Compendium of Cases filed in Opposition to Paragraph 31 Motion

176 Cal.App.3d 245, 221 Cal.Rptr. 738
(Cite as: 176 Cal.App.3d 245)

BEKINS MOVING & STORAGE COMPANY, Plaintiff and Appellant,
v.
PRUDENTIAL INSURANCE COMPANY OF AMERICA et al., Defendants and Respondents.
No. B012854.

Court of Appeal, Second District, Division 4, California.
Dec 31, 1985.

SUMMARY

Plaintiff moving and storage company leased an office building under a ten-year lease that provided for three five-year renewal options. After making substantial improvements to the property, plaintiff neglected to timely notify defendant, a successor to plaintiff's original landlord, that plaintiff wished to exercise the option. After defendant refused to extend the original lease under the option, the lease was renegotiated, more than tripling the rent. Plaintiff filed an action for declaratory relief, seeking to enforce the original lease, with options, for restitution of the excess rent, and for damages for breach of contract. On opposing motions, the trial court entered summary judgment for defendant. (Superior Court of Los Angeles County, No. NCC12457G, Norman L. Epstein, Judge.)

The Court of Appeal affirmed, holding that plaintiff had failed to conform to the requirement of strict compliance with option contract notice provisions that arises from the fact that an option is nothing more than an offer, the timely acceptance of which is crucial to the formation of a contract binding the optioner. The court also held that the doctrine of substantial compliance had no bearing in the absence of a timely acceptance, that equitable relief was inappropriate where the failure to exercise the option was entirely due to plaintiff's inadvertance or neglect, and that statutory (Civ. Code, § 3275) relief from forfeiture did not apply to an unaccepted offer because no vested right was involved. (Opinion by Woods, P. J., with Arguelles, J., and Fields, J., [FN*] concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Landlord and Tenant § 28--Leases--Extensions, Renewals, Options, and Changes in Terms--Options to Renew--Strict Compliance With Terms--Notice of Acceptance.
An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. Since the optioner is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option. In order to exercise the right to renew a lease containing an option to renew, a tenant must apprise the lessor in unequivocal terms of his unqualified intention to exercise the option, within the time, in the manner, and on the terms stated in the lease. Accordingly, in an action for declaratory relief, restitution, and breach of contract brought by a lessee who failed to timely notify the lessor of the lessee's desire to exercise an option to renew the lease, the trial court properly granted summary judgment for the defendant lessor, where, although plaintiff had made substantial improvements to the property shortly before the expiration of the lease, plaintiff failed to give the timely written notice of exercise of the option to renew called for by the lease and the lessor had not, by conduct or otherwise, waived the notice requirement.
[Waiver or estoppel as to notice requirement for exercising option to renew or extend lease, note, 32 **A.L.R.4th** 452. See also **Cal.Jur.3d**, Landlord and Tenant, §§ 289-291; **Am.Jur.2d**, Landlord and

Tenant, §§ 1181-1189.]

(2) Landlord and Tenant § 28--Leases--Extensions, Renewals, Options, and Changes in Terms--Options to Renew--Equitable Relief--Lessor's Conduct.
Conduct by a lessee, alone, is insufficient to warrant equitable relief upon a failure by a lessee to timely exercise its option to renew a lease. There must be substantial evidence of conduct by the lessor upon which the lessee relied in failing to give notice or a showing that the lessor waived the requirement of written notice.

(3) Contracts § 3--Consent--Options--Substantial Compliance--Requirement of Contract.
Because an option is but an offer that expires by its own terms if it is not accepted within the time prescribed, and the doctrine of substantial compliance applies only when a binding contract exists, the doctrine will not avail one who has failed to exercise an option on time.

(4) Contracts § 3--Consent--Options--Time for Exercise of Option-- Extension.
The time within which an option to renew a contract must be exercised, ordinarily cannot be extended beyond that provided in the contract.

(5) Landlord and Tenant § 28--Leases--Options to Renew--Time for Exercise of Option--Equitable Relief--Optionee's Neglect.
Although a court may grant relief on traditional grounds for equitable intervention such as fraud, accident, or mistake, it may not grant equitable relief to extend an option period to renew a lease beyond that agreed to by the parties when the failure to timely exercise the option is due entirely to the inadvertence or neglect of the optionee, to which the optioner in no way contributed.

(6) Courts § 37--Decisions and Orders--Doctrine of Stare Decisis--Authority of Decisions of Foreign Courts.
Where a rule is clearly established by a decision of the courts of California, other California courts are not at liberty to overrule it in favor of a rule followed by decisions in other states.

(7) Forfeitures and Penalties § 5--Relief--Statute--When Applicable--Vested Right.
Pursuant to Civ. Code, § 3275, California courts afford relief from forfeiture in appropriate cases. In order for there to be a forfeiture, there must be some right or vested interest involved.

COUNSEL

Seyfarth, Shaw, Fairweather & Geraldson, Evans & Harter, Robert L. Ivey, Ellen Hodgson Brown, Hufstedler, Miller, Carlson & Beardsley and Otto M. Kaus for Plaintiff and Appellant.

Robert S. Manns, G. Richard Green and Carol R. Mitchell for Defendants and Respondents.

WOODS, P. J.

Bekins Moving & Storage Company (Bekins) appeals the summary judgment granted in favor of the Prudential Insurance Company of America (Prudential) and Property Management Systems, Inc. (PMS). Bekins contends that notwithstanding its failure to exercise its option to renew its lease in accordance with the terms of the lease agreement, it is entitled to equitable relief, based on the following grounds:

1. Bekins' actions in relation to the leased properties provided sufficient notice to Prudential of Bekins' intent to renew. Hence, Bekins was in substantial compliance with the requirements of the renewal option. ***248**

2. Where, as here, the delay was slight, the loss to lessor was small, and denial of relief would result in such hardship to lessee as to make it unconscionable to enforce literally the condition precedent to the lease, equity should intervene. (*F. B. Fountain Co. v. Stein* (1922) 97 Conn. 619 [118 A. 47, 27 A.L.R. 976].)

3. California law protects Bekins against a forfeiture.

We disagree and affirm.

