitted by many disinterested persons; but if this conclusion be based on the law of the state where the divorce was granted, the Court should impartially ascertain the law of that state and should not reverse the finding of a court of another state when its interpretation is not unreasonable. If the ratio decidendi of the *Johnson* case is followed, the Supreme Court must in all cases ascertain the law of the divorcing state and in instances of doubt resolve the issue in favor of precluding attack, even though this involves overruling an equally sound interpretation to the contrary by a court of some other state.

WILLIAM E. NODINE

LIQUIDATED-DAMAGES CLAUSES IN REAL ESTATE CONTRACTS

Wrongful invasion of legally recognized personal or property rights is compensated under our legal system either by a form of specific relief or by a money judgment for damages. Generally, the remedial character of the common law contemplated a pecuniary award calculated to compensate for legal wrong.[1] Because money is rarely an accurate substitute for the performance of a contract, however, and because the damages attending breach are difficult of ascertainment,

[60]Query: When the child and the parties to the Florida divorce proceeding reside outside Florida, how can the child obtain a determination of the Florida law by the Florida courts?

[1]See 1 SEDGWICK, MEASURE OF DAMAGES §2 (9th ed. 1912).

contracting parties often attempt to decide in advance the money value to be assigned to a breach.[2] The power of the parties to "liquidate" damages at the inception of a contract is limited by the invalidity of clauses designed to forestall breach by imposition of a penalty.[3] The line between valid liquidated-damages clauses and penalty clauses is not clear-cut. An analysis of this hazy confluence of legal theories, with particular reference to the Florida cases, ensues.

History and Development

The problem of protecting improvident debtors against exorbitant payments in the event of default occurred at common law most frequently in the case of penal bonds, in which the obligor bound himself to pay a certain sum of money at a fixed date, but with the proviso that such obligation should become void on the payment of a lesser sum of money or the performance of a particular act.[4] If the conditions were not complied with, the penalty was payable and could be recovered at law without regard to the actual damage incurred.[5] But equity began to relieve against the oppression caused by such a practice by permitting the creditor to recover only the actual damages incurred.[6] Subsequently, legislation provided that in an action upon a bond for a penal sum for the nonperformance of covenants the plaintiff might assign the breaches of condition and the jury was thereupon to assess the plaintiff's actual damage.[7] Though the language of the statute was permissive, it was construed by the courts to be compulsory.[8] The amount named still had the effect, however, of fixing the maximum limit of recovery in an action on the bond, although an action on the contract was not so limited.[9]

A liquidated-damages clause, as distinct from a penalty clause, was early upheld in *Fletcher v. Dyche*,[10] on the grounds that the parties

[2]See McCormick, Damages §146 (1935).

[3]*Ibid.*

[4]See McCormick, Damages §147 (1935); 2 Sedgwick, Measure of Damages §675(b) (9th ed. 1912).

[5]*Ibid.*

[6]See McCormick, Damages §147 (1935).

[7]8 & 9 Wm. III, c. 11, §8 (1697).

[8]Hardy v. Bern, 5 T.R. 636, 101 Eng. Rep. 355 (K.B. 1794); Roles v. Rosewale, 5 T.R. 38, 101 Eng. Rep. 302 (K.B. 1794); see 2 Sedgwick, Measure of Damages §675(d) (9th ed. 1912).

[9]*See* Cramp & Co. v. Doughty, 89 N.J.L. 288, 98 Atl. 260, 262 (1916).

[10]2 T.R. 32, 100 Eng. Rep. 18 (K.B. 1787).

were seeking to prevent dispute over the amount of damages and that a jury would experience considerable difficulty in ascertaining damages. Thus the distinction became entrenched in English law.

The validity of liquidated-damages clauses has been recognized often in this country.[11] Several states have enacted legislation providing that such clauses shall be invalid unless they come within certain enumerated conditions or exceptions.[12] Similarly, the courts have set down general principles said to govern the determination of their validity. The bench has not bound itself by any one principle but uses all such principles conjunctively in applying them to each factual situation; and these principles are sufficiently broad to permit great latitude in their application.

The "Intent" of the Parties

The courts, continuing to act under the theory that eventually led the English bench to grant relief against penal bonds, have characterized the imposition of liability for a larger sum upon failure to pay a contract sum as a penalty against which both law and equity will relieve.[13] Since there is little difficulty in measuring damages for nonpayment of money,[14] equity will grant relief against a penalty or forfeiture occasioned thereby.[15] Likewise, a clause contemplating primarily security for performance rather than compensation for breach cannot prevail.[16]

[11]*E.g.*, St. Petersburg Advertising Co. v. American Motorsign Co., 25 F.2d 397 (5th Cir. 1928); Lee v. Clearwater Growers Ass'n, 93 Fla. 214, 111 So. 722 (1927); Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000 (1916); Allison v. Dunwody, 100 Ga. 51, 28 S.E. 651 (1896); Keefe v. Fairfield, 184 Mass. 334, 68 N.E. 342 (1903); Riling v. Idell, 291 Pa. 472, 140 Atl. 270 (1928); Nelson v. Butler, 190 S.W. 811 (Tex. Civ. App. 1917).

