University of Michigan Law School
University of Michigan Law School Scholarship Repository

Articles | Faculty Scholarship

1911

Liquidated Damages and Estoppel by Contract

Joseph H. Drake
University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Contracts Commons, and the Litigation Commons

Recommended Citation
Drake, Joseph H. "Liquidated Damages and Estoppel by Contract." Mich. L. Rev. 9 (1911): 588-94.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LIQUIDATED DAMAGES AND ESTOPPEL BY CONTRACT.

IN the last edition of SEDGWICK'S ELEMENTS OF THE LAW OF DAMAGES the author says (p. 232) that the subject of liquidated damages has been put in a new light by the two cases of the *Sun Printing and Publishing Association* v. *Moore*[1] and the *Clydebank E. &S. Co.* v. *Castaneda*,[2] and that they may be expected to have a considerable effect upon the further development of the law on the subject. The learned author then presents the old canons of interpretation with full illustration from the cases, followed by the citation of the decisions above mentioned, and concludes that in the light of these cases the old technical views of the canons of interpretation can no longer be regarded as conclusive. An examination of some of the cases recently decided may be helpful in determining the meaning of these decisions.[3]

A few months before the decision in the *Sun Assn.* case (supra) was handed down by the United States Supreme Court, a case on a somewhat similar state of facts was decided in the Seventh Circuit of the Circuit Court of Appeals.[4] In this case the plaintiffs had executed a bond conditioned that it should be void if the work of clearing off a lot preparatory to building should not be completed in accordance with the contract by April 1, 1897, but by which they bound themselves in the sum of $20,000, "computed and agreed upon by and between the United States of America and themselves as liquidated damages and not as penalty, to be immediately due the United States on the first day of April, 1897." The court held that the loss from a slight delay in delivery of the lot ready for the new building would be easily calculable and therefore the sum mentioned in the bond was penalty and not liquidated damages.[5] The court said that in such cases "unless it is clear that * * * it would be difficult or impossible to assess the actual damages from testimony" the court must admit the testimony to prove a penalty. This statement is cited with disapproval by the United States Supreme Court in the case to be considered next.

In the case of the *Sun Printing and Publishing Ass'n* v. *Moore* (supra) a yacht was chartered by the newspaper company to gather

[1] (1901), 183 U. S. 642.

[2] [1905], A. C. 6.

[3] The following from the State courts may be cited as suggestive: City of York v. York Rys. Co. (1910), — Pa. —, 78 Atl. 128; Mosler Safe Co. v. Maiden Lane Deposit Co. (1910), — N. Y. —, 93 N. E. 81; Cleveland Crane & Car Co. v. American Cast Iron Pipe Co. (1910), — Ala. —, 50 South 313.

[4] The Chicago House-Wrecking Co. v. United States (1901), 106 Fed. 385.

[5] Cf. Kemble v. Farren, 6 Bing. 141.

news of the Spanish-American War. Among other provisions it was agreed "that for the purpose of this charter the value of the yacht shall be considered and taken at the sum of $75,000." The yacht was wrecked and became a total loss. The Supreme Court quoted the *Chicago House Wrecking* case (supra) and the *Gay Mfg. Co.* v. *Camp*[6] as saying "where actual damages can be assessed * * * the court * * * must require proof of the damages." It said this doctrine was wrong in principle and refused to consider evidence that the loss was less than the sum mentioned. Both these decisions would seem to be right. The Supreme Court is right, too, in part at least, in its disapproval of what it calls the doctrine of the cases in the lower federal courts, but that the supreme court does not make plain just what its own doctrine is and why it differs from the lower courts is evident enough from the use that has been made of the decision subsequently by the courts and by commentators on these cases. The distinction between the cases may be made by invoking the principle of estoppel. In the *Chicago House-Wrecking* case both parties were considering an *undeterminable future event*; namely, the failure to finish a task on time, and there was nothing in the situation to prohibit them from considering all the possibilities as to value of the breach, taking into account the agreement itself, the sum mentioned in the bond, the subject matter of the contract and the possible combination of events attending the breach, if it occurred. Nor when the case came to trial was there anything to prevent the court from admitting testimony in regard to any one of these points. It may be noted here in passing that a different interpretation might have been placed upon the situation after full consideration of evidence on all the above mentioned points. Damages for delay in the performance of a contract if reasonable, may be stipulated.[7] See also *City of York* v. *York Rys. Co.*,[8] to be considered later. It seems though, as said above, that the decision was right. Possibly if the sum mentioned had been something less than $20,000 the conclusion might have been different.

