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# Liquidation of Damages by Pre-Estimate

Joseph H. Drake
*University of Michigan Law School*

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LIQUIDATION OF DAMAGES BY PRE-ESTIMATE.—A freshly minted phrase, if attractive in form, even though it connotes no new idea, will frequently have as extensive a circulation, even in our supreme courts, as would a real concept. In a contract for building two laboratories for the Department of Agriculture, the contractor had agreed that the United States should be entitled to the "fixed sum of $200, as liquidated damages * * * for each and every day's delay" in the completion of the buildings. The court decided that this was a stipulation for liquidated damage because it was the result of a "genuine pre-estimate" of the anticipated loss. *Wise* v. *United States* (May, 1919), Adv. O. 343.

The use of this term, "pre-estimate", as a new canon of interpretation for distinguishing liquidated damages from penalty, seems to belong to the last two decades, but during that time it has had a flourishing existence and a continual misapplication. In the case of the *Sun Pub. Assoc.* v. *Moore* (1901), 183 U. S. 642, a yacht was rented to be used for gathering news, the parties agreeing that "for the purpose of this charter the value of the yacht shall be considered and taken at seventy-five thousand dollars." The court "refused to consider evidence tending to show that the admitted value was excessive". In the case of the *United States* v. *Bethlehem Steel Co.* (1906), 205 U. S. 105, in a contract for the delivery of disappearing gun-carriages, it was agreed that "the amount of the penalty for delay in delivery" was to be $35 per day. It was decided that this was liquidated damages and not a penalty, but the court said that "the principle decided in that case (*Sun Pub. Co.* v. *Moore*) is much like the contention of the government herein". These two cases and an intermediate English case, *Clydebank E. and S. Co.* v. *Castaneda*, [1905] A. C. 6, have since been quoted as though they were precedents, for decisions in our Federal and State courts and in England; and the English court uses the phrase "a genuine pre-estimate", which has since been repeated so often, and is given as the reason for the decision in our instant case. This phrase has been used so often by the courts that it seemed best to the revising editors of the last editions of Sedgwick's treatises on the subject of Damages to add, after a presentation of various canons of interpretation, a section on "VALUATION AND PRE-ASCERTAINMENT." *Cf.* SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, page 249, and SEDGWICK-BEALE, MEASURE OF DAMAGES, Section 420, a.

It was pointed out some years ago, cf. 9 MICH. LAW REV. 588, (1911), that these cases in the United States Supreme Court and in the Court of Appeals do not add anything to the principle of the law of damages nor do they add to our canons of interpretation of contracts as for liquidated damages or a penalty. The *Sun Case* is a simple case of estoppel on the contract of the parties, and the only question to be determined is whether or not the party is estopped. There is in the *Sun Case* an almost unique state of facts. The only case like it that has been observed by the writer is *Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 A. C. 332, and the estoppel is perfectly evident in either case. In a series of cases somewhat similar in character, arising under the HEPBURN ACT, it is argued most forcefully by Justice PITNEY, in a dissenting opinion, that one of the essential elements of estoppel is wanting and therefore the estoppel fails. Cf. *Boston and Maine Rd.* v. *Hooker*, 233 U. S. 134, also 15 COL. LAW REVIEW, 413.

On the other hand, the *Bethlehem Case*, the *Clydebank Case*, and others on the same state of facts, are to be interpreted under the long established canon of interpretation, that where the damages are very difficult of ascertainment they are to be considered liquidated. *Cf.* SEDGWICK-BEALE, MEASURE OF DAMAGES, Section 416; SEDGWICK, ELEMENTS OF THE LAW OF DAMAGE, 72.

In the use made of these cases it should be said that the courts have usually gone right, without however seeing why they have done so. The principle upon which the *Sun Case* was decided is *not* at all similar to the contention of the Government in the *Bethlehem Case*, because the facts of the two cases are widely different, and the citation of the two cases are precedent for cases in which the facts are on all fours with those in one case but not in the other, can lead only to hopeless bewilderment. It would seem wise for the courts to recognize this situation. J. H. D.