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Remedies

by *Kenneth H. York**

This article will cover the remedial aspects of civil cases, and as such will mention several decisions which are reviewed elsewhere in this volume in a substantive law context. It will concentrate upon the California courts' application of various legal remedies (principally damages), equitable remedies (including the existence of equitable jurisdiction), and restitutionary remedies (both legal and equitable) with some reference to the substantive elements needed for restitution.

Choice of Tort, Contract or Restitution—Remedial Consequences

The remedial goals of compensatory damages for tortious wrongs differ from those of breach of contract—and both differ from the goal of restitution which may be alternatively sought. There are many instances of a plaintiff being allowed

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Remedies

a choice of substantive theory for remedial advantage; examples include the routine waiver of the tort in favor of quasi-contract to obtain the advantage of attachment, or the choice of damages or rescission in warranty and deceit cases. The joint venturer (in a land development arrangement), barred from a breach of contract action against his co-venturer short of an equitable accounting suit, may quite properly turn to a fraud count, as in *Boyd v. Bevilacqua*,¹ and recover damages for tort under the broad provisions of sections 3333 and 1709 of the California Civil Code, rather than under the “out of pocket” limitations of section 3343 applicable to the vendor-vendee relationship. To avoid this supposed “out of pocket” limitation on compensatory damages for deceit, the California Supreme Court, in *Ward v. Taggart*,² allowed the plaintiff to choose between tort and restitution theories and thus pursue disparate remedial goals with concomitant advantages. Without quarreling with the propriety of permitting an aggrieved party to take his choice of substantive rights, it should be pointed out that while tort-contract-restitution distinctions may be obscured, they cannot be remedially erased. *Ward v. Taggart* has spawned a line of decisions in which tort damages (properly or improperly) are disguised under a “constructive trust-unjust enrichment-quasi contract” rubric which applies to nothing of substance in the case.³

Another remedial problem created by permissive tendencies toward plaintiff’s substantive law choices is the necessity of placing some fences around the playgrounds. In the familiar situation where the plaintiff is permitted either to affirm a fraudulent contract and sue for damages for deceit or to disaffirm and take restitution, certain rules have been developed (albeit shaky ones) on forcing the inevitable election. Whenever the choice of substantive theory is extended into novel situations, similar guidelines should be laid down for the edification of the profession and the protection of defendants from undue harassment.

1. 247 Cal. App.2d 272, 55 Cal. Rptr. 610 (1966).

2. 51 Cal.2d 736, 336 P.2d 534 (1959).

3. The most notable is *Coleman v. Ladd Ford Co.*, 215 Cal. App.2d 90, 29 Cal. Rptr. 832 (1963).

*Crisci v. Security Insurance Co.*⁴ is a decision in point. The impact of this decision on the insurance industry is discussed elsewhere in this volume, and only the remedial implications are of concern here. The wrong committed was the refusal of a liability insurer to settle within the policy limits, where the ensuing trial resulted in a judgment against the insured in excess of those limits. Several years ago, in *Comunale v. Traders & General Insurance Co.*,⁵ a claim based on the same wrong was allowed as a contractual one for purposes of assignability and the statute of limitations. Intervening cases⁶ assumed the claim to sound in contract, and the lower court in *Crisci*, acting on this assumption, ruled out a \$25,000 claim for mental distress. On appeal, the California Supreme Court made it clear that the plaintiff could elect a tort theory and reinstated the claim for mental anguish. This is all well and good, but the plaintiff cannot have it both ways at the same time, and an election must be compelled at some stage. Even an insurance company is entitled to know when.

A similar problem may be developing with respect to cases on “wrongful life,” as to remedial possibilities derived from a permitted choice of substantive theories. These cases involve sterilization operations followed by unexpected pregnancies.⁷

Restitution—General Application

Restitution for unjust enrichment is a simple, but on occasion a most puzzling and complicated, notion. It has emerged as a well-recognized branch of legal learning and its standard usages are sufficiently well defined to permit the treatment of restitutionary remedies within the topical organization of this article as it develops. As a very broadly based concept with a frank appeal to natural justice, restitution also lends itself very readily to application in unusual situations, and

4. 66 Cal.2d 425, 58 Cal. Rptr. 13, 426 P.2d 173 (1967). For further discussion of this case, see Seligson, *Insurance*, in this volume.

5. 50 Cal.2d 654, 328 P.2d 198, 68 ALR2d 883 (1958).

6. See, e.g., *Critz v. Farmers Insurance Group*, 230 Cal. App.2d 788, 41 Cal. Rptr. 401, 12 ALR3d 1142 (1964).

7. See, e.g., *Custodio v. Bauer*, 251 Cal. App.2d 303, 59 Cal. Rptr. 463 (1967).

California courts have shown a commendable willingness to use this flexible device to come up with a remedy in litigation that lacks decisional precedent.

Prof. John P. Dawson in his book, *Unjust Enrichment*,⁸ mentions a case decided in France—"The great case of June 15, 1892 . . . [which] created a great sensation." A French farmer, a tenant of the defendant, had bought fertilizer from the plaintiff, who remained unpaid. After application of the fertilizer to the land, the lease was canceled because of the farmer's default and the defendant took possession. The farmer was insolvent, so the plaintiff sued the defendant directly for the benefit received from the application of the fertilizer to the land of the defendant. We quote from Prof. Dawson:

So far it was not a great extension beyond [an] 1864 case . . . of seed sold to a farmer, with other facts the same. There was one important difference, however; the Code gave a preferential claim on the proceeds of crops to suppliers of seeds, but not to suppliers of fertilizer. . . . From seeds to fertilizer may be a short step across the barn, but it was a high dive for the Court of Cassation. For the Court, in refusing to reverse the lower court's judgment for the purchase price of the fertilizer, declared that the judgment did not falsely apply 'the principles of the *actio de in rem verso*.' By this simple phrase it elevated the principle of unjust enrichment to a rank beside the Code. . . .⁹

On September 22, 1967 the California Court of Appeal (Fifth District) decided a case, *Kossian v. American National Insurance Co.*,¹⁰ which is not going to cause a great sensation, but is nonetheless interesting by comparison. When the Bakersfield Inn burned down it left a pile of litigation as well as debris. The owner hired the plaintiff to clean up the debris for \$18,900. The work was performed but the

8. Dawson, UNJUST ENRICHMENT 10, 254 Cal. App.2d 694, 62 Cal. Rptr. 225 (1967).

9. Dawson, UNJUST ENRICHMENT p. 101 (1951).

owner went bankrupt. The defendant was the beneficiary of a trust deed on the premises. The trustee in bankruptcy abandoned the premises to the defendant together with any interest of the bankrupt estate in the fire policies covering the respective interests of the owner and the lender under the deed of trust, and the defendant acquired the policies by assignment. All this may be regarded as the equivalent of a foreclosure of the trust deed. Thereafter defendant received insurance monies which included an undetermined sum for the clean-up. Plaintiff was now in the position of having no practically enforceable claim against the owner, and no lien against the premises. He therefore sued for unjust enrichment. The defendant correctly pointed out that there was a complete lack of privity between it and the plaintiff, and that there was no fraud or mistake involved. The court agreed that the plaintiff could not assert any claim of lien against the insurance funds similar to that allowed a materialman who has relied upon a loan fund for reimbursement,¹¹ but held, nevertheless, that plaintiff was entitled to reimbursement from the defendant to the extent defendant received insurance monies in compensation for work already done by the plaintiff. The court said:

We are cited no California cases that are close aboard, and independent research reveals none. Lack of precedent applicable to the facts peculiar to this case is not surprising, however, as the authors of the Restatement recognize that the essential nature of equity cases concerned with problems of restitution makes definitive precedent unlikely. We are guided by the "Underlying Principles" delineated in the Restatement.¹²

Thus, as in the case involving the French farmer, the plaintiff, who had a valid though uncollectible contract claim against

11. This rule has been more fully stated in *Doud Lumber Co. v. Guaranty Savings and Loan Ass'n.*, 254 Cal. App. 2d —, 60 Cal Rptr. 94 (1967). The materialman is given an equitable lien on proceeds of foreclosure of the security for a construction loan when he has

been induced to rely on the fund for payment. Unjust enrichment may exist even though construction is incomplete at the time of foreclosure.

12. 254 Cal. App.2d at 697-698, 62 Cal. Rptr. at 227.

one person, was given a restitutionary claim against a third person to whom a benefit of the contract could be traced on only the broadest of principles, which principles nonetheless appear to be multi-national in application.

Certain unanswered questions are raised by the *Kossian* decision. Could the insurer have declined payment because the insured had sustained no loss? If the plaintiff held an unsatisfied judgment against the owner in a contract action, could he have sued the insurer directly for reimbursement under the coverage for the clean-up if settlement had not otherwise been made? The decision invites comparison with *Allen v. Powell*,¹³ in which a real estate broker, who had negotiated a lease, was left with a claim for a commission of \$60,000 against insolvent parties because of the alleged tortious action of the defendant-lessee in conspiring with the lessor to interfere with the broker's contractual right to collect the listed commission. The defendant-lessee had made separate arrangements to pay rent directly to creditors of the financially troubled lessors, and apparently obtained thereby some concessions against the rent to be paid. The complaint set forth a tort count, and a count for "unjust enrichment" in that defendant "by its said collusive action procured said land at a sum which was less than the fair market value thereof by the amount of the plaintiff's \$60,000 commission."¹⁴ The court held that the second count stated neither a cause of action for a constructive trust (there being an adequate legal remedy for tort damages), nor for quasi-contract recovery based on a waiver of the tort. For the latter remedy, said the court:

"[T]here must be something moving to the defendant to support the implied promise to pay therefor. . . . Plaintiffs must simply rely on the tort."¹⁵ Conceptually, the *Allen* decision seems rather more doctrinaire than *Kossian*.

Although the California courts are willing to use restitution for unjust enrichment, they are not necessarily above misusing

13. 248 Cal. App.2d 502, 56 Cal. Rptr. 715 (1967).

15. 248 Cal. App.2d at 510, 56 Cal. Rptr. at 721.

14. 248 Cal. App.2d at 509, 56 Cal. Rptr. at 720.

it. In *Palmer v. Gregg*,¹⁶ an action in *quantum meruit* had been filed against the estate of the decedent, the plaintiff alleging the rendition of services to decedent before his death “with the expectation on the part of both . . . that plaintiff would be compensated therefor.”¹⁷ On appeal the Supreme Court eliminated certain items on the basis that they were not of direct benefit to the decedent and could not be recovered in *quantum meruit*. It is almost embarrassing to suggest that the Supreme Court has here confused contract and quasi-contract, and that, as stated, the problem was whether the questioned services were included in the contract, and not whether there was benefit.

Another seeming misapplication of restitutionary remedies appears in the case of *Thompson v. Price*.¹⁸ Defendant Price and his wife took half the shares in the J. A. C. Corporation and Thompson took the other half. After being entrusted with management, Price allegedly violated most of the fiduciary duties listed in standard corporate texts, including diversion of corporate opportunities and the withdrawal, in the form of improper salaries and fees, of more than he had invested. On behalf of themselves and the corporation, the plaintiffs sought to have a constructive trust declared in Price’s shares, which remedy the trial court denied. The appellate court reversed, holding that, by withdrawing more than he had put in, Price had put the total risk of the corporation on Thompson; therefore, the corporate investments thereafter made were really Thompson’s investments and thus Price, in his position as shareholder, would be unjustly enriched. Whatever the merits as between the parties, this equitable restitutionary remedy of a constructive trust appears inappropriately applied, since the shares were not originally acquired in any improper fashion. The court is simply causing them to be forfeited because of personal and corporate claims.

16. 65 Cal.2d 657, 56 Cal. Rptr. 97, 422 P.2d 985 (1967).

17. 65 Cal.2d at 660, 56 Cal. Rptr. at 98, 422 P.2d at 986.

18. 251 Cal. App.2d 182, 59 Cal. Rptr. 174 (1967). For further discussion, see Brandel, *Business Associations*, in this volume.

Equitable Jurisdiction and Remedies in General—as Distinguished from Equitable Jurisdiction

Erroneous exercise of equitable jurisdiction is usually tested by appeal, whereas void orders issued in the absence of primary jurisdiction or in obvious and gross excess of equitable jurisdiction are subject to immediate attack by extraordinary writ. An application of these principles appears in *United Farm Workers Organizing Committee v. Superior Court*,¹⁹ wherein prohibition rather than appeal was held to be the proper recourse against a lower court injunction decree, alleged and found to be unconstitutional.

Maintenance of Litigational Status—Preliminary Injunctions

A mandatory temporary injunction to pay over money would seem to be peculiarly vulnerable under routine equity principles, but such an order was sustained on appeal in *Fretz v. Burke*,²⁰ in what was basically a partnership accounting suit. Upon service of summons and complaint, the defendant had begun placing the plaintiff's share of profits, \$5,000 per month, in a "suspense account"; the account had reached the sum of \$35,000. The defendant's explanation was that the sums might be needed to reimburse him for costs and expenses in conjunction with the current litigation, a wholly baseless excuse. The trial court issued a preliminary order to pay over the retained profits with \$5,000 to be placed in trust, and to pay over future shares to which plaintiff might become entitled. This was affirmed on appeal. Defendant's main objections and the court's answers thereto may be summarized as follows:

(1) *A temporary decree should not issue to correct past actions, but only future actions.* The court pointed out that here there was a plain intent to continue.

(2) *This was a mandatory decree and improper at the interlocutory stage.* While it is true such decrees are uncommon, the status quo here was in fact a state of action, monthly payments, which the defendant had interrupted.

¹⁹. 254 Cal. App.2d 841, 62 Cal. Rptr. 567 (1967).

²⁰. 247 Cal. App.2d 741, 55 Cal. Rptr. 879 (1967).

(3) *The decree was for the payment of money, and therefore unenforceable by the usual civil contempt proceedings of equity.* The court recognized that this case was an exception in that it was the payment of a fund held by a fiduciary, and not an indebtedness.