In the *Sun Ass'n* case the situation of the parties making the agreement is entirely different from what it was in the previous case. The parties are not looking toward an undeterminable future event but are attempting to arrive at a rough estimate of the value of an *undeterminable present fact*—the yacht had no market value. They agreed upon the sum of $75,000 as the value of the yacht and on the strength of that agreement Moore parted with his property.

---

[6] 65 Fed. 794, 68 Fed. 67.

[7] Monmouth Park Assoc. v. Wallis Iron Works, 55 N. J. L. 132.

[8] (1910), — Pa. —, 78 Atl. 128 (supra).

The *Clydebank, etc.*, case (supra) is cited by SEDGWICK[9] along with the *Sun Ass'n* case as if the two cases were analogous, each illustrating the new idea of "liquidation by preascertainment," a phrase adapted from the utterance of Lord Robertson in the first mentioned case.[10] It would seem possible to differentiate these two cases on their respective facts. In the *Clydebank, etc.*, case the appellants had contracted with the Spanish government to build four torpedo boats, to be delivered within varying periods. The contracts provided that "the penalty for later delivery shall be at the rate of £500 per week for each vessel." It is manifest that we have here the consideration by the parties of the value of an *undeterminable future event;* namely, the loss resulting from a failure to deliver. There is no question raised as to the exclusion of evidence of actual loss, and considering the contract in all its relations when made it is decided to be one in which a fair sum is fixed as the value of an undeterminable future event, which can of course be liquidated under the provisions of our old canon of criticism used for the decision in *Monmouth Park Ass'n* v. *Iron Works* (supra). The court, however, lays stress on the "preascertainment" and ignores the conditions that make the preascertainment significant. It may be noted here that the case upon which the opinion of Lord Davey rests,[11] in which respondents agreed to "pay the lessor £100 per acre for all lands not restored at a particular date," the facts are on all fours with those in the yacht case (supra) as the parties have agreed as to a present fact; namely, the value of the land in case it is not redelivered. The sum fixed, though called a penalty by the parties, was held to be a liquidated sum by the court which gave "preascertainment" as the reason, though the ultimate reason back of the preascertainment would seem to be the estoppel, as in the *Sun Ass'n* case (supra). In a subsequent Privy Council case[12] the "preascertainment" doctrine was called in to decide the question. A clause fixing damages for non-completion of a railway, was held to be a penalty, as not being a preestimate of damages by agreement, but the agreement here was to forfeit ten per cent. retention money in case of delay in completion, and this sum might have been very large in case of a slight delay the value of which could be easily calculated, bringing this case exactly in line with the *Chicago House-Wrecking* case (supra).

In a later case[13] the court approves the principle of *Sun Assn.* v

[9] Op. cit. p. 249.
[10] See [1905], A. C. p. 19.
[11] Elpinstone v. Monkland Iron & Coal Co. (1886), 11 A. C. 332, 342 and 345.
[12] Commissioners of Public Works v. Hill [1906], A. C. 368.
[13] United States v. Bethelem Steel Co. (1907), 205 U. S. 105, 119.

Moore (supra) and holds that a provision of $35 a day for slow delivery of disappearing guns was liquidated damages although the term "liquidated" was not in the clause in question and the word "penalty" was used repeatedly by both parties in the correspondence. The court in this case gives some hint of what it means in talking of the "principle" laid down in *Sun Ass'n* v. *Moore* by saying that formerly in all cases of doubt the tendency of the courts was to construe the provision as being a penalty whereas now the courts have become "strongly inclined to allow the parties to make their own contracts." The facts in the *Bethlehem* case are exactly on all fours with those in *Clydebank Co.* v *Castaneda* (supra) the sum being fixed in the American case for delay in furnishing disappearing guns instead of torpedo boats and in both instances the war in which the material contracted for was to be used came to an end before the time fixed for delivery. In both cases the court gives as a reason for the decision the "liquidation by preascertainment" The same distinction on the facts can be made between this later U. S. Court case and the earlier one, the *Sun Ass'n* case (supra) as was made between that later case and the English case. In the *Bethlehem Steel Co.* v. *U. S.* there was an agreement as to the value of an undeterminable future event, failure to deliver disappearing gun carriages. The court said the principle decided in that case [*The Sun Ass'n* v. *Moore*] is "much like the contention of the government herein" but as has been seen above in the examination of the *Clydebank etc.* case, the facts of the two cases are so different that they can scarcely be included under the same principle.