In 1971, Bekins leased an office building on Flower Street from Prudential's predecessor in interest. The parties entered into a 10-year written lease agreement with options to renew. The initial term of the lease was to expire in April 1981. The monthly rental agreed upon was $4,950.

By subsequent amendment the parties agreed to extend the initial term of the lease to December 31, 1981. Bekins was also given the option to renew the lease for three 5-year periods, provided that it gave Prudential written notice of its intent to renew no less than six months prior to the expiration of each term of the lease.

On timely and proper exercise by Bekins of its option to renew, the monthly rental for the property was to remain at $4,950 subject only to an upward adjustment in proportion to the increase, if any, in the consumer price index.

Bekins also obtained a long-term lease for the building across the street from its offices on Flower Street. After that, Bekins operated the two buildings as one office complex and made substantial improvements in both buildings.

In 1977, the leased properties were purchased by Prudential and were thereafter managed by PMS.

In 1980, by petition to the city council, Bekins changed the name of the street leading to the leased properties to Bekins Way.

Between February and June 1981, there was an exchange of letters between Mr. Gallego, the legal counsel for Bekins, and Mr. Moore, a senior property manager for PMS, regarding the installation by Bekins of certain air conditioning equipment in the Flower Street property. The installation cost Bekins $61,000. ***249**

Under the lease agreement, Prudential would have the right to require Bekins to remove any improvements made by it on expiration of the lease, or leave them on the premises. During the course of correspondence regarding the air conditioning, Mr. Moore specifically reminded Mr. Gallego of this provision, stating: "All terms and conditions of Paragraph 6 of the lease covering the 777 Flower Street property shall apply to this installation."

Bekins failed to give written notice before June 30, 1981, of its intent to renew the Flower Street lease. PMS was aware of Bekins oversight as evidenced by Mr. Moore's letter to his superior. Bekins broached the matter of renewal of the lease for the first time, in September 1981. A meeting was held at Mr. Gallego's request, between Mr. Gallego and representatives of PMS, to discuss the Flower Street lease. At that meeting, Mr. Gallego acknowledged that Bekins had neglected to exercise its option to renew its lease in writing as required. Nevertheless, he stated that Bekins wanted Prudential to know that "Bekins of course intended to remain in the building through the option term."

Mr. Moore immediately informed Mr. Gallego that the lease would expire on December 31, 1981, and for continued occupancy of the premises by Bekins beyond that date, Prudential would require a new agreement.

A couple of days later, Mr. Gallego wrote to Mr. Moore purporting to exercise Bekins' option to renew its lease. Mr. Gallego stated in his letter dated October 1, 1981, that the previous exchange of correspondence regarding the air conditioning constituted sufficient notice of Bekins' intention to continue to occupy the premises under the original terms.

In his reply, Mr. Moore reiterated that Bekins had not exercised its option to renew its lease. He elaborated:

"(1) ... in order for The Bekins Company to have exercised said Option to Renew, it was required that said exercise of option be in writing, be delivered personally or by certified or registered mail, and be delivered at least six (6) months prior to

December 31, 1981. *None of these criteria were met.*

"(2) At no time prior to our conversations of the past two weeks did I, or any other representative of Property Management Systems, know of Bekins 'desire to remain on the premises under the original terms of the lease'. Furthermore, it was specifically communicated to you in our recent meeting ***250** that Bekins had failed to exercise the subject Option to Renew and that the lease covering the referenced property will expire on December 31, 1981.

"(3) The installation of air conditioning equipment on the referenced property has nothing to do with the subject Option to Renew. None of my conversations with you concerning the air conditioning equipment or the letters you refer to in your letter of October 1, 1981 ever dealt with or referred to Bekins exercise of the subject Option to Renew.

"If you are interested in discussing a new lease on the subject property, we will be happy to sit down and discuss the situation with your representatives. However, I again reiterate the facts -the Bekins Company lease on the referenced property will expire on December 31, 1981." (Italics in original.)

In November 1981, Bekins and Prudential entered into a new five-year lease agreement regarding the Flower Street property, which increased the rent from $4,950 per month to $18,900 per month. The initial term of the lease ran from January 1982 to December 31, 1986, with Bekins having the option to renew for two additional five-year periods. Under this agreement, the rent was subject to further increases, at the end of each five-year period.

Bekins filed a complaint against Prudential and PMS in which it sought a judgment declaring the 1971 lease, together with its options, to be in full force and effect, and declaring the new lease executed in November 1981 to be void. Bekins also sought restitution of claimed excessive rent paid by it, as well as damages for breach of contract.

Both sides moved for summary judgment. After a hearing, the trial court granted summary judgment to Prudential and PMS, and denied the motion for summary judgment by Bekins.

This appeal followed.

I

Bekins' plea for equitable relief finds no support in California case law.

(1a)"An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. Since the optioner is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option." (***251***Simons v. Young* (1979) 93 Cal.App.3d 170, 182 [155 Cal.Rptr. 460], quoting *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp.* (1953) 117 Cal.App.2d 221, 229 [255 P.2d 473].)

In order to avail himself of the right to renew a lease as provided for by a lease option, a tenant must apprise the lessor in unequivocal terms of his unqualified intention to exercise his option, within the time, in the manner and on the terms stated in the lease. (42 Cal.Jur.3d, Landlord and Tenant, § 291, p. 328; *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp., supra.*, 117 Cal.App.2d at pp. 227-228 .)

Bekins concedes that it failed to timely exercise its option on the Flower Street building. Bekins claims, however, that its actions in relation to the leased properties constituted actual notice to Prudential of its intent to renew, and that there was substantial compliance with the requirements of the renewal option.

(2)Bekins contends that the substantial improvements made by it to the two properties just before the option date was notice to Prudential of its intent. Conduct by a lessee, alone, is insufficient to

warrant equitable relief upon failure by lessee to timely exercise its option to renew a lease. There has to be substantial evidence of conduct by the lessor upon which lessee relied in failing to give notice. There is absolutely no showing in the instant case that Prudential, by its conduct, waived the requirement of written notice. (*Simons v. Young, supra.*, 93 Cal.App.3d at p. 179.)