[12]Cal. Civ. Code §§1670, 1671 (1949); Okla. Stat. Ann. tit. 15, §§214, 215 (1941).

[13]Goodyear Shoe Mach. Co. v. Selz, Schwab & Co., 157 Ill. 186, 41 N.E. 625 (1894) (law); Maybury v. Spinney-Maybury Co., 122 Me. 422, 120 Atl. 611 (1923) (equity); Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415 (1895) (equity); *see* Kaplan v. Gray, 215 Mass. 269, 273, 102 N.E. 421, 422 (1913) (law); Kemble v. Farren, 6 Bing. 141, 148, 130 Eng. Rep. 1234, 1237 (C.P. 1829).

[14]See, *e.g.*, Potomac Power Co. v. Burchell, 109 Va. 676, 64 S.E.2d 262 (1909).

[15]Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415 (1895); *see* Langever v. R. G. Smith & Co., 278 S.W. 178, 179 (Tex. Civ. App. 1925).

[16]Watts v. Camors, 115 U.S. 353 (1885); Giesecke v. Cullerton, 280 Ill.

Whether a sum named is to be considered as liquidated damages or penalty is a question of law.[17] Aside from the foregoing situations, in which the rules are relatively easy of application, prediction of the judicial attitude is difficult. The intent of the parties is said to be the controlling factor or guide;[18] and the courts arrive at it by construing the entire contract.[19] Although the language used to describe the sum named is one of the factors to be considered in determining intent,[20] such designation is not conclusive.[21] "Forfeiture"[22] and "penalty"[23] have been said to import penal intent; and the execution of a bond conditioned on the performance of a certain act is also prima facie evidence thereof.[24] The intent is determined as of the time the contract was entered into,[25] because the parties in naming a

510, 117 N.E. 777 (1917); Wilkes v. Bierne, 68 W. Va. 82, 69 S.E. 366 (1910); Aylet v. Dodd, 2 Atk. 238, 26 Eng. Rep. 547 (Ch. 1741).

[17]Pembroke v. Caudill, 160 Fla. 948, 37 So.2d 538 (1948); Greenblatt v. McCall, 67 Fla. 165, 64 So. 748 (1914); Smith v. Newell, 37 Fla. 147, 20 So. 249 (1896); Langever v. R. G. Smith & Co., 278 S.W. 178 (Tex. Civ. App. 1925).

[18]Barnette v. Sayers, 289 Fed. 567 (D.C. Cir. 1923); Gay Mfg. Co. v. Camp, 68 Fed. 67 (4th Cir. 1895); Weatherford v. Adams, 31 Ariz. 187, 251 Pac. 453 (1926); Shields v. Early, 132 Miss. 282, 95 So. 839 (1923); Richards v. Edick, 17 Barb. 260 (N.Y. Sup. Ct. 1853); Dobbs v. Turner, 70 S.W. 458 (Tex. Civ. App. 1902). *But see* Central Trust Co. v. Wolf, 255 Mich. 8, 14, 237 N.W. 29, 31 (1931), in which the court stated that intent was of no practical importance if the sum was in fact (to the court) in the nature of a penalty.

[19]Sun Printing & Pub. Ass'n v. Moore, 183 U.S. 642 (1901); Shields v. Early, 132 Miss. 282, 95 So. 839 (1923).

[20]Allison v. Dunwody, 100 Ga. 51, 28 S.E. 651 (1896).

[21]Chicago, B. & Q. Ry. v. Dockery, 195 Fed. 221 (8th Cir. 1912) (liquidated damages); Weatherford v. Adams, 31 Ariz. 187, 251 Pac. 453 (1926) (forfeit); Pembroke v. Caudill, 160 Fla. 948, 37 So.2d 538 (1948) (liquidated damages); Greenblatt v. McCall, 67 Fla. 165, 64 So. 748 (1914) (liquidated damages); Allison v. Dunwody, 100 Ga. 51, 28 S.E. 651 (1896) (liquidated damages); Tudor v. Beath, 76 Ind. App. 526, 131 N.E. 848 (1921) (forfeiture as liquidated damages); Merica v. Burgett, 36 Ind. App. 453, 75 N.E. 1083 (1905) (forfeiture); Richards v. Edick, 17 Barb. 260 (N.Y. Sup. Ct. 1853) (forfeiture); Wilkes v. Bierne, 68 W. Va. 82, 69 S.E. 366 (1910) (penalty).