(4) *No irreparable injury was shown.* The court said that, regardless, the defendant's action might be properly considered as "insufferable" and an overbearing assumption of superiority and domination over the rights of others. It must be admitted that the California courts' attitude as to this element of equitable jurisdiction adds a new dimension to the law.

(5) *A court may not enjoin a breach with respect to a contract that cannot be specifically enforced.* [Apparently this contention had reference to the lack of equitable jurisdiction to control a partnership by decree.] The court, however, noted that this was an accounting rather than a specific performance suit.

Overall the decision represents a proper discretionary application of equitable doctrines in exceptional circumstances. It might be noted that no reference was made to the holdings in California that mandatory temporary orders are subject to stay on appeal.¹

Declaratory Judgments

The declaratory judgment is an extension of the equitable bill *quia timet* and, although statutory, is subject to equitable principles. The widespread practice of using the declaratory judgment device to obtain calendar priority in inapposite situations received a setback in *Travers v. Loudon*.² The complaint merely sought a declaration as to whether defendant had broken a contract. No other remedy was sought. Summary judgment against the plaintiff was affirmed. The court observed that the rights of the parties "had crystallized into a cause of action for past wrongs."³

1. See *Paramount Pictures Corp. v. Davis*, 228 Cal. App.2d 827, 39 Cal. Rptr. 791 (1964).

2. 254 Cal. App.2d 1044, 62 Cal. Rptr. 654 (1967).

3. 254 Cal. App.2d at 1047, 62 Cal. Rptr. at 656.

Remedies

The declaratory judgment is becoming a routine remedy to test the constitutionality of penal ordinances, and its availability is normally not even seriously questioned.⁴ As an extension of the equitable remedy of injunction against oppressive government actions (with which it is frequently combined), the declaratory judgment is made subject to traditional criteria for equitable jurisdiction in this type of case, with the result that its exercise is erratic. Perhaps this reflects some reservations as to whether equitable jurisdiction should be confined to declaring a penal ordinance unconstitutional, as such, or should be expanded to determine whether a person is exposed to a possible unconstitutional application of a penal statute as to him.

In one case in point, the California Water and Telephone Company challenged the constitutionality of a Los Angeles County ordinance related to procedures attendant upon the installation of a water supply system to subdivisions.⁵ The impact of the ordinance was quite remote, as there was no prosecution or threat of prosecution at the time. After considerable discussion it was held that constitutional questions could be decided through a declaratory judgment, but that a concomitant injunction would be dissolved as being needless under the circumstances. Two prior cases (which technically antedate the temporal scope of this article) showed an ambivalence toward the remedy. In *Manchel v. County of Los Angeles*⁶ an injunction (in conjunction with a declaratory judgment suit) against the enforcement of an ordinance against playing the game of "pan" was struck down on appeal on the grounds that there was no issue of unconstitutionality of the ordinance, no deprivation of a property right leading to irreparable injury was shown, and injunctions against criminal prosecutions will not ordinarily be issued in suits for declaratory relief. On the other hand, in *Landau v. Fording*⁷

4. See, e.g., *La Franchi v. City of Santa Rosa*, 8 Cal.2d 331, 65 P.2d 1301, 110 ALR 639 (1937).

5. *Cal. Water & Telephone Co. v. County of Los Angeles*, 253 Cal. App.2d 11, 61 Cal. Rptr. 618 (1967).

6. 245 Cal. App.2d 501, 54 Cal. Rptr. 53 (1966).

7. 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), *aff'd mem.*, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 2109 (1967); the dicta implying that "pandering" is

a declaratory judgment was issued that the film (“*Un Chant d’Amour*”) was obscene. Plaintiff had been threatened with arrest by the Berkeley Police Department. Nothing was said about the propriety of the proceedings or as to exactly what effect the decree would have in the event a criminal action were to follow.

Remedies for Injuries to Tangible Property Interests

Trespass—Damages

We are reminded, in *Costerisan v. Tejon Ranch Company*,⁸ that “damage” is a substantive element of the tort of trespass, so a jury finding of a trespass without damage is a nullity. Nominal damages, however, should have sufficed to validate the verdict. This seemingly trivial point acquires greater magnitude when its relevance to assessment for costs is considered.

The measure of damages against innocent trespassers who remove a portion of the freehold is reviewed again in the third appeal in prolonged litigation—the case now has the title of *Bates v. Smith*.⁹ Defendants had in good faith mined 4,663 tons of gypsite from the plaintiff’s holdings and sold the mineral after some processing. There was no profit; indeed, a loss from the operation was indicated. On a previous appeal, the court had directed that the damages should be measured by the value of the mineral *in situ* by determining “reasonable market value” less the reasonable cost of transportation and cost of milling and mining. Thereupon the trial court determined the market value at \$3.50 per ton and subtracted \$1.10 per ton for delivery costs, which would give a value of \$2.40 per ton at the mine head. This was raised to \$2.50 on an allowance for upgrading the particular mineral because of its percentage rating of gypsite content. The trial

a part of the offense proscribed by Penal Code § 311.2 was specifically overruled in *People v. Noroff*, 67 Cal.2d 814, 63 Cal. Rptr. 575, 433 P.2d 479 (1967). For further discussion of this case see Leahy, *Constitutional Law*, in this volume.

8. 255 Cal. App.2d 77, 62 Cal. Rptr. 800 (1967).

9. 246 Cal. App.2d 357, 54 Cal. Rptr. 624 (1966).

court then determined the “reasonable” cost for milling and mining, partial screening, and for road-building expense at \$1.22 per ton. Thus, \$2.50 less \$1.22 times 4,663 tons equals \$5,968.64 damages. Defendants now urged that the *actual* costs of mining and milling should have been offset against the value at the pit head, pointing out that the word “reasonable” had not been used in the prior opinion relative to mining and milling costs. The appellate court rejected this contention, noting that holding otherwise would allow the unskillful or improvident innocent trespasser to escape all damage liability. Such a result would hardly be proper compensation to an owner who has had 4,663 tons of gypsite stripped from his land.

The rules as to measuring damages for trespass for removal of ore were also reviewed in *Whittaker v. Otto*¹⁰ without reference to the *Bates* decision. In this case the court protected the *purchaser* of the ore on the theory that personal property produced from real property by the efforts of an innocent trespasser becomes marketable—an apparent extension of the property doctrine of “accession.”

Trespass—Injunction against Encroachments

A private injunction against utility companies is difficult because of the probable intervention of a public use. In a quiet title-injunction suit, *Slemons v. Southern California Edison Co.*,¹¹ brought on by the installation of three power poles on plaintiff’s land, a decree for the plaintiff was affirmed on the ground that the taking must be for a *substantial* public use. The availability of an alternate route is thus a factor in the landowner’s favor.

Personal Property—Negligent Injuries—Damages

The owner of a damaged automobile is entitled to the cost of repairs plus loss-of-use value until repaired, or to the value of the automobile in the case of total destruction plus loss-of-use value (under certain circumstances) until replaced. In

10. 248 Cal. App.2d 666, 56 Cal. Rptr. 836 (1967).