(3)Bekins' reliance on the doctrine of substantial compliance is also futile. The doctrine of substantial performance comes into play only when there exists a binding contract. An option is but an offer which expires by its own terms if it is not accepted within the time prescribed. (*Rosenaur v. Pacelli* (1959) 174 Cal.App.2d 673, 676-677 [345 P.2d 102].)

Consequently, there can be no question of substantial compliance with the terms of a contract that never came into existence.

II

Bekins asks this court to be guided by cases decided in other states which have granted equitable relief. Primarily it relies on *F. B. Fountain Co. v. Stein, supra.*, 118 A. 47, wherein the court said, in granting equitable relief, that "in cases of mere neglect in fulfilling a condition precedent of a lease, ... equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the ***252** tenant as to make it unconscionable to enforce literally the condition precedent of the lease." (*Id.*, at p. 50.) The *Fountain* court acknowledged that under the better rule equity would never relieve in cases of willful or gross negligence in failing to fulfill a condition precedent of a lease. (*Ibid.*)

Bekins asserts that all the prerequisites stated in *Fountain* for granting equitable relief are present in the instant case. Even conceding arguendo the accuracy of this claim, FN1 we are not persuaded by *Fountain* or the line of cases that have followed it. FN2 We prefer the reasoning reflected in those cases which hold that equitable relief is not available, where failure to renew a lease within the time prescribed was due solely to lessee's negligence. (See Annot. (1984) 27 A.L.R.4th 278-280.)

FN1 The notice of intent to renew was late by three months in the instant case in contrast to the notice that was late by four days in *Fountain*. Also, unlike in *Fountain*, Prudential never sought a surrender of the leased property on expiry of the term.

FN2 For a discussion of cases granting such equitable relief see Annotation (1984) 27 A.L.R.4th 277-278, section 4a.

We also disagree with Bekins' assertion that with the exception of *Simons v. Young, supra.*, California cases follow the *Fountain* doctrine. FN3 *Streicher v. Heimburge* (1928) 205 Cal. 675 [272 P. 290], is cited as an example. In *Streicher*, the lease option had been properly exercised but the rent for the renewal period was to be agreed upon by the parties. The issue before the court was whether reaching an agreement as to the rent was a condition precedent to the effectiveness of the option renewal. The court found it was not and stated: "We may concede also that the right of renewal depended upon the giving of notice to the respondent within the time and in the manner stated in said paragraph, but here again a situation might be easily supposed where a court of equity would be warranted in decreeing the vesting of the new term notwithstanding the failure of the lessees to literally live up to said requirements. (See *Fountain Co. v. Stein*, 97 Conn. 619 [118 Atl. 47, 27 A.L.R., p. 976 and note].)" (*Streicher v. Heimburge, supra.*, at p. 681.) The statement quoted is dicta, and not entitled to precedential value. (*Simons v. Young, supra.*, 93 Cal.App.3d at p. 188; *People v. Gregg* (1970) 5 Cal.App.3d 502, 506 [85 Cal.Rptr. 273].)

FN3 Bekins also states that even prior to the *Fountain* decision, the California Supreme Court in *Hall v. Center* (1870) 40

> Cal. 63 "found an option contract to be an appropriate occasion for equitable relief." However, that case merely stands for the now accepted proposition that lack of "mutuality" does not make it inequitable to enforce a validly exercised option.

(4)In a later and more direct statement, albeit also in dicta, the California Supreme Court stated that the time within which an option must be exercised cannot be extended beyond that provided in the contract. (***253***Holiday Inns of America v. Knight* (1969) 70 Cal.2d 327, 330 [74 Cal.Rptr. 722, 450 P.2d 42].)

Simons v. Young, supra., 93 Cal.App.3d 170, followed the precept that a lessee must exercise his option within the time, in the manner and upon the terms stated in the lease. (5)"[W]hile a court may grant relief on traditional grounds for equitable intervention such as fraud, accident or mistake, it may not grant equitable relief to extend an option period beyond that agreed to by the parties when, as here, the failure to timely exercise the option is due entirely to the inadvertence or neglect of the optionee to which the optioner in no way contributed." (*Id.*, at p. 182.) Far from being an "aberrant opinion" as Bekins claims, *Simons* correctly reflects the law and policy of California regarding the granting of equitable relief upon lessee's failure to exercise its lease option.

(6)Where, as here, "a rule of law is clearly established by a decision of the courts of California we are not at liberty to overrule it in favor of one followed in decisions of other states." [FN4] (*Estate of Perez* (1950) 98 Cal.App.2d 121, 123 [219 P.2d 35]; *Schneider v. Schneider* (1947) 82 Cal.App.2d 860, 862 [187 P.2d 459].)

> FN4 *American Houses v. Schneider* (3rd Cir. 1954) 211 F.2d 881 [44 A.L.R.2d 1352]; *Wharf Restaurant, Inc. v. Port of Seattle* (1979) 24 Wash.App. 601 [605 P.2d 334]; *J.N.A. Rlty. Corp. v. Cross Bay Chelsea, Inc.* (1977) 42 N.Y.2d 392 [397 N.Y.S.2d 958, 366 N.E.2d 1313]; *Geo. W. Millar & Co. v. Wolf Sales & Service Corp* . (1971) 65 Misc.2d 585 [318 N.Y.S.2d 24] ; *Sosanie v. Pernetti Holding Corp.* (1971) 115 N.J.Super. 409 [279 A.2d 904]; *Deane v. Mitchell* (1950) 312 Ky. 389 [227 S.W.2d 893]; *Application of Topp* (1948) 81 N.Y.S.2d 344; *Galvin v. Simons* (1942) 128 Conn. 616 [25 A.2d 64]; *Xanthakey v. Hayes* (1928) 107 Conn. 459 [140 A. 808].

III

(7)Bekins correctly states that pursuant to Civil Code section 3275, [FN5] California courts afford relief from forfeiture in appropriate cases. However, that policy has no application to the facts before us.

> FN5 Civil Code section 3275 provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

In order for there to be a "forfeiture" there must be some right or vested interest involved. (1b)An option is merely an offer.