[22]Brown-Crummer Co. v. W. M. Rice Constr'n Co., 285 Fed. 673 (5th Cir. 1923); Tudor v. Beath, 76 Ind. App. 526, 131 N.E. 848 (1921); Richards v. Edick, 17 Barb. 260 (N.Y. Sup. Ct. 1853); *see* Weatherford v. Adams, 31 Ariz. 187, 197, 251 Pac. 453, 456 (1926).

[23]Wilkes v. Bierne, 68 W. Va. 82, 69 S.E. 366 (1910).

[24]Giesecke v. Cullerton, 280 Ill. 510, 117 N.E. 777 (1917).

[25]Frick Co. v. Rubel Corp., 62 Fed. 765 (2d Cir. 1933); Blackwood v. Liebke, 87 Ark. 545, 113 S.W. 210 (1908); Seidlitz v. Auerbach, 230 N.Y. 167, 129

sum as liquidated damages are agreeing upon a binding estimate of the amount of actual damages in case of breach. Nevertheless, regardless of the judicial lip service paid to this factor of intent, the determination is in fact objective. The bench employs certain principles allegedly leading to ascertainment of the "intent"; and this process in actuality shifts such ascertainment from the subjective level of reading the minds of the contracting parties to the objective plane of facts and figures.

The Rules of Proportion and of Certainty

Probably the foremost of the principles governing ascertainment of intent is that of proportion. This rule, simply stated, is that an amount payable upon breach, if grossly disproportionate to actual damages reasonably contemplated, is a penalty,[26] whereas an amount commensurate with actual damages constitutes liquidated damages.[27] The difficulty is that in many cases the proportion test embraces the damages when they occur rather than when they were anticipated.[28] This misuse of the rule is completely illogical in view of the theory of liquidated damages as a good-faith pre-estimate of the actual damages occasioned by breach. It is perhaps traceable to the judicial tendency to employ the doctrine of impossibility of performance to relieve against a contract that was validly entered into but that has become oppressive through changed conditions without fault of the obligor.

N.E. 461 (1920).

[26]Lee v. Clearwater Growers Ass'n, 93 Fla. 214, 111 So. 722 (1927); J. I. Case Threshing Machine Co. v. Souders, 48 Ind. App. 503, 96 N.E. 177 (1911); Holt v. Doty, 193 Iowa 582, 187 N.W. 550 (1922). *But see* Schneider v. Allis Chalmers Mfg. Co., 196 Wis. 56, 219 N.W. 370, 373 (1928), in which a sum was held liquidated damages though "such stipulated amount seemed grossly disproportionate to actual damages."

[27]United States v. Bethlehem Steel Co., 205 U.S. 105 (1907); Central Trust Co. v. Wolf, 255 Mich. 8, 237 N.W. 29 (1931). But the rule of proportion does not apply, and recovery will be denied, if the vendee, after paying a part of the purchase price, defaults in further payments and undertakes to recover payments made while the vendor is free from fault, Miller v. Fletcher Sav. & Trust Co., 78 Ind. App. 183, 133 N.E. 174 (1921).

[28]*E.g.*, Axe v. Tolbert, 179 Mich. 556, 146 N.W. 418 (1914); Seidlitz v. Auerbach, 230 N.Y. 167, 129 N.E. 461 (1920); Riling v. Idell, 291 Pa. 472, 140 Atl. 270 (1928) (stipulation in realty contract for down payments to be forfeited as liquidated damages on vendee's breach is binding and limits amount of recovery even though less than actual damages suffered).

The judiciary accepts as one indication of liquidated damages the fact that the probable damages upon breach will not even then be determinable by a known rule[29] or that they will not then be subject to computation by an exact pecuniary standard.[30] If they will be readily measurable upon breach, however, a stipulation of their amount is regarded as a penalty.[31] The reason for this rule may lie in the impossibility of knowing in advance when the contract will be breached and hence what the actual damages will be at that time, even though the method of measuring their amount at any given time is definite. The values of performance do not stay fixed, and the parties will not be permitted to pre-estimate them if they can be determined readily upon breach. This determination is regarded as a function of the courts rather than of the parties. Though the courts generally speak of contemplated actual damages or of damages that