Since the decision in the *Sun Ass'n* case a number of cases have been decided in the lower federal courts which have used the statement in the *Sun Ass'n* case as authority for denying the admission of evidence to prove penalty, but each of the cases showed on its face that the actual damages were difficult of computation. Three of these cases[14] are agreements to pay a definite sum per diem for delay in delivery. In all of them the *Sun Ass'n* case is quoted as a controlling authority and as if the Supreme Court in that case had laid down a new canon of interpretation by its refusal to consider evidence as to the intention of the parties to the agreement.

In several other Federal cases[15] there were agreements to pay a lump sum in event of failure to furnish goods or perform service. Each one is decided on the precedent of the *Sun Ass'n* case (supra)

[14] Wood v. Niagara Falls Co. (1903), 121 Fed. 818; Stephens v. Essex Park Com. (1906), 143 Fed. 844; Chapman Decorating Co. v. Mut. Ins. Co. (1906), 149 Fed. 189.

[15] Brooks v. City of Wichita (1902), 114 Fed. 297; United States v. Alcorn (1906), 145 Fed. 995; Turner v. City of Fremont, 159 Fed. 221, again in 170 Fed. 261; Blodget v. Live Stock Co., 164 Fed. 307.

with some such statement as that in *Brooks* v. *Wichita* (supra), "the case at bar falls directly within the doctrine of the supreme court" in the *Sun Ass'n* case.[16] All these cases are in their facts on a par with the *Bethlehem Steel Co.* v *U. S.* and are decided on the same principle, or rather by the same method; i. e., by considering the contract, the sum mentioned and the subject matter of the contract, and, with all these points before the court, determining whether the agreement is one by which independently of the stipulation the damages would be uncertain, or incapable, or very difficult of ascertainment, in which case the damages may be liquidated;[17] or whether, on the other hand, the sum agreed upon is one fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation according to the ordinary legal standard, and for any of which the stipulated sum is an excessive compensation, in which case it would be considered a penalty.[18]

In the *City of York* v *York's Rys. Co.*, (supra) a bond was given by the defendant "that the said bond (in the sum of $25,000) shall be forfeited to and collectible by the city as assessed and liquidated damages due and owing said city in the event of failure of the company to complete and operate its line of railway within the time stated." This was held to be liquidated damages. The defendant argued that this was a penalty under the canon which says that where an agreement contains several matters of different degrees of importance and yet the sum is payable for the breach of any, even the least, it is to be construed as a penalty. The court while not denying that the principle contended for had been recognized by the Pennsylvania court said there was nothing in it which forbade an express contractual stipulation that the whole sum named * * * shall be collectible as liquidated damages * * * provided the contemplated breach is of such a nature that the damages would be impossible or most difficult to ascertain. The court thus acknowledges the validity of both canons of interpretation but holds that the second applies and not the first.

[16] In the case of Brooks v. Wichita an agreement had been made by Brooks with the city that in the event of his failure to furnish 130 arc lights by April 1, he was to forfeit and pay to the city as liquidated damages and not as penalty the sum of $10,000. It might well have been argued in this case as it was in the Chicago House Wrecking case that if the contract had been fulfilled by April 1 in every respect except some small detail, it could hardly have been contemplated by the parties that the full amount of $10,000 should have been exacted.

The case of United States v. Alcorn (supra) arose on a proposal bond for carrying mail and although the actual damage had been proved to be $336 and paid to the Government, this did not prevent the United States from recovering the face of the bond less this sum.