Barkis v. Scott (1949) 34 Cal.2d 116 [208 P.2d 367], and *Freedman v. The Rector* (1951) 37 Cal.2d 16 [230 P.2d 629, 31 A.L.R.2d 1], relied ***254** upon by Bekins for the proposition that California courts have afforded relief from forfeiture, are entirely distinguishable. Those cases do not deal with options but with contracts to purchase property.

Nor does *Title Insurance & Guaranty Co. v. Hart* (9th Cir. 1947) 160 F.2d 961, deal with failure to timely exercise an option to renew a lease. The court in *Title Insurance* specifically found the lessee to have exercised his option to renew the lease "well within the time [prescribed]" (at p. 966) and

therefore held that minor breaches by a tenant who had made large investments in the property, should be overlooked. That ruling was followed in *Kaliterna v. Wright* (1949) 94 Cal.App.2d 926, 936 [212 P.2d 32], in which relief against forfeiture was afforded.

Bekins has failed to demonstrate entitlement to relief on any of the grounds asserted. No triable issue of material fact remains unresolved. The granting of summary judgment was entirely proper. (Code Civ. Proc., § 437c, subd. (c);[FN6] *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717 [150 Cal.Rptr. 408].)

> FN6 Code of Civil Procedure section 437c, subdivision (c), provides in relevant part: "The motion [for summary judgment] shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The judgment is affirmed.

Arguelles, J., and Fields, J.,[FN*] concurred. ***255**

> FN* Assigned by the Chairperson of the Judicial Council.

Cal.App.2.Dist.
Bekins Moving & Storage Co. v. Prudential Ins. Co.
176 Cal.App.3d 245, 221 Cal.Rptr. 738

END OF DOCUMENT

214 Cal.App.2d 551, 29 Cal.Rptr. 760
(Cite as: 214 Cal.App.2d 551)

C

C. T. (CARL) BENSON, Petitioner,
v.
THE SUPERIOR COURT OF NAPA COUNTY, Respondent; JULIUS CAIOCCA, JR., Real Party in Interest.
Civ. No. 21127.

District Court of Appeal, First District, Division 1, California.
Mar. 28, 1963.

HEADNOTES

(1) Statutes § 114--Construction--Intent of Legislature.
In construing a statute, the courts should ascertain the Legislature's intent so as to effectuate the purpose of the law.
See **Cal.Jur.2d,** Statutes, §§ 126-130; **Am.Jur.,** Statutes (1st ed § 223).

(2) Statutes § 114--Construction--Intent of Legislature.
In determining the Legislature's intent as expressed in a statute, courts will consider the purpose sought to be achieved and the evils to be eliminated.

(3) Statutes § 125--Construction--Language of Statute.
Courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them.

(4) Words and Phrases--"Deliver."
In its philological definition, the word "deliver" denotes the physical act of transferring possession and implies a change of custody; the word "deliver" is not restricted in its definition to manual tradition to the transferee, but may include any physical act by which the transferor effects a change of possession from himself to the transferee. Accordingly, the word has within its connotation a transfer of possession accomplished by leaving the thing with a third person or at the transferee's residence or place of business.

(5) Process § 24--Service--Mode of Service.
Because service of process is deemed jurisdictional, it must meet the requirements of manual tradition within the meaning of the common-law rule of personal delivery, unless the Legislature has specifically provided for some form of substituted service.
See **Cal.Jur.2d,** Process, Notice, and Papers, § 39; **Am.Jur.,** Process (1st ed § 46).

(6) Elections § 105--Contests--List of Illegal Votes.
The purpose of Elec. Code, § 20052, requiring that list of illegal votes be given to defendant in an election contest before testimony shall be received of any illegal votes, is to permit defendant in an election contest to examine the list and prepare his defense.
See **Cal.Jur.2d,** Elections, § 189.

(7) Elections § 105--Contests--List of Illegal Votes.
In an election contest where defendant's only objection to testimony of any illegal votes was that the list of illegal votes was not personally served on him within the statutory time, and where he did not deny receipt of the list or urge that he did not have sufficient time to prepare his defense, the trial court should have exercised its discretion to determine whether the failure, if any, to deliver the list within the statutory time prevented defendant from preparing his defense. Had defendant objected that he did not have time to prepare his defense, the court was specifically authorized under Elec. Code, § 20083, to continue the trial.

(8) Elections § 105--Contests--List of Illegal Votes.
In an election contest, the discretion of the court to determine whether the failure to deliver to defendant the list of illegal votes within the statutory time prevented defendant from preparing his defense is dictated by the paramount public policy that is inherent in election contests and that calls for a determination of election contests on their merits and for a construction of election statutes that will not defeat that end unless their language imperatively commands it.

(9) Elections § 92--Contests.
Proceedings to contest an election are not of an ordinary adversary character such as is maintained between individuals asserting personal rights or interests; the statute does not confer the right of contest on the assumption that the personal rights of contending individuals to the office is of particular public moment.

(10) Elections § 96--Contests--Statutory Provisions.
The purpose of the election statute is to invite inquiry into the conduct of popular elections, the aim being to secure the fair expression of the popular will in the selection of public officers.

(11) Elections § 102--Contests--Statement of Contest.
When a statement is presented by an elector to the tribunal whose duty it is to investigate its merits, the statement should not be received in a spirit of captiousness or put aside on mere technical objections designed to defeat the very search after truth that the statute intended to invite; the public interests imperatively require that the ultimate determination of an election contest should, where possible, reach the right of the case.

(12) Elections § 105--Contests--List of Illegal Votes.
In an election contest, a sufficient delivery to defendant three days before trial of the list of illegal votes was made where the list, three days before the trial, was attached to the door of defendant's residence; Elec. Code, § 20052, concerning delivery of the list makes no reference to "personal service" and does not require that the list be served "personally" or be "personally served." The statute merely says that the list shall be delivered.

(13) Elections § 105--Contests--List of Illegal Votes.
Since the purpose of the list of illegal votes to be furnished to defendant in an election contest is to acquaint him with the claimed illegal votes so that he can prepare his defense, any method of transmission that is calculated to put the list in his possession ought to suffice.

(14) Elections § 105--Contests--List of Illegal Votes.
In an election contest, where delivery of the list of illegal votes to defendant is not effected, he has ample time to object, and, on a showing that he did not receive the list, he is entitled to invoke the penalty prescribed by Elec. Code, § 20052, prohibiting testimony concerning illegal votes.