[29]Frick Co. v. Rubel Corp., 62 Fed. 765 (2d Cir. 1933); Barnette v. Sayers, 289 Fed. 567 (D.C. Cir. 1923) (liquidated-damages clause upheld because actual damages difficult to ascertain unless plaintiff-vendor could make an early subsequent sale); Seid Pak Sing v. Barker, 197 Cal. 321, 240 Pac. 765 (1925) (stipulated sum per acre, to be paid by lessee for failure to perform "any or all" covenants of lease, held liquidated damages despite statute rendering such provisions invalid unless actual damages are incapable of ascertainment); Tuten v. Morgan, 160 Ga. 90, 127 S.E. 143 (1925) (liquidated-damages clause in realty contract held penalty in view of statute directing this result whenever actual damages can be definitely computed); Parker-Washington Co. v. Chicago, 267 Ill. 136, 107 N.E. 872 (1915); Ressig v. Waldorf-Astoria Hotel Co., 185 App. Div. 4, 172 N.Y. Supp. 616 (1st Dep't 1926); Sheffield-King Milling Co. v. Jacobs, 170 Wis. 389, 175 N.W. 796 (1920); *see* Wilkes v. Bierne, 68 W. Va. 82, 85, 69 S.E. 366, 367 (1910).

[30]Wise v. United States, 249 U.S. 361 (1919); Weatherford v. Adams, 31 Ariz. 187, 251 Pac. 453 (1926); Quaile & Co. v. William Kelly Milling Co., 184 Ark. 717, 43 S.W.2d 369 (1931) (in a contract for sale of flour, actual damages held unascertainable because of frequent fluctuations in price of wheat); Merica v. Burgett, 36 Ind. App. 453, 75 N.E. 1083 (1905); Board of Educ. v. Broadwell, 117 Okla. 1, 245 Pac. 60 (1926) (statute provided that actual damages must be unascertainable if stipulated sum to be construed as liquidated damages); Dobbs v. Turner, 70 S.W. 458 (Tex. Civ. App. 1902).

[31]Seid Pak Sing v. Barker, 197 Cal. 321, 240 Pac. 765 (1925) (stipulated sum, to be paid per acre by lessee for failure to perform one specific covenant of lease, held penalty under statute because actual damages were easily ascertainable for that particular breach); Giesecke v. Cullerton, 280 Ill. 510, 117 N.E. 777 (1917); Westfall v. Albert, 212 Ill. 68, 72 N.E. 4 (1904); Barber Asphalt Paving Co. v. St. Paul, 136 Minn. 396, 162 N.W. 470 (1917); Richards v. Edick, 17 Barb. 260 (N.Y. Sup. Ct. 1853) (actual damages held capable of ascertainment upon breach by vendee of realty contract).

may arise from breach, certainty is adjudged as of the time of actual breach.

When the subject matter of a contract is the concern of daily commerce, certainty is normally attainable by reference to an established market. Various situations arise, however, in which ascertainment of damages is more difficult because of the lack of some objective scale of measurement. Thus damages have been held unascertainable with sufficient certainty for the following breaches: failure to drill oil and gas wells within a specified time,[32] to repair a factory,[33] to manufacture patented lamp shades under license,[34] to manufacture and sell certain quantities of flour,[35] and to carry out the covenants in a lease of an apartment building.[36] Conversely, damages have been held sufficiently calculable for failure to return loaned stock as agreed,[37] to perform a contract for the conditional sale of realty,[38], and to carry out covenants to make improvements as specified in a lease.[39]

Many courts state the rule of certainty conjunctively with the rule of proportion.[40] The two are obviously interdependent in application, and indeed are perhaps mere aspects of the same principle. The rule of certainty appears to be a product of the later stage of the common law, when equity gave relief against bonds to secure the payment of money.[41] There is, however, no need for the rule of certainty in addition to the requirement of reasonableness or proportion; the courts cannot determine whether the sum named is unreasonable or disproportionate[42] without first ascertaining the actual damages with reasonable certainty. Indeed, many of the decisions expressly adopting the rule of certainty are nevertheless based on the requirement

[32]Davidson v. Hughes, 76 Kan. 247, 91 Pac. 913 (1907).

[33]Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000 (1916).

[34]Kaplan v. Gray, 215 Mass. 269, 102 N.E. 421 (1913).

[35]Sheffield-King Milling Co. v. Jacobs, 170 Wis. 389, 175 N.W. 796 (1920). The dissenter, however, believed that plaintiff had a duty to mitigate damages by selling on the market and that his damages for flour already manufactured should normally be the difference between the contract price and the market price at which he could have sold.

[36]Malone v. Levine, 240 Mich. 222, 215 N.W. 356 (1927).

[37]Walker v. Bement, 50 Ind. App. 645, 94 N.E. 339 (1911).