[17] Cf. Strickland v. Williams [1899], 1 Q. B. 382.

[18] Cf. Kemble v. Farren, 6 Bing. 14.

The facts here are almost identical with those in the *Chicago House-Wrecking* case (supra) in which the sum named was held to be penalty, the court reaching this conclusion by holding that the first canon applied and not the second. In the *Cleveland Crane, etc., Co.* v. *Am. Pipe Co.* (supra) there was an agreement to pay $25 a day as liquidated damages for failure to deliver cranes by a certain date. The Alabama court held the agreement to be one for liquidated damages in accordance with the canon of interpretation cited in the York (Pa.) case, quoted above. The New York case of *Mosler Safe Co.* v *Maiden Lane Co.* (supra) providing for a specified sum to be paid for each day's delay in completing the contract, was held to be liquidated damages by reference to the same canon of interpretation.

These last three cases, recently decided by courts not immediately under the influence of the United States Supreme Court, seem to have been decided in ignorance of the decisions in the United States court or at least without any appreciation of their bearing upon the old canons of interpretation, and they are all decided just as they would have been if the new doctrine of liquidation by preascertainment had been applied to them.

We may perhaps conclude then that the new light thrown on the subject of liquidated damages, by the two cases cited at the beginning of this article, show us that in case we have to determine the meaning of an agreement in reference to the value of an undeterminable future event, the old canons may be used as of yore to aid in the interpretation of the contract, recognizing that we may have difficulty in each instance in determining whether our agreement is one to do a single thing of an indeterminable value or to do several things one or more of which has an easily calculable value. In all of these cases the fact that the sum has been predetermined by the parties is not the significant element in the decision but the fact that the agreement may be one or the other of those mentioned above. The old canons of interpretation are appealed to for aid in the actual determination of the question of penalty or liquidated damages whether we acknowledge the doctrine of "preascertainment" or not, and no more since than before the decisions by the United States Supreme Court and the House of Lords can the parties "preascertain" and fix upon what is actually a penalty under the guise of liquidated damages.

It is not to be concluded, however, that the *Sun Ass'n* case is not of great importance in assisting in the determination of similar cases, but its importance does not depend upon the fact that it lays down a new canon of interpretation nor abrogates any of the old ones.

Nor does its importance consist in the fact that there was in it a preascertainment of the sum by the agreement of the parties. It is important because such preagreement was in regard to a present fact and as such gives us the necessary conditions of estoppel. This can not be invoked in the other class of cases because they are all instances of agreement in regard to a future event, which is only a matter of opinion and not a statement of a present or past fact by the acknowledgment of which the other party has been persuaded to change his position.

It is true, too, that the discussion of these cases by the supreme courts has made evident a changed tendency of the courts in handling such cases, a change which is perhaps best expressed in the language of Mr. Justice Peckham in *Bethlehem Steel Co.* v. *U. S.*[19] "The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendencey was to construe the language as a penalty so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts have become more tolerant of such provisions, and have now become strongly inclined to allow parties * * * to carry out their own intentions * * * upon proof of the violation of the contract and without proof of the damage actually sustained."

It is true that this pronouncement by the United States Supreme Court of the tendency of the courts has been used by some of the lower Federal courts very much as though it were a binding rule of interpretation, notably in *Brooks* v. *City of Wichita*,[20] *Turner* v. *City of Fremont*,[21] *United States* v. *Alcorn*,[22] although it actually leaves us just where we were in handling cases of the type of these last mentioned; namely, those in which the courts are dealing with an undeterminable future event. It is only when we have before us the somewhat unusual state of facts presented in the *Sun Ass'n* case,[23] where the parties have agreed upon a present fact, that the peculiar doctrine of that case may be of assistance to us, and this peculiar doctrine is after all nothing more than the simple principle of estoppel by contract.

JOSEPH H. DRAKE.

UNIVERSITY OF MICHIGAN.

[19] 205 U. S. 119.
[20] 114 Fed. 297.
[21] 159 Fed. 221.
[22] 145 Fed. 995.
[23] The only other case in which a similar state of facts appears is Elpinstone v. Monkland Iron & Coal Co. (1886), 11 A. C. 332.