11. 252 Cal. App.2d 1088, 60 Cal. Rptr. 785 (1967).

Owens v. Pyeatt,¹² the insurer, Allstate, undertook repairs which were unsatisfactory to the owner, and the latter declined to sign a proffered release (which Allstate, by the terms of the policy, was not entitled to demand). Inasmuch as the repairs were not appropriate, plaintiff lost the use of the car for twenty-nine months, for which the trial court allowed \$1,250 damages. The appellate court held that this award was too low where there had been a clear showing that the loss of use in terms of minimum rental for twenty-nine months exceeded \$3,000, even with generous allowance for depreciation, etc.

Remedies for Personal Injuries

Wrongful Death Damages—Adequacy

A new trial on the sole issue of damages was granted in *Haskins v. Holmes*.¹³ Plaintiff had sustained a fractured cheek and jaw requiring surgery. In a nonjury trial, \$1,000 damages were awarded of which \$911.37 were ascribed to special damages for medical and similar costs, leaving only \$88.63 for general damages. This the appellate court regarded as obviously inadequate for the pain, suffering, and inconvenience manifestly incurred. Likewise a new trial limited to the damage issue was ordered in *Doyle v. Hamren*,¹⁴ a wrongful death case, where the decedent had a 44-year life expectancy and a wife and child, and had earned a substantial income while in school. The appellate court estimated that annual earnings of \$5,000 for 40 years would have a present value of \$98,965—a minimal estimation of damages and yet grossly in excess of the \$50,000 verdict. By comparison, a mere \$30,000 wrongful death award was affirmed in *Syah v. Johnson*,¹⁵ where the decedent had a wife and two minor daughters and a life expectancy of 30 years. The deceased in this instance was a penniless paroled convict and a compulsive gambler who had abandoned his wife and taken their

¹². 248 Cal. App.2d 840, 57 Cal. Rptr. 100 (1967).

¹³. 252 Cal. App.2d 580, 60 Cal. Rptr. 659 (1967).

¹⁴. 246 Cal. App.2d 733, 55 Cal. Rptr. 84 (1966).

¹⁵. 247 Cal. App.2d 534, 55 Cal. Rptr. 741 (1966).

small savings with him. However, the evidence indicated that between gambling episodes the deceased displayed some affection for his family and had earned up to \$100 per week before being sent to the penitentiary.

In two personal injury cases, *Gallentine v. Richardson*¹⁶ and *Buniger v. Buniger*,¹⁷ new trials on *all* issues were directed because the inadequacy of the verdicts indicated that the respective juries were divided as to liability. The decision in *Jehl v. Southern Pacific Company*,¹⁸ permitting *additur* in California, should affect the volume of appellate decisions involving retrials on the issue of damages.

Damages—Punitive

Products liability cases are usually directed at solvent corporations, and in addition to sizeable personal injury awards, punitive damages of major proportions may be imposed. A concerted, but unsuccessful, attack upon the allowance of such recoveries was made in *Toole v. Richardson-Merrel, Inc.*,¹⁹ where a verdict of \$175,000 general damages and \$500,000 punitive damages was reduced to \$250,000 and, thus reduced, affirmed. Specifically, the objections were directed to the propriety of punitive damages against corporations (which awards, as critics have emphasized, are borne by many shareholders who are in no position to control management); that the required "malice in fact" was not (and perhaps could not be) shown; and that punitive damages are in fact unconstitutional.

Remedies for Deception

As mentioned in the opening paragraphs of this article, deceptive practices in bargaining transactions are wrongs for which the offended party may be given substantive law choices

16. 248 Cal. App.2d 152, 56 Cal. Rptr. 237 (1967).

17. 249 Cal. App.2d 50, 57 Cal. Rptr. 1 (1967).

18. 66 Cal.2d 821, 59 Cal. Rptr. 276, 427 P.2d 988 (1967).

19. 251 Cal. App.2d 689, 60 Cal. Rptr. 398 (1967), and on denial of rehearing 251 Cal. App.2d at 718, 60 Cal. Rptr. at 418 (1967).

between tort, contract, or restitution. Remedial possibilities may affect the election.

Damages

A promise made without intent to perform may, upon non-performance, be treated as breach of contract, or as the commission of common-law deceit. The latter remedy affords recovery of all damages proximately caused, whether or not within the contemplation of the parties, and also punitive damages. These remedial advantages probably influenced the plaintiff's choice in two recent cases. In *Wilkinson v. Linnecke*,²⁰ the defendant promised (without intent to perform) to obtain security for a loan of \$10,000 advanced by the plaintiff to a third party. The loan was uncollectible, and in a tort action, damages to the amount of the loan plus \$1,000 punitive damages were awarded and affirmed on appeal. The other case, *Brockway v. Heilman*,¹ involved the sale of a cafe, bar, and liquor license, with \$22,000 of the price being allocated to the property and \$20,000 to the liquor license. The plaintiff buyer, received only the property, although he paid \$7,358.88 in excess of \$22,000. The seller committed actionable fraud in that he had no intent at the time of making the contract to deliver the liquor license. A judgment in a tort action for \$7,358.58 plus \$5,000 punitive damages was affirmed on appeal, the court holding this to be a proper application of section 3343 of the Civil Code² (out-of-pocket rule), with dicta to the effect that section 3343 is not the exclusive remedy. Under the circumstances, a question might be raised as to possible advantages in electing the alternative remedy for breach of contract.

20. 251 Cal. App.2d 291, 59 Cal. Rptr. 290 (1967).

1. 250 Cal. App.2d 807, 58 Cal. Rptr. 772 (1967).

2. Cal. Civ. Code § 3343. **Damages for fraud in purchase, sale or exchange of property.**

One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual

value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

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

Damages—Collateral Source

The Souza & McCue Construction Co. held a contract for the construction of a sewer line for the City of Salinas. Because of the latter's deceit (by active concealment) as to soil conditions which affected the bid, Souza secured a \$124,100 judgment for damages, calculated as the difference between the fair and reasonable cost of the actual performance and the cost of performing the work in the absence of misrepresentation. To the reasonable value of the services and materials, the trial court added 10 percent as compensation for indirect overhead, plus 15 percent of total as compensation for the profit to which the contractor was deemed to be entitled. The supreme court found no fault with this formula for measuring compensatory damages.³

However, Souza had had collateral dealings with Armco, the supplier of pipe for the job, whereby the latter had guaranteed performance of the piping and had promised to indemnify Souza for any loss. The city offered evidence as to an alleged compromise agreement between Armco and Souza. That agreement, claimed the city, compensated Souza in whole, or in part, for the city's "breach." This evidence was excluded by the trial court, and, because of this, the case was reversed.

The issue raised was concerned with the "collateral source" doctrine. The Supreme Court reviewed the doctrine generally and held that, to the extent it was designed to exclude the benefits of collateral sources of compensation in calculating a tortfeasor's liability in damages, it is punitive in nature. On this assumption the doctrine would have no applicability when a government entity, free from punitive liability, was the tortfeasor; hence other sources of compensation (even contractual claims for indemnity) could be shown to exist. The implication of this potentially important decision is that the government, though liable in tort, is in effect entitled to the benefit of the injured party's insurance.