[38]Lytle v. Scottish-American Mtge. Co., 122 Ga. 458, 50 S.W. 402 (1905); *see* Allison v. Cocke, 106 Ky. 763, 786, 51 S.W. 593, 598 (1889).

[39]Giesecke v. Cullerton, 280 Ill. 510, 117 N.E. 777 (1917).

[40]See note 30 *supra.*

[41]See McCormick, Damages §148 (1935).

[42]*Ibid.*

that the sum named be proportionate to the actual damages.[43] There is no logical reason for invalidating a provision for liquidated damages merely because the actual damages are readily ascertainable, unless the stipulated sum is disproportionate thereto. Furthermore, complaint would seldom be raised unless one party thought the pre-estimated damages disproportionate.

It is recognized that a sum fixed for breach of any one of several undertakings of varying importance is generally a penalty.[44] The same result follows whenever the contract imposes liability in the same amount regardless of whether the breach is total or partial.[45] Unless the sum denominated as liquidated damages is staggered in proportion to the importance of the various breaches, it cannot validly be applied to those of minor degree.

In the light of the foregoing basic principles, what follows upon the characterization of the agreed sum as liquidated damages or as penalty? Of course, if the characterization is upheld the injured party recovers the amount stipulated,[46] although some jurisdictions require proof of some actual damage as a predicate to any recovery.[47]

---

[43]*E.g.*, Tuten v. Morgan, 160 Ga. 90, 127 S.E. 143 (1925); Dobbs v. Turner, 70 S.W. 458 (Tex. Civ. App. 1902).

[44]Chicago, B. &. Q. Ry. v. Dockery, 195 Fed. 221 (8th Cir. 1912); Metz v. Kennedy Inv. Co., 118 Fla. 708, 160 So. 5 (1935); Holt v. Doty, 193 Iowa 582, 187 N.W. 550 (1922); Gross v. Exeter Machine Works, Inc., 277 Pa. 363, 121 Atl. 195 (1923); Astley v. Weldon, 2 Bos. & P. 346, 126 Eng. Rep. 1318 (C.P. 1801).

[45]Brown-Crummer Co. v. W. M. Rice Constr'n Co., 285 Fed. 673 (5th Cir. 1923); Poinsettia Dairy Products, Inc. v. Wessel Co., 123 Fla. 120, 166 So. 306 (1936); Arnold v. First Sav. & Trust Co., 104 Fla. 545, 140 So. 660 (1932); Greenblatt v. McCall, 67 Fla. 165, 64 So. 748 (1914); Horn v. Poindexter, 176 N.C. 620, 97 S.E. 653 (1918); Palestine Ice, Fuel & Gin Co. v. Walter Connally & Co., 148 S.W. 1109 (Tex. Civ. App. 1912); Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415 (1895).

[46]Sun Printing & Pub. Ass'n v. Moore, 183 U.S. 642 (1902); Quaile & Co. v. William Kelly Milling Co., 184 Ark. 717, 43 S.W.2d 369 (1931); Merica v. Burgett, 36 Ind. App. 453, 75 N.E. 1083 (1905); Sheffield-King Milling Co. v. Jacobs, 170 Wis. 389, 175 N.W. 796 (1920).

[47]Miller v. Macfarlane, 97 Conn. 299, 116 Atl. 335 (1922); Barber Asphalt Paving Co. v. St. Paul, 136 Minn. 396, 162 N.W. 470 (1917); *see* Ward v. Haren, 183 Mo. App. 569, 588, 167 S.W. 1064, 1070 (1914). *Contra:* Davidson v. Hughes, 76 Kan. 247, 91 Pac. 913 (1907) (court said some damage was presumed); *see* United States v. Bethlehem Steel Co., 205 U.S. 105, 120 (1907); Blackwood v. Liebke, 87 Ark. 545, 553, 113 S.W. 210, 213 (1908) (no proof of actual damages required if some positive element of damage was foreseeable

If, however, the sum is held a penalty the aggrieved party cannot recover beyond the extent to which he alleges and proves actual damages.[48]

Although a liquidated-damages clause is in effect an admission by the parties that monetary damages are adequate, this concept is disregarded in decrees ordering specific performance of contracts containing such clauses.[49] The courts will not grant both remedies, however;[50] and they refuse to decree specific performance if the provision for liquidated damages is phrased alternatively as permitting either performance of the contract or nonperformance and payment of the damages specified.[51]

The distinction between a provision for liquidated damages and a contractual limitation of liability should be noted. The validity of a limitation is recognized, and only the sum specified as the maximum is recoverable upon breach.[52]

---

at the time the contract was made); Dobbs v. Turner, 70 S.W. 458, 460 (Tex. Civ. App. 1902).