(15) Elections § 96--Contests--Statutory Provisions.
The efficacy of leaving papers incident to an election contest at defendant's residence is recognized by the Legislature in its provision for the service of the citation on defendant by this method when he cannot be found (Elec. Code, § 20081).

(16) Elections § 105--Contests--List of Illegal Votes.
Though Code Civ. Proc., § 1011, providing for service by delivery on a party or his attorney, is not specifically applicable to Elec. Code, § 20052, the methods provided in Code Civ. Proc., § 1011, concerning delivery to an attorney's office and delivery to the residence of a party are applicable to delivery of the list of illegal votes under Elec. Code, § 20052.

(17) Elections § 105--Contests--List of Illegal Votes.
In an election contest, the voluntary obtaining of a copy of the list of illegal votes by defendant's attorney did not constitute a delivery, though it may have amounted to notice of the existence of the list and its contents to defendant so as to make it a circumstance for the court's consideration in the exercise of its discretion to determine whether the failure to deliver the list within the statutory time prevented defendant from preparing his defense.

(18) Elections § 105--Contests--List of Illegal Votes.
Elec. Code, § 54, providing that where personal service by manual tradition cannot be made, the election contestant is restricted to making personal ser-

vice by serving the Secretary of State or the county clerk on the obtaining of an order of court directing such service, applies only to process and does not concern the service of the list of illegal votes provided for in Elec. Code, § 20052, once jurisdiction has been obtained.

(19) Elections § 105--Contests--List of Illegal Votes.
Compliance with Elec. Code, § 20052, providing that testimony shall not be received of any illegal votes unless the contestant delivers to defendant, at least three days before trial, a written list of illegal votes, may be waived.

(20) Elections § 105--Contests--List of Illegal Votes.
In an election contest, objection to testimony of any illegal votes for failure to deliver to defendant within the statutory time a list of illegal votes (Elec. Code, § 20052) must be made before testimony is received as to any illegal votes, or the objection is waived. Defendant waived such objection where, though an objection was interposed, it was not timely made in that testimony was previously adduced as to maps and registration affidavits presented as a foundation for the proof of illegal voting.

SUMMARY

PROCEEDING in mandamus to compel the Superior Court of Napa County to admit relevant testimony on the issue of 189 claimed illegal votes in an election contest action. Charles J. McGoldrick, Judge.[FN*] Peremptory writ granted.

FN* Assigned by Chairman of Judicial Council.

COUNSEL

Timothy J. Crowley for Petitioner.

No appearance for Respondents.

Coombs, Dunlap & Dunlap and Frank L. Dunlap for Real Party in Interest.

MOLINARI, J.

This is a petition for a writ of mandate to compel the Superior Court of Napa County to admit relevant testimony on the issue of 189 claimed illegal votes in an election contest action.

Question Presented

Did the trial court properly sustain an objection to the admission of testimony of the claimed illegal votes on the ground that the written list of the number of illegal votes was not delivered to the defendant as provided in section 20052 of the Elections Code?[FN1]

FN1 Said section provides: "When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were given to the defendant, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office. Testimony shall not be received of any illegal votes, unless the contestant delivers to the defendant, at least three days before the trial, a written list of the number of illegal votes, and by whom given, which he intends to prove. No testimony may be received of any illegal votes except those which are specified in the list."

All references hereafter, unless otherwise indicated, shall be to the Elections Code.

The Record

The petitioner, C. T. (Carl) Benson, hereinafter called the ***555** contestant, and the real party in interest, Julius Caiocca, Jr., hereinafter called the defendant, were opposing candidates for the office of Supervisor of the Third Supervisorial District, County of Napa, State of California, the election for

said office taking place on November 6, 1962. The official canvass declaring the results of said election was made on November 20, 1962. It disclosed that the defendant received 11 more votes than the contestant. On December 18, 1962 the contestant filed a statement with the county clerk pursuant to section 20050 contesting the election and demanding a recount of the votes cast. The particular grounds therein stated consisted of allegations that numerous illegal votes were cast for the defendant. On the same day on which the statement was filed, the defendant consulted an attorney, Frank L. Dunlap, concerning the latter's representation of the defendant in the election contest. An order setting the hearing of the statement for January 15, 1963, was made by the presiding judge of the superior court. A citation was thereupon issued by the clerk directing the defendant to appear at the time and place specified in the order. The citation and a copy of the said statement and order were personally served on the defendant on January 8, 1963. On the next day, January 9th, at about 2 p.m., the defendant went to Attorney Dunlap's office where he signed a list of 18 claimed illegal votes cast for the contestant. Thereafter, and on the same day, the defendant left the County of Napa and went to Fort Bragg in Mendocino County.

The defendant stayed at the Driftwood Motel in Fort Bragg on the night of January 9th, moving the next day to the Bay Cities Motel in the same city. On January 11 the defendant departed Fort Bragg and went to Ignacio in Marin County where he spent the night at Rickey's Motel. The 12th of January was spent with friends in Sonoma County. The defendant returned to his residence in the City of Napa in the early morning hours of Sunday, January 13th.

The contestant had, in the meantime, prepared a list of 189 claimed illegal votes and delivered the same to the constable for service upon the defendant. The constable was unable to locate the defendant either at his office or his residence, and was told by someone at the defendant's office that the defendant was out of town and would not return until Monday, January 14th. On Friday, January 11th, the constable attached a copy of the said list on the door of the defendant's residence and on the same day filed with the county clerk his *556 return of service, reciting the foregoing data with reference to service and the defendant's absence, with the original of said list. On the same day (January 11th), Attorney Dunlap called at the county clerk's office and obtained a photostatic copy of the contestant's said list of claimed illegal votes. It also appears that on January 11th, a copy of the subject list was mailed to the defendant at his residence by registered mail.

On Saturday, January 12, the contestant was personally served with the defendant's list of claimed illegal votes. (No attorney's name appeared or was designated on said list.) The defendant testified at the hearing that when he arrived at his residence on January 13th there was no such list attached to his door or at his residence, but that on the afternoon of that day his attorney, Dunlap, called at his residence and showed him the photostatic list Dunlap had obtained from the county clerk. On Monday, January 14th, the list which had been forwarded by registered mail was tendered to the defendant, but he refused to accept it because there was a claim of 42 cents postage due thereon.