3. *City of Salinas v. Souza & McCue Construction Co. Inc.*, 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967).

Damages plus Injunction

A rather unusual combination of remedies for deceit was sanctioned by the Supreme Court in *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.*,⁴ wherein a tort action for deceit by a grantee of realty resulted in a judgment for punitive damages and a reduction of the purchase price. As a further remedy, the court granted a temporary injunction against foreclosing an outstanding trust deed (which was still less than the judicially reduced price) because the gestures toward foreclosure interfered with plaintiff's attempts to dispose of the property. A decree extending the temporary order was the subject of the appeal to the California Supreme Court.

Rescission: Mechanics of—Punitive Damages—More Election Problems

The defrauded party may, of course, elect to disaffirm the bargain and seek restitution—legal or equitable. Sections 1691–1693 of the Civil Code were passed in 1961 purporting to create but a single action “based on rescission” and to eliminate prior distinctions between legal and equitable rescission. The failure to mention the statutes in some cases may suggest that the distinctions supposedly eliminated lie deeper than the statutes' cut. For example, *Efron v. Kalmanovitz*⁵ involved a derivative suit by a corporate shareholder relating to a sale of assets by the corporation to another corporation wholly owned by the seller's dominant shareholder. Restitution and appropriate equitable relief by way of a constructive trust, equitable lien, or money payment (depending on how far tracing could be had) was decreed. The defendant's objection to the form of the decree, that rescission of the contract was not expressly adjudged, was properly overruled by the court. This was an equity decree effecting restitution by its own operation. Nothing was said about the statutory “action based upon a rescission” which would have been ill-adapted to the situation at hand.

4. 66 Cal.2d 782, 59 Cal. Rptr. 141, 427 P.2d 805 (1967).

5. 249 Cal. App.2d 187, 57 Cal. Rptr. 248 (1967).

Joinder of counts for deceit and for restitution are permissible, subject to the ultimately required election. Thus, in *Klein v. Benaron*,⁶ the defendant, president of the Gamble Ranch Investment Company, a Nevada corporation, obtained \$50,500 from plaintiff, giving in exchange a promissory note, stock in the company, and a false promise to use the money to buy additional land. Plaintiff sued for deceit plus punitive damages and appended a common count to the complaint. In connection with the latter count, attachment was had which was dissolved by order of the Superior Court. This order was reversed on appeal in a holding which seems quite correct. The plaintiff had restored everything of value, so the case resolves into a classic example of rescission *in pais* (rescission at law, out-of-court rescission, disaffirmance, or other variant expressions) followed by a quasi-contractual action for restitution in conjunction with which an attachment is proper. The California rescission statutes were not mentioned, but there is nothing in the decision incompatible therewith. On the election point, the appellate court noted in its reversal that there may well be an election which would result not from the mere joinder of counts of deceit and quasi-contract, but from the restoration of benefits by the plaintiff, indicating an intent and attempt to rescind, *coupled* with the detriment caused by the attachment. The court also indicated that such an election might terminate the claim for exemplary damages.

On this last point—whether rescission plus punitive damages is permissible—the recent California cases are in conflict. In addition to the statement in *Klein*, there is similar dictum in *Brockway v. Heilman* that rescission precludes punitive damages.⁷ The court gives as authority for this position *Crogan v. Metz*,⁸ although the *Crogan* case is one for the recovery of secret profits from an agent, not for rescission.

On the other hand, in *Millar v. James*,⁹ in which a conveyance of realty was obtained by fraud of the grantee, the

6. 247 Cal. App.2d 607, 56 Cal. Rptr. 5 (1967).

7. 250 Cal. App.2d 807, 58 Cal. Rptr. 772 (1967).

8. 47 Cal.2d 398, 303 P.2d 1029 (1956).

9. 254 Cal. App.2d 570, 62 Cal. Rptr. 335 (1967).

grantor obtained a decree cancelling the deed and quieting his title, and a monetary award for loss of use. It was held that plaintiff could also obtain punitive damages as well as rescission, citing *Topanga Corp. v. Gentile*.¹⁰ In the latter case, restitution plus punitive damages was ordered in favor of a corporation against a promoter in a fraud case. *Ward v. Taggart*¹¹ was cited.

Although the holding in *Millar v. James* is unequivocal, its lineage is suspect. *Ward v. Taggart* may lend itself to the construction that both restitution and punitive damages may be had, but *Ward v. Taggart* was *not* a rescission case and no election between substantive rights was involved. In any event, some clarification is urgently needed.

One other 1967 case involving an election problem did refer to section 1693 of the Civil Code. That section sanctions the joinder of a claim for tort damages based on affirmation with a claim based on rescission. The inexorable election between the two must still be made, and if mishandled can lead to a loss of *all* remedies. In *Doctor v. Lakeridge Construction Co.*,¹² the plaintiff, a land developer, bought a vacant lot and claimed a misrepresentation as to land conditions affecting building possibilities. An action for damages was filed in July, 1963, but no mention of rescission was made until the pretrial statement in February, 1966. The fraud claim was lost for want of proof of the substantive elements of the tort of deceit, which might not have been required for rescission had the right of election been held open. But not acting promptly to rescind, the plaintiff had elected to affirm and was remedially bound by the choice.

Remedies for Duress, Undue Influence, Etc.

In the absence of a defined tort of duress or undue influence, remedial possibilities are confined to rescission or cancellation of transactions induced thereby. In *Odorizzi v.*

10. 249 Cal. App.2d 681, 58 Cal. Rptr. 713 (1967).

11. 51 Cal.2d 736, 336 P.2d 534 (1959).

12. 252 Cal. App.2d 778, 60 Cal. Rptr. 824 (1967).

Remedies

Bloomfield School District,¹³ the plaintiff, a schoolteacher, had been booked by the police on charges of homosexuality and released on bail. Emotionally and mentally upset and sleepless for forty hours, he retired to his apartment, where he was met by school authorities who advised him to resign to avoid publicity, or otherwise face suspension and dismissal with the attendant notoriety. He resigned and then brought suit for declaratory relief which, in effect, requested the court to rescind his resignation pursuant to section 1689 of the Civil Code. The thrust of plaintiff's allegations was that he had trust and confidence in the representations of the school authorities so that they were able to substitute their will and judgment for his own and cause him to submit a resignation. A demurrer to the complaint without leave to amend was sustained. On appeal, the court held that neither fraud nor mistake was pleaded in the complaint. Further, neither common-law duress nor menace was pleaded because the only threat was to take such legal proceedings as was the duty of the officials to bring, and this was in no sense unlawful if done in good faith. Parenthetically, it could have been added that the concept of common-law duress requires that the *defendant* originate the coercion operative upon the plaintiff's will and, apart from the good-faith threats to institute proceedings, the defendant and its agents were not responsible for the pressures bearing upon the plaintiff. This eliminated all grounds for rescission as mentioned in section 1689 except "undue influence," and on this ground the lower court was reversed. In contrast to "legal" duress, undue influence is a concept of equitable origin, characteristically applied to abuses of the inherent influence possessed by one in a fiduciary or confidential relation to another. Undue influence has been given an expanded definition in section 1575 of the Civil Code, subsection (2), as "taking an unfair advantage of another's weakness of mind", and in subsection (3) as "taking a grossly oppressive and unfair advantage of another's necessities or distress." In none of these variations is there