[48]Watts v. Camors, 115 U.S. 353 (1885); Brown-Crummer Co. v. W. M. Rice Constr'n Co., 285 Fed. 673 (5th Cir. 1923); Graham v. Lebanon, 240 Pa. 337, 87 Atl. 567 (1913); Palestine Ice, Fuel & Gin Co. v. Walter Connally & Co., 148 S.W. 1109 (Tex. Civ. App. 1912); *see* Poinsettia Dairy Products, Inc. v. Wessel Co., 123 Fla. 120, 128, 166 So. 306, 309 (1936); Arnold v. First Sav. & Trust Co., 104 Fla. 545, 556, 140 So. 660, 664 (1932); Greenblatt v. McCall, 67 Fla. 165, 169, 64 So. 748, 749 (1914); Smith v. Newell, 37 Fla. 147, 156, 20 So. 249, 252 (1896).

[49]Bradshaw v. Millikin, 173 N.C. 432, 92 S.E. 161 (1917) (negative specific performance; injunction to enforce covenant not to compete); *see* O'Brien v. Paulsen, 192 Iowa 1351, 1355, 186 N.W. 440, 442 (1922) (realty contract). *Contra:* Martin v. Murphy, 129 Ind. 464, 28 N.E. 1118 (1891) (negative specific performance); Nelson v. Butler, 190 S.W. 811 (Tex. Civ. App. 1917).

[50]Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N.Y. 214, 192 N.E. 297 (1934).

[51]Smith v. Bergengren, 153 Mass. 236, 26 N.E. 690 (1891) (refusing to decree specific performance of agreement to pay a certain sum upon breach of covenant not to practice medicine in competition with covenantee); Burgoon v. Johnston, 194 Pa. 61, 45 Atl. 65 (1899); Haskins v. Dern, 19 Utah 89, 56 Pac. 953 (1899) (no specific performance when election to return stock loaned or pay $1.00 per share therefor); *see* Bradshaw v. Millikin, 173 N.C. 432, 435, 92 S.E. 161, 163 (1917).

[52]Riggs v. Gish, 201 Iowa 148, 205 N.W. 833 (1925); Nostdal v. Morehart, 132 Minn. 351, 157 N.W. 584 (1916). In Pinkerton v. Crail, 113 Cal. App. 484, 298 Pac. 532 (1931), the court allowed recovery by lessor of $100 for each orange tree destroyed by lessee's drilling operations, as agreed, but it pointed out that neither of the parties contended that such destruction constituted a breach.

THE FLORIDA VIEW

The Florida Court, in recognizing the distinction between a provision for liquidated damages and a penalty clause, has upheld the former on several occasions[53] without departing from the general rules previously discussed. In three recent cases[54] it has considered the problem of liquidated damages in real estate contracts, but even now the exact state of the Florida law is doubtful.

Pembroke v. Caudill,[55] decided in 1948, involved a contract to purchase land at a total price of $67,500 and to forfeit, as "liquidated damages" for failure to perform, $6,200 of earnest money placed in escrow by the vendee. The vendee stopped payment on his escrowed check and refused to perform the contract, whereupon the vendor sought to recover the $6,200 as liquidated damages. The trial court sustained defendant's demurrer and the Supreme Court affirmed on the ground that the contract provided for a penalty rather than liquidated damages. It found the escrowed sum disproportionate to the actual damages that "should" ensue from breach; but it then enunciated the rule of certainty in the following sweeping language:[56]

> "There was nothing in the transaction which could have rendered the damages which might reasonably have been expected to flow from a breach of the contract uncertain, conjectural or speculative.
>
> ". . . the measure of the sellers' damages ordinarily being in such cases the difference between the agreed purchase price and the actual value of the property at the time of the breach of the contract of purchase, less the amount paid."

The usual realty contract prescribes a deposit, to be left with the

---

[53]Lee v. Clearwater Growers Ass'n, 93 Fla. 214, 111 So. 722 (1927); Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000 (1916).

[54]Pembroke v. Caudill, 160 Fla. 948, 37 So.2d 538 (1948); Medard v. Paulson, 37 So.2d 902 (Fla. 1948); Beatty v. Flannery, 49 So.2d 81 (Fla. 1950).

[55]160 Fla. 948, 37 So.2d 538 (1948).