On Tuesday, January 15th, the trial of the election contest commenced at 10 a.m. in the superior court, at which time Attorney Dunlap appeared of record for the first time. The contestant called the county clerk as his first witness. Under direct examination the said clerk identified certain official documents consisting of the supervisorial district map, 3 precinct maps, a group of registration books, a group of rosters of voters and 29 original affidavits of 29 individual voters. The maps and affidavits were admitted into evidence without objection. The attorney for the contestant thereupon asked leave of court to interrupt the testimony of the county clerk in order to call "some of these witnesses out of order." Counsel for the defendant stated that he had

no objection "to that," but that he wanted to ask the county clerk "a few questions, however, before they are examined." Defendant's counsel thereupon cross-examined the clerk concerning one of the precinct maps which had been admitted into evidence. He was interrogated concerning the setting up and creation of the precincts, the accuracy of the maps, certain changes in precinct boundaries, and the effect of voters moving from one precinct to another. The county clerk was also questioned on redirect examination concerning some of these matters, during which a map of all the supervisorial districts of Napa County was identified and admitted *557 into evidence on behalf of the contestant without objection. Counsel for the contestant then called an Edward J. Kewell to the stand. [FN2] An objection was thereupon interposed by the defendant to the taking of the testimony of said witness on the ground that section 20052 had not been complied with in that a list of the claimed illegal votes had not been delivered to the defendant at least three days before the trial. The objection was sustained. Leave was granted to the contestant, however, to establish such delivery. The contestant thereupon called the defendant as a witness. The matters hereinabove narrated concerning the occurrences prior to the trial (other than those appertaining to procedural matters and those contained in the constable's return, and such as were stipulated to) were developed during the examination of the defendant.

FN2 The original affidavit of registration of a voter designated as "Edward J. Kewell" was one of the 29 affidavits and had previously been admitted into evidence as "Exhibit No. 12."

Upon the conclusion of the testimony of the defendant and arguments by respective counsel, the trial court stated that section 20052 had not been complied with and accordingly sustained the defendant's objection to the reception of testimony concerning any illegal votes. In announcing its ruling on the objection the court below expressed the opinion that because section 20052 contains no provision for substituted service the delivery contemplated by the section was that accomplished by personal service. The trial court was also of the opinion that an alternate mode of service was provided for by section 54, but that the contestant had failed to avail himself of its provisions. [FN3] *558

FN3 Section 54 reads as follows: "Whenever any candidate files a declaration of candidacy, nomination paper, affidavit of acceptance of sponsor's declaration, acceptance of nomination or any other paper evidencing an intention to be a candidate for any public office at any election in this State with either the Secretary of State or a county clerk, he shall by such filing irrevocably appoint the Secretary of State or the county clerk with whom the filing is made and their successors in office his attorneys upon whom all process in any action or proceeding against him arising out of or in connection with any matters concerning his candidacy or the election laws may be served with the same effect as if the candidate had been lawfully served with process. The appointment shall continue until the day of election.

"If in any action or proceeding arising out of or in connection with any matters concerning his candidacy or the election laws it *it* [*sic*] shown by affidavit to the satisfaction of a court or judge that personal service of process against the candidate cannot be made with the exercise of due diligence, the court or judge may make an order that the service be made upon the candidate by delivering by hand to the Secretary of State or the county clerk appointed as his attorney for service of process, or to any person employed in his office in the capacity of assistant or deputy, one copy of the process for the defendant to be served, together with a copy of the order authorizing such service. Service in this manner

> constitutes personal service upon the candidate. The Secretary of State and the county clerks of all counties shall keep a record of all process served upon them under this section, and shall record therein the time of service and their action with reference thereto.
>
> "Upon the receipt of any such service of process the Secretary of State or the county clerk shall immediately give notice of the service of the process to the candidate by forwarding the copy of the process to the candidate at the address shown on his declaration, nomination paper, affidavit, acceptance or other evidence of intention to be a candidate filed with that officer, by special delivery registered mail with request for return receipt."

Elections Code Section 20052

The first inquiry in the present case is directed to the meaning of the language "unless the contestant delivers to the defendant, at least three days before the trial, a written list of the number of illegal votes. ..." The interpretation of this phraseology of section 20052 has not heretofore been before the appellate courts of this state. (1) We are therefore called upon to ascertain the intent of the Legislature pursuant to the fundamental rule of statutory construction that the court should ascertain such intent so as to effectuate the purpose of the law. (*Select Base Materials, Inc. v. Board of Equalization,* 51 Cal.2d 640, 645 [335 P.2d 672].) (2) In arriving at such intent we will consider the purpose sought to be achieved and the evils to be eliminated. (*Lesem v. Board of Retirement,* 183 Cal.App.2d 289, 298 [6 Cal.Rptr. 608]; *Hidden Valley Municipal Water Dist. v. Calleguas Municipal Water Dist.,* 197 Cal.App.2d 411, 419 [17 Cal.Rptr. 416].) (3) It is also a primary rule of construction that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. (*Chavez v. Sargent,* 52 Cal.2d 162, 203 [339 P.2d 801].)

The precise question before us is the meaning of the word "deliver." Its dictionary definition, in the sense used in the subject statute, is "give, transfer: yield possession or control of: make or hand over: make delivery of." (Webster's New Internat. Dict. (3d ed.).) (4) In its philological definition the word "deliver" denotes the physical act of transferring possession and implies a change of custody. It is apparent, therefore, that the word "deliver" is not restricted in its definition to manual tradition to the transferee, but that it may include any physical act by which the transferor effects a change of possession from himself to the transferee. Accordingly, it has within its connotation a transfer of possession ***559** accomplished by leaving the thing with a third person or at the transferee's residence or place of business. We are thus confronted with the inquiry as to whether the Legislature intended to use the word "deliver" in its broad philological meaning, or whether it intended manual tradition in the sense of the common law rule of personal delivery, or whether it intended "personal service," other than by manual tradition as judicially defined by the courts of this state.