13. 246 Cal. App.2d 123, 54 Cal. Rptr. 533 (1966).

the requirement—so important for common-law duress—that the defendant be responsible for the plaintiff’s difficult position. The appellate court in *Odorizzi* concluded that a cause of action for rescission was stated under both subsections 1575(2) and (3). An extended discussion of the case need not be undertaken here, because of the probable *ad hoc* application of the considerations elaborated upon. Let it be said that section 1575(3) appears to be more a generalized codification of the broad equitable notion of “unconscionability” than a specific variety of “undue influence.” If this inference is correct, there is little likelihood that the provisions of section 1575(3) will be given application much beyond situations such as the *Odorizzi* case, particularly where regular commercial transactions might be concerned. There is little in the history of section 1575(3) to show such extension despite the elasticity of the language, and *Odorizzi* relies almost exclusively on precedents from testamentary dispositions and confidential relationships between persons with notable disparities in ability. California did not adopt the unconscionability provisions of article 2, section 302, of the Uniform Commercial Code, and although a distinct doctrine of “business compulsion” seems to be evolving, the concept of “undue influence,” even as expanded by statute, has not had as much influence as might be expected in this state.

Odorizzi leaves unanswered the question of whether a jury trial would be a matter of right on the issues raised in pursuing this essentially equitable relief.

Remedies for Mistake

Mistake in Non-Bargaining Transactions

The collapse of a subdivision project resulted in an interesting and perhaps important decision in which the equitable restitutionary remedy of a lien was used to save a lending institution from a peculiarly egregious error. In this case, *Jones v. Sacramento Savings & Loan Association*,¹⁴ a group of purchase money trust deeds securing loans of \$806.45 per

14. 248 Cal. App.2d 522, 56 Cal. Rptr. 741 (1967). For further discussion, see McIntosh, *Real Property*, in this volume.

Remedies

lot, all drafted to permit subordination in favor of the anticipated construction loans, were outstanding. Some time later, Sacramento Savings & Loan Association advanced construction monies secured by trust deeds amounting to \$11,000 to \$12,000 per lot and the monies were indeed used for improvements. Sacramento Savings intended that the purchase money trust deeds would be subordinated, but through inadvertence this was not accomplished. Jones acquired (at a discount) the purchase money trust deeds which fortuitously had priority. Upon default, both Jones and Sacramento Savings took separate foreclosure measures, and the trustees' sales of various houses and lots took place more or less contemporaneously, and in some cases overlapped. No sale produced a bid in excess of the secured debt of the particular beneficiary. As the appellate court described it:

The sales to Jones in enforcement of the senior liens wiped out the junior liens of Sacramento Savings. . . . In those cases where Jones' trustee was the first to give notices and hold sales, the subsequent sales on behalf of Sacramento Savings conveyed no title to Sacramento Savings and succeeded only in clouding Jones' title. . . . Where Sacramento Savings' trustee was the first to give notices and hold sales, Sacramento Savings purchased title subordinate to the senior liens of [Jones].¹⁵

Jones, perhaps feeling overly secure, filed this suit to quiet title, presumably to facilitate the marketability of the houses (or at least some of them) at retail, and the trial court ruled in his favor.

The position of Sacramento Savings was, of course, analogous to that of one who mistakenly improves the property of another, except that it had provided the money for the improvements instead of the improvements themselves. The legal position of the mistaken improver of the land of another is not a comfortable one. "Betterment Statutes" may allow removal of the improvements (hardly a solution here) and

¹⁵ 248 Cal. App.2d at 528, 56 Cal. Rptr. at 745.

otherwise provide remedies by offset against claims by the owner rather than affirmative remedies. For example, section 741 of the Code of Civil Procedure, relied upon by Jones, allows a mistaken trespasser to offset the value of improvements only against damages when such are claimed in an ejectment action.

The appellate court, however, reversed the ruling in favor of Jones and directed equitable liens on the various parcels in favor of Sacramento Savings to prevent unjust enrichment. The exact terms of the liens were left flexible within the discretion of the trial court, depending upon further developments as to marketing of the homes. Immediate foreclosure of the liens was definitely not suggested. Neither prior nor post-judgment interest was awarded as part of the liens.

The decision here is a commendable utilization of equitable principles and remedies. The court properly rejected section 741 of the Code of Civil Procedure as inapplicable. The suit to quiet title is equitable and the decision is no more than an application of the maxim: "He who seeks equity, must do equity." The equitable lien imposed no personal obligation on Jones, as would a money judgment for restitution, so the argument against "improving the owner out of his property" is avoided. Had Jones not sued to quiet title, however, it is doubtful that there would have been any affirmative restitutionary remedy available to Sacramento Savings.

When a person mistakenly pays property taxes on the wrong parcel, he has no common-law right of restitution from the taxing authority in California. A statutory remedy is afforded for, among other things, taxes "erroneously collected," but this does not cover the payor's mistake.¹⁶ If statutory restitution is sought, however, the action is said to be governed by equitable principles.¹⁷ The correlative question of restitution from the property owner whose premises were relieved from the tax claim did not arise during the year.

¹⁶ *Sierra Inv. Corp. v. County of Sacramento*, 252 Cal. App.2d 339, 60 Cal. Rptr. 519 (1967).

¹⁷ See, e.g., *El Tejon Cattle Co. v. County of San Diego*, 252 Cal. App.2d 449, 60 Cal. Rptr. 586 (1967).

Remedies

Mistake as to Existence of a Contract: Restitution for Services Rendered in Reliance

The person mistakenly performing services benefiting another is in much the same position as the mistaken improver of another's property. Specific restitution is impossible and a translation of his claim into one for money would place a harsh burden upon the recipient of the services, who would have to come up with money to pay for something, the value of which may be dubious as well as intangible, for which he would have struck no bargain. Restitution is not automatically accorded in all instances,¹⁸ and even when it is, the quasi-contractual benefit is measured from the standpoint of the recipient.

A special case obtains, however, when services are rendered *at the request* of the defendant in connection with a "contract" which never materializes—or, put another way, in misreliance upon a nonexistent contract, but with the knowledge and at the request of the recipient. A line of authority establishes the measure of quasi-contractual recovery here in terms of the reasonable value of the work, even though of no benefit to the recipient. This is the gist of a dissenting opinion by Chief Justice Traynor in *Coleman Engineering Company v. North American Aviation*.¹⁹ Since the case was decided in terms of breach of an express contract, the opinion is technically no more than an augury for a future rule of restitution when suitable litigation arises. There is nothing wrong with this rule of measurement of *quantum meruit* recovery for mistake in special circumstances, but the disguise of reliance damages in the language of restitution of benefits should fool no one. Perhaps it is more important to preserve the legal symmetry of contract law, than to worry about precision in the much more unstructured rules of "unjust enrichment."