[56]*Id.* at 954, 37 So.2d at 541. This conclusion may have been prompted by an earlier opinion, which though distinguishable implied that damages to vendor for breach of a realty contract by vendee were sufficiently ascertainable. Upon vendee's failure to make deferred payments the vendor sought in equity to rescind and yet to retain as liquidated damages the payments received. The Court refused to permit this, especially inasmuch as he had had ample opportunity

broker by the purchaser. Upon default this sum is forfeited and is used to cover the broker's commission, with any excess to go to the seller as liquidated damages. This type of provision has generally been enforced on the ground that damages for breach of a contract to purchase realty are not readily ascertainable,[57] although some jurisdictions have held to the contrary.[58] Whether the majority view is motivated by the concepts prompting equity to grant specific performance of contracts for the sale of realty or by the factor of indeterminability of damages for breach of such contracts is difficult to discern. In upholding a provision for liquidated damages in such a contract the Supreme Court of Arkansas said:[59]

> "The fluctuations in the market values of land, and the contingencies likely to arise in almost every negotiation concerning real estate, which might cause or hinder the sale thereof, render the question of the damages caused by a failure to perform a contract for the exchange of same so indeterminable and uncertain as to be a proper subject for the parties in advance to liquidate by contract."

Since land fluctuates in value like other commodities of the market place, the result of the *Pembroke* case, standing alone, would make it virtually impossible to provide in advance for liquidated-damages clauses in contracts to buy and sell land; obviously any prediction of future market value, and hence of damages, at the time of drawing up the contract is at most an educated guess. Therefore, if the guess proves at the time of breach to have been even slightly erroneous, the provision for liquidated damages may nevertheless be stricken because the value of the land is then "certain."

The results of such a rule are obvious. The standards or methods by which damages are measured can rarely be precisely delineated by rules of law applicable to all instances. Disagreement frequently arises as to whether a jury has awarded recompense commensurate with the injury sustained, and the opinions are replete with vague

to prove them, Taylor v. Rawlins, 90 Fla. 621, 106 So. 424 (1925).

[57]Tuten v. Morgan, 160 Ga. 90, 127 S.E. 143 (1925); Shields v. Early, 132 Miss. 282, 95 So. 839 (1923); Dobbs v. Turner, 70 S.W. 458 (Tex. Civ. App. 1902).

[58]Benfield v. Croson, 90 Kan. 661, 136 Pac. 262 (1913) (contract for exchange of realty).

[59]Westbay v. Terry, 83 Ark. 144, 148, 103 S.W. 160, 161 (1907).

definitions of speculative or unforeseeable damages. When the bargaining power of the parties is relatively equal there is no reason for defining "reasonable certainty" in such a manner that a sum agreed upon in good faith must be termed a penalty — unless the judiciary is striving to drum up litigation. This is especially true if the sum is not grossly disproportionate to the actual damages later adjudged. The parties cannot predict precisely the amount of actual damage that might ensue, nor should they be expected to do so if prediction is permitted at all. Indeed, upon entering into the contract the parties may well have been attempting to protect themselves against a mere speculative jury determination of damages. If their effort is made in good faith there is little reason for denying it effect.

The *Pembroke* opinion, in emphasizing the rules of proportion and of certainty, recognizes but fails to rest the decision on another important and relevant principle, namely, that stipulation of the same sum for breach of any one of a number of covenants involving damages of varying amounts, some ascertainable and others not, constitutes imposition of a penalty.[60] The contract provided for deposit in escrow of a sum regarded variously as partial payment of the total purchase price, as earnest money for payment of the remainder at the close of the transaction, and as security for the assumption of two mortgages at the existing rates of interest and amortization. In two previous cases involving breach of realty contracts[61] the Florida Court expressly rested its decision on this principle, which was also recognized in another case not involving the sale of real estate.[62]

The *Pembroke* case was followed in *Medard v. Paulson*,[63] decided immediately thereafter. The vendee agreed to forfeit to the vendor $2,500, which was placed in escrow, if he should fail to perform his covenants within the time specified. He later sought in equity to rescind the contract and to obtain return of this sum. The chancellor found that the vendee had committed a breach and could not rescind, but directed the return of $500; and the Supreme Court affirmed, thereby confining the vendor in effect to his actual damages and characterizing the earnest money as a penalty.

In the most recent case of this nature, *Beatty v. Flannery*,[64] the

[60]See note 44 *supra*.

[61]Metz v. Kennedy Inv. Co., 118 Fla. 708, 160 So. 5 (1935); Smith v. Newell, 37 Fla. 147, 20 So. 249 (1896).

[62]Greenblatt v. McCall, 67 Fla. 165, 64 So. 748 (1914).

[63]37 So.2d 902 (Fla. 1948).