The court below equated the delivery of the list in question with the delivery of process, which in our state has been held to connote manual tradition to the person to be served in the sense of the " 'common law rule of personal delivery'. ..." (See *Sternbeck v. Buck,* 148 Cal.App.2d 829, 833 [307 P.2d 970].) It should be noted, however, that our courts have recognized a legislative differentiation between the formality of delivery in making service of process and the delivery of notices and papers other than process. (*Hunstock v. Estate Development Corp.,* 22 Cal.2d 205, 211 [138 P.2d 1, 148 A.L.R. 968].) (5) A careful reading of the cases indicates that because the service of process is deemed jurisdictional it must meet the requirements of manual tradition within the meaning of the common law rule of personal delivery, unless the Legislature has specifically provided for some form of

substituted service. (*Hunstock v. Estate Development Corp., supra,* p. 211; *Sternbeck v. Buck, supra,* p. 833; *Batte v. Bandy,* 165 Cal.App.2d 527, 533-536 [332 P.2d 439]; Code Civ. Proc., §§ 411-413, Corp. Code, §§ 3301-3306, 6500-6504.) Accordingly, the words "by delivering" as used in Code of Civil Procedure section 411 as used in relation to the service of process have been interpreted to mean the actual delivery of the process to the defendant in person or, in cases of corporations, to the person designated for that purpose in person. (*Holiness Church v. Metropolitan Church Assn.,* 12 Cal.App. 445 [107 P. 633]; *Hunstock v. Estate Development Corp., supra,* p. 209; *Sternbeck v. Buck, supra,* p. 833; *Batte v. Bandy, supra,* pp. 533-536.) It should be noted here, particularly, that in the case of the service of the citation provided for in election contests, pursuant to which the court acquires jurisdiction of the defendant, the Legislature has seen fit to provide for a form of constructive service where the defendant cannot be found, by providing for the leaving of a copy at the house where he last resided. FN4 The constitutionality of ***560** this form of constructive service has been upheld. (*Chatham v. Mansfield,* 1 Cal.App. 298, 301-302 [82 P. 343]; *Conlan v. Superior Court,* 12 Cal.App. 420, 421 [107 P. 577].)

> FN4 Section 20081-Elections Code: "The clerk shall thereupon issue a citation for the defendant to appear at the time and place specified in the order, which citation shall be delivered to the sheriff and served upon the party at least five days before the time so specified, either: (a) Personally, or (b) If the party cannot be found, by leaving a copy at the house where he last resided."

(6) In the case at bench we are not concerned with service of process, but with the service of a paper after service of process was made, and jurisdiction of the proceeding had been acquired. The list of voters which is the subject of this action is, in our opinion, analogous to the "bill of particulars" provided for in an action on an account. (Code Civ. Proc., § 454.) It is worthy of note that the language of section 454 of the Code of Civil Procedure pertaining to a bill of particulars is similar to that used in section 20052. FN5 A comparison of the two statutes indicates a similarity of purpose which is aptly stated in *McCarthy v. Mt. Tecarte L. & W. Co.,* 110 Cal. 687 [43 P. 391]: "[I]t [speaking of section 454] is designed to protect the adverse party from embarrassment upon the trial, by enabling him to demand and obtain in advance a detailed statement of the items charged against him. If the demand is not complied with, then, for the refusal or gross neglect, the prescribed penalty may be exacted. If the demandant receives the copy long enough before the trial to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness." (P. 692.) In section 20052 the demand is implicit in the statute itself. The purpose of section 20052 is plain. Its object is to give notice to the contestee of the number of illegal votes, and by whom given, upon which the contestant predicates his contest, long enough before trial to permit the contestee to examine the list and prepare his defense. (See *Freshour v. Howard,* 142 Cal. 501, 504 [77 P. 1101].)

> FN5 The pertinent portion of section 454 reads as follows: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must *deliver* to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof." (Italics added.)

In *McCarthy* the court held that service of the bill of particulars on the sixth day where the statute then required service within five days was sufficient under the circumstances, and was such as to warrant the court, in the exercise of its discretion, in not precluding the plaintiff from giving evidence of the account. In ***561***Silva v. Bair,* 141 Cal. 599 [75 P. 162], another case involving a bill of particulars, we find this language: "No objection was made at, or before, the trial that it was too general

or defective. The only objection was, that it was not delivered within the statutory time. This, however, did not give the defendant an absolute right to have the evidence offered rejected at the trial. It was within the discretion of the court to determine whether, under the circumstances, the penalty of the statute should be enforced, and the evidence excluded." (P. 602.) (See also *Cromer v. Strieby,* 54 Cal.App.2d 405, 409-410 [128 P.2d 916]; *St. John v. Consolidated Construction Co.,* 182 Cal. 25, 28 [189 P. 276].) We see no reason why the rationale of *McCarthy* and *Silva* would not be applicable to section 20052. (7) In the instant case the defendant's only objection is that the list was not personally served upon him within the statutory time. He does not deny receipt of the list, nor does he urge that he did not have sufficient time to study it or to prepare his defense. Had he made such an objection the trial court was specifically authorized under the provisions of section 20083 to continue the trial. FN6 This latter statute has been construed to permit a continuance even where there has been a failure to serve the citation. (*O'Dowd v. Superior Court,* 158 Cal. 537 [111 P. 751]; *Hagerty v. Conlan,* 15 Cal.App. 643 [115 P. 762].) In the present case the lower court did not presume to exercise any discretion, but considered that the failure to personally serve the list at least three days before the trial made it mandatory upon the court to preclude the offered testimony.

> FN6 Section 20083: "The court shall meet at the time and place designated, to determine the contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until the trial is ended, and may also continue the trial before its commencement for any time not exceeding 20 days for good cause shown by any party upon affidavit, at the costs of the party applying for the continuance."