Mistakes in Integration

Whether or not a subdivider who has sold all the houses is an "aggrieved party" within the meaning of section 3399

18. See Restatement of the Law of Restitutions §§ 40-41.

19. 65 Cal.2d 396, 55 Cal. Rptr. 1, 420 P.2d 713 (1966).

of the Civil Code was one of the questions raised in a suit to reform provisions with respect to access to a street within the subdivision. The actual aggrieved party was the last purchaser on a cul-de-sac street whose right of access was challenged by earlier residents. To straighten out the situation required modifications of prior deeds to which the late-comer was not a party. The subdivider was allowed to maintain the suit.²⁰

Remedies for Breach of Contract

Contracts for the Sale of Land; Breach by Buyer—Damages

The textbook equitable remedies available to the vendor because of the purchaser's breach are in current disfavor in California, what with such things as anti-deficiency legislation as to instalment contracts and the general obstacle to specific performance inherent in the Civil Code requirement that the plaintiff establish that the consideration be adequate and the bargain just and reasonable.¹

On the other hand, there is doubt that the vendor will, as a practical matter, very often be able to establish *general* damages for the purchaser's failure to perform. According to section 3307 of the Civil Code, the measure of damages for breach of contract to purchase real property is the amount by which the contract price exceeds the value of the property *to the seller* on the date of breach. If the contract is an instalment one, and the breach delayed, the vendor might as well forget it. If the contract is the usual down payment plus a trust deed for the balance at close of escrow, the vendor's claim for general damages is complicated by certain evidentiary difficulties. In *Newhart v. Pierce*,² the plaintiffs owned an operating cattle ranch in Nevada, which they contracted to sell in April, 1957, for \$171,500 (this figure excludes the price of the livestock and certain other extraneous and diverse consideration). The purchase price was to be

20. *Shupe v. Nelson*, 254 Cal. App.2d 744, 62 Cal. Rptr. 352 (1967).

2. 254 Cal. App.2d 856, 62 Cal. Rptr. 553 (1967).

1. Cal. Civ. Code § 3391(1) and (2).

Remedies

secured by a trust deed. The close of escrow was extended to July 1, 1957. The purchaser defaulted, and after eighteen months the ranch was exchanged for other properties, which the plaintiff in the present action for damages vaguely estimated as being worth \$95,000. The plaintiff also gave his opinion (or "guess") as to the value to him at the time of breach as \$150,000. The appellate court concluded that the owner could competently testify as to value (since the statutory measure is based on a subjective standard, the rule could hardly be otherwise), and that resale price is likewise competent, if not conclusive, evidence. Nonetheless, the evidence was held insufficient to sustain the trial court's finding that the value at the time of breach was \$150,000.

Instead, the appellate court stated the rule that:

[W]here (a) the contract price is not excessive and (b) there is no decline in the market before the resale date, it follows that the contract price and the value on the date of breach are the same.³

Since plaintiff admitted the contract price was not excessive and there was no indication of a general drop-off in land values, there were no general damages sustained in the case. It is to be noted that this formula places the vendor at some disadvantage in the ordinary sale through escrow. The vendor, if directly confronted at trial, is not likely to admit that the contract price was excessive, nor are land values likely to drop appreciably during the normal period of escrow.

The vendor, in an executory land sale contract, is generally precluded from suing to recover the purchase price in California, since he holds the security of a vendor's lien subject to the restrictions of the anti-deficiency statute which cannot be evaded by a purported waiver of the lien. If there is in fact no security of any sort, however, the vendor may bring an action on the purchase money note. Thus in *Van Vleck Realty v. Gaunt*,⁴ an action was brought on a \$15,000 note given as part of the original purchase price and the plaintiff

3. 254 Cal. App.2d at 865, 62 Cal. Rptr. at 560.

4. 250 Cal. App.2d 81, 58 Cal. Rptr. 246 (1967).

was permitted recovery. The case is not ordinary. The property was conveyed on the security of a trust deed together with the “unsecured” note. Upon default the premises were re-conveyed in settlement, but the \$15,000 note was excluded from the settlement. Therefore, despite superficial appearances, the action here was on an absolutely unsecured note, free from even the possible existence of the ephemeral grantor’s lien.

Breach by Vendor—Specific Performance

Cases in this category, decided within the past year, present only the usual equitable problems. Specific performance was denied in *Loeb v. Wilson*⁵ because of inadequacy of consideration and unilateral mistake as to the nature of the vendor’s title. The decree also made the vendor immune to incidental damages. In *Am-Cal Investment Co. v. Sharlyn Estates, Inc.*,⁶ the vendor breached by anticipatory repudiation in the form of a conveyance to another during escrow. A decree for the purchaser was reversed for lack of a showing that the plaintiff was able and willing to perform at the time performance was due, rather than at the time of trial. A breach by anticipatory repudiation is only an excuse for non-tender of performance. The remand embodied a suggestion to the trial court to consider, in the event plaintiff is not entitled to specific performance, the imposition of damages as an alternative to the mere restitution of the money deposited in escrow.

Specific performance was granted in *Alfnito v. Sater*,⁷ despite a barrage of defenses ranging from non-performance of conditions to unclean hands.

Contracts for the Sale of Chattels: Breach of Warranty—Damages

For breach of warranty in connection with the sale of tomato seeds, the court, in *Klein v. Asgrow Seed Company*,⁸

5. 253 Cal. App.2d 438, 61 Cal. Rptr. 377 (1967).

6. 255 Cal. App.2d 622, 63 Cal. Rptr. 518 (1967).

7. 246 Cal. App.2d 362, 54 Cal. Rptr. 636 (1966).

8. 246 Cal. App.2d 87, 54 Cal. Rptr. 609 (1966).

Remedies

held the measure of damages was the difference between the reasonable market value of the crop actually produced and the value of the theoretical crop had the warranty been complied with, less the necessary expenses of raising and selling. This conclusion was based on former Civil Code section 1789(6), but the court commented that it was also the measure under the present Commercial Code section 2714(2).

Contracts for the Sale of Stocks: Breach by Buyer—Damages

*Sackett v. Spindler*⁹ arose out of a contract to sell all outstanding shares of the corporation which owned the *Santa Clara Journal*. The buyer repudiated. The appellate court affirmed the measure of damages as the difference between the contract price and the price obtained on a resale of the shares a year later. It held that the Uniform Sales Act then in effect did not apply to shares of stock, and that the general damage statute in California did not (in cases other than the sale of realty) compel rigid adherence to the rule of “sale price less market value” at the time of breach. The absence of a ready market for the shares justified the variant measure here. The allowance of prejudgment interest by the lower court was reversed.

Construction Contracts—Breach by Owner

In *Alec Ferguson Electrical Contractors v. Integrated, Inc.*,¹⁰ the defendant breached by stopping progress payments. In reversing and remanding for retrial, the appellate court noted the anomaly in this state that the failure to make progress payments is not a total breach as would entitle the contractor to sue for damages, but is enough so that he may rescind and recover in quasi-contract for part performance. Yet, even for the latter remedy to be available, the failure to make progress payments must be substantial. This means

⁹ 248 Cal. App.2d 220, 56 Cal. Rptr. 435 (1967).