[64]49 So.2d 81 (Fla. 1950).

vendee sued the vendor to recover $3,000 paid both as earnest money and in part payment on a $30,000 purchase price of realty. The contract provided for forfeiture of this amount as "liquidated damages" if the vendee should fail to make either of the deferred payments or to perform his covenants. The Court upheld the forfeiture on the ground that even in the absence of provision therefor a vendee in default cannot recover from the vendor money paid in part performance of an executory contract. The *Pembroke* case was distinguished as an action by a vendor to obtain from the vendee an amount denominated liquidated damages as distinct from an action by the vendee to recover a partial payment after defaulting. The following passage from the *Pembroke* opinion was quoted:[65]

> "We have made no attempt to settle certain questions which may arise under a stipulation similar to the one we have considered, in a case where a deposit of money has actually been made by the prospective purchaser for the benefit of the owner."

The rule enunciated in the *Beatty* case is in line with the great weight of American authority.[66] Although many jurisdictions do not deny the vendee the right to recover payments already made unless time is expressly made of the essence of the contract,[67] others make no mention of this factor as a prerequisite.[68] In either event a forfeiture clause is not essential,[69] and conversely a provision for retention of payments as liquidated damages does not of itself establish

---

[65]Pembroke v. Caudill, 160 Fla. 948, 37 So.2d 538, 542 (1948). For some reason the final paragraph of the opinion, which contains the quoted passage, does not appear in either the Florida Reports or the Southern Reporter Advance Sheets; but it does appear in the bound volume of Southern Reporter and is quoted by the Court in Beatty v. Flannery, 49 So.2d 81, 83 (Fla. 1950).

[66]*E.g.*, Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713 (1898); Beveridge v. West Side Constr'n Co., 130 App. Div. 139, 114 N.Y. Supp. 521 (1st Dep't 1909); Jennings v. Dexter Horton & Co., 43 Wash. 301, 86 Pac. 576 (1906); Woodman v. Blue Grass Land Co., 125 Wis. 489, 103 N.W. 236 (1905); *see* Realty Securities Corp. v. Johnson, 93 Fla. 46, 61, 111 So. 532, 537 (1927).

[67]Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713 (1898); Jennings v. Dexter Horton & Co., 43 Wash. 301, 86 Pac. 576 (1906); *see* Realty Securities Corp. v. Johnson, 93 Fla. 46, 61, 111 So. 532, 537 (1927).

[68]Downey v. Riggs, 102 Iowa 88, 70 N.W. 1091 (1897); Beveridge v. West Side Constr'n Co., 130 App. Div. 139, 114 N.Y. Supp. 521 (1st Dep't 1909).

[69]Downey v. Riggs, 102 Iowa 88, 70 N.W. 1091 (1897).

the right to recover.[70] The basis of the rule has been expressed as follows:[71]

> ". . . a party to a contract cannot breach it and, being in default, thereby secure for himself some right or advantage to the detriment of the other party who is not in any default. To permit a recovery by the party in default would be to allow one who has breached his contract to recover under that contract despite such breach, and the innocence of his adversary."

In theory the *Beatty* decision is contrary to the basic policy underlying denial of recovery of a sum agreed to as liquidated damages whenever it is a penalty in the eye of the judiciary. Regardless of whether a plaintiff sues for return of excessive payments or a defendant requests assessment of actual damages, the party in default is the one alleging that the sum is penal. The court ignores or listens to his claim neither on its merits nor on the basis of fault, but merely by noting whether the money has changed hands. Indeed, in one case[72] the vendee was denied recovery of $2,500 paid on a total purchase price of only $3,740, although the seller did not suffer damages to that extent. To state this situation is to reveal its inequity.

Explanation of these theoretically contrary results may perhaps be found in the analogous treatment of illegal contracts. The judiciary will not aid in their enforcement, but neither will it serve as a conduit for restitution after partial performance.[73] Depositing money with an escrow agent is not "execution" of the contract, however; and accordingly the contract is still open to consideration and appropriate action by the courts.

CONCLUSION

The *Pembroke* case leads to the conclusion that damages for the sale of realty will be judicially regarded in Florida as certain rather

---

[70]Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713 (1898); Beveridge v. Westside Constr'n Co., 130 App. Div. 139, 114 N.Y. Supp. 521 (1st Dep't 1909); Woodman v. Blue Grass Land Co., 125 Wis. 489, 103 N.W. 236 (1905).

[71]Ward Real Estate v. Childers, 223 Ky. 302, 304, 3 S.W.2d 601, 602 (1928).

[72]Jennings v. Dexter Horton & Co., 43 Wash. 301, 86 Pac. 576 (1906).

[73]Dixie Rubber Co. v. Catoe, 145 Miss. 342, 110 So. 670 (1926); Finley v. Stripling, 15 S.W.2d 711 (Tex. Civ. App. 1929); see WILLISTON, CONTRACTS §1780