¹⁰ 250 Cal. App.2d 287, 58 Cal. Rptr. 503 (1967).

that the evaluation of available remedies is complicated by three levels of contract breach.

*Contract of Employment: Breach by Employer—
Damages—Mitigation*

The discharged employee in *Erler v. Five Points Motors*¹¹ sued for the balance of the contracted compensation for the unexpired term. The defendant entered a general denial. The trial court excluded evidence both as to what plaintiff had earned after the breach and as to what he might reasonably have earned with the exercise of reasonable diligence, on the ground that matters in mitigation of damage should have been affirmatively pleaded. The appellate court held that the plaintiff, of course, has a duty to minimize damages. He also has the duty of proving actual damages, and the amount he actually earned after defendant's breach bears upon his actual damage. Therefore evidence as to actual damages can be introduced under a general denial. On the other hand, what plaintiff might reasonably have earned (which the court characterized as "true mitigation") is an affirmative matter and is the proper subject of defensive pleading. All this may help in distinguishing between three separate matters—avoidable consequences, minimization of damages, and mitigation of damages.

Breach of a Dealership Contract: Specific Performance

In *Thayer Plymouth Center Inc. v. Chrysler Motors Corp.*,¹² the appellate court reversed a preliminary injunction against terminating plaintiffs' dealership. The reasons given were the usual equitable ones: adequacy of damages, a principal-agent relationship, and the difficulty of continuous supervision of a contract calling for co-operation.

11. 249 Cal. App.2d 560, 57 Cal. Rptr. 516 (1967).

12. 255 Cal. App.2d 337, 63 Cal. Rptr. 148 (1967).

Remedies

Remedies for Breach of Nominally Unenforceable Transactions

Transactions Unenforceable Because of the Lack of a Writing; Oral Contracts to Devise Realty—Quasi-Specific Performance

The common problem of the oral promise to devise realty in exchange for services during the “testator’s” lifetime was again presented in *Riganti v. McElhinney*.¹³ In this case, specific performance was decreed although services were performed for only six years (“not the length but the breadth,” says the court). The case is useful only as containing further illustrations as to the type of services that will incline a decision in favor of specific performance for the property rather than quasi-contract recovery for the services. The defendant unsuccessfully advanced the unusual argument that plaintiff could not obtain a decree here because the holder of an equitable title cannot quiet title against the legal owner.

Conveyances on Oral Trust

In *Adams v. Young*,¹⁴ the usual remedy of a constructive trust was decreed for breach of an oral promise to hold property in trust. The confidential relationship between the parties sufficed for equitable jurisdiction. As per statute¹⁵ in California, the trust is constructed for the benefit of the person who would otherwise have had the *res* rather than in favor of the grantor’s estate—a result which, as is often pointed out, is precisely the same as if there were a trust indenture. The evidentiary aspect of this case is of mild interest, as the conveyance was made over fifty years ago and direct testimony, save for that of an 84-year-old woman of uncertain memory, was unavailable. The statute of limitations, of course, begins to run only upon repudiation of the “trust.”

13. 248 Cal. App.2d 116, 56 Cal. Rptr. 195 (1967).

14. 255 Cal. App.2d 177, 62 Cal. Rptr. 877 (1967).

15. Cal. Civ. Code § 2224.

Other Breaches by Fiduciaries

In a typical case of a diversion of a benefit by a real estate agent who had title to property (as to which he was employed to negotiate) taken in the name of his wife, the agent attempted to avoid liability for a constructive trust because there was no memorandum in writing signed by the defendant sufficient to satisfy the statute. The justice's initial paragraph disposes of this defense to an equitable remedy:

[T]his is yet another case of the faithless agent attempting to hide his double-dealing behind the skirts of the statute of frauds. But skirts are not as voluminous as they once were nor the coverage of the statute as comprehensive as it was sometimes thought to be. Unshapely limbs and unsightly conduct alike are today disclosed to public view, and both must risk the consequences of full exposure.¹⁶

The statute of frauds does not apply to a case which is essentially in equity to impress a constructive trust.

Transactions Unenforceable Because of Illegality—Restitution

The general rule which allows no remedies in favor of either party to an illegal transaction was quite properly applied in two cases during 1967—*Pyle v. Shipman*¹⁷ (violation of Corporate Securities Law) and *Goldstein v. Enoch*¹⁸ (an indirect attempt to obtain a share of profits from an illegal transaction).

The sale of stock without a permit is illegal, but usually a buyer is allowed restitution because of the “not *in pari delicto*” exception. The prohibitive statute is designed to protect one of the parties (the plaintiff-buyer) in the transaction. This exception was applied in *Maner v. Mydland*.¹⁹

The “not *in pari delicto*” exception was also invoked to

16. *Gerhardt v. Weiss*, 247 Cal. App. 2d 115, 55 Cal. Rptr. 425 (1966).

17. 251 Cal. App.2d 913, 60 Cal. Rptr. 46 (1967).

18. 248 Cal. App.2d 891, 57 Cal. Rptr. 19 (1967).

19. 250 Cal. App.2d 526, 58 Cal. Rptr. 740 (1967).

Remedies

allow a small dairyman to recover illegal rebates from the president of a large creamery.²⁰ The rebates were made to secure and retain so-called "Grade A contracts" for the sale of his milk. Without such "Grade A contracts" it appeared the plaintiff would be unable to make a financial success of the business. The statute forbidding such rebates applied literally to both producers and distributors, so the parties were technically *in pari delicto* under the statute. However, the court held that the exercise of economic coercion made the plaintiff less at fault and allowed restitution.

An equitable balance between the policy against enforcing illegal bargains and the policy against unjust enrichment was reached in *Hainey v. Narigon*.¹ The defendant was a veteran entitled to a G.I. loan for housing. The plaintiff, his brother-in-law, was not a veteran. In order to avoid the laws restricting the benefits of veterans' loans, a house was bought in the defendant's name. The plaintiff, who was in possession, made essentially all payments on the G.I. loan, plus other outlays for twelve years. Plaintiff then sued for a declaration of a resulting trust, which would obviously judicially effect an illegal bargain. The defendant, on the other hand, would be equally obviously enriched by taking advantage of a violation of a statute designed merely to afford him certain exclusive benefits. The trial court followed the general rule and allowed the defense of illegality. On appeal the decision was reversed and the plaintiff was given an equitable lien, covering all payments, including interest, taxes, insurance, and out-of-pocket expenses in making permanent improvements. He was, however, deprived of the title to the property and a sizeable increase in market value. Such a decree is another creditable application of equitable principles and remedies to mitigate a harsh rule of law. The law cannot very well provide legal remedies for a bargain which the law says is illegal, but equity should permit of adjustments to prevent an enrichment unwarranted by the degree of illegality involved.

²⁰ *Karpinski v. Collins*, 252 Cal. App.2d 768, 60 Cal. Rptr. 846 (1967). ¹ 247 Cal. App.2d 528, 55 Cal. Rptr. 638 (1966).