We are satisfied, under the principles hereinabove alluded to, that the trial court should have exercised its discretion in determining whether the failure to deliver the list within the statutory time (if in fact there was such a failure) prevented the defendant from preparing his defense. (8) This discretion is not only suggested by the analogies of the law applicable to "bill of particulars" cases, but it is dictated by the paramount public policy which is inherent in election contests. That policy calls for a determination of election contests on their merits, and for a construction of the election statutes ***562** which will not defeat that end, "unless their language imperatively commands it." (*O'Dowd v. Superior Court, supra,* p. 542.) (9) The spirit and purpose of the statutes applicable to election contests is stated thusly in *O'Dowd*: "A determination on the merits is what the statute mainly has in view. The proceedings are not of an ordinary adversary character such as is maintained between individuals asserting personal rights or interests The statute does not confer the right of contest upon the assumption that the personal rights of contending individuals to the office is of particular public moment. ... (10) As said in *Minor v. Kidder,* 43 Cal. 236: 'It is the wholesome purpose of the statute to invite inquiry into the conduct of popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under which we live. With this view it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. ... (11) When such a statement is presented by an elector to the tribunal whose duty it is to investigate its merits, it should not be received in a spirit of captiousness, nor put aside upon mere technical objections designed to defeat the very search after truth which the statute intended to invite. ... The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case." ' (Pp. 541- 542.)

(12) We are convinced, moreover, that there was, in the instant case, a sufficient delivery of the list three days before the trial. This delivery consisted

of the attachment of the list to the door of the defendant's residence on Friday, January 11th. The subject statute makes no reference to "personal service" or that the list be served "personally" or be "personally served." It merely says that it shall be delivered. (13) As we have pointed out above, the purpose of the list is to acquaint the contestee of the claimed illegal votes so that he can prepare his defense. Any method of transmission to him which is calculated to put the list in his possession ought to suffice. (14) If the delivery is not effected he has ample time to object; and upon a showing that he did not receive it, he is entitled to invoke the penalty prescribed by the statute. (15) The efficacy of leaving papers incident to an election contest at the residence of the defendant has been recognized by the Legislature in its provision for ***563** the service of the citation upon the defendant by this method when he cannot be found. (§ 20081.) If such service is adequate to acquire jurisdiction of the defendant in the contest, we can see no valid reason why it should not be deemed a sufficient delivery of the list in question after such jurisdiction has been obtained. In upholding the constitutionality of Code of Civil Procedure section 1119 (now Elections Code section 20081) in a case involving the service of the citation in this manner, the appellate court stated: "It is claimed that such provision for constructive service is unconstitutional, and that defendant could not be brought into court except by personal service. If this were held to be the law, the defendant, by absenting himself where he could not be personally reached, might prevent a contest under the provisions of the code. An election contest is intended to be a summary proceeding, and is one in which the people of the political subdivision in which the contest is pending are interested. The defendant is presumed to have known the law, and to have known that after the return day of the election, if he absented himself, a citation might be left at his residence. It was so left, and he must have received it." (*Chatham v. Mansfield, supra,* 1 Cal.App. 299, 301-302.)

Applying the rationale of *Chatham* to the present case, we have a situation where the defendant knew that he was the defendant in an election contest in which he was cited to appear for trial on January 15th. He is presumed to have known that the contestant was required to deliver the list in question to him at least three days before the trial, and that such might be delivered to his home either by messenger or by mail. If such delivery could only be effected by manual tradition, the defendant could frustrate the purpose of determining the contest on its merits by absenting himself, as he did, until two days before the trial.

The legislative intent to permit methods of service other than that by manual tradition in cases involving the service of notices and papers after jurisdiction has attached, is demonstrated by Code of Civil Procedure section 1011, which provides for service by "delivery" in the manner therein specified upon a party or his attorney. [FN7] (16) While ***564**Code of Civil Procedure section 1011 is not specifically made applicable to the Elections Code, we are satisfied that the methods therein provided would be applicable to the accomplishment of the delivery provided for in section 20052. We are persuaded in this conclusion by again analogizing to the procedure applicable to bill of particulars. While we have been unable to find any case in this state which has defined the required method for service or delivery under Code of Civil Procedure section 454, we take judicial cognizance of the time-honored and accepted practice of legal practitioners to make both service of the demand and of the bill of particulars itself in the manner provided for in section 1011 of the Code of Civil Procedure. It should be noted further, that the "delivery" made pursuant to section 1011 of the Code of Civil Procedure has been held to be personal service when made through the instrumentality of the mails. (*Hunstock v. Estate Development Corp., supra,* 22 Cal.2d 205, 211; *Heinlen v. Heilbron,* 94 Cal. 636, 640 [30 P. 8]; *Shearman v. Jorgensen,* 106 Cal. 483, 485 [39 P. 863]; *Colyear v. Tobriner,* 7 Cal.2d 735, 743 [62 P.2d 741, 109 A.L.R. 191]; Code Civ. Proc., § 1012.) The contestant did not avail himself

of the methods provided in Code of Civil Procedure section 1011, except by the use of the registered mail which proved ineffective because of the lack of sufficient postage. (17) Nor do we believe that there was a delivery to the defendant's attorney. No such service was attempted. The voluntary obtaining of a copy by the defendant's attorney from the county clerk did not constitute such a delivery, notwithstanding it may have amounted to notice of the existence of the list and its contents to the defendant (on the basis that notice to an attorney is constructive notice to the principal when the attorney is acting for the principal in a particular matter (*Atkinson v. Foote,* 44 Cal.App. 149, 165 [186 P. 831])) so as to make it a circumstance for the trial court's consideration in the exercise of the discretion discussed above.

> FN7 Section 1011 substantially provides that the service of a notice or paper "may be personal, by delivery to the party or attorney on whom the service is required to be made" by leaving the same at the office of the attorney within certain hours, with a person over 18 years of age at the attorney's residence during other hours, or by leaving the same with a person over 18 years at the party's residence during certain hours, or by putting the same in the mail to the attorney or party where service cannot be had in the manner in said section specified.

Elections Code Section 54

(18) The contention is made that the Legislature has specifically made provision for an alternate method of service by the enactment of section 54, and that where personal service by manual tradition cannot be had, the contestant is restricted to the method provided in this section. This section ***565** provides that personal service may be effected by service upon the Secretary of State or the county clerk upon the obtaining of an order of court directing such service. The contestant, here, did not avail himself of this procedure. A close reading of the section, however, indicates that by its very terminology it has to do with *process.* As we have hereinabove pointed out, we are not here concerned with process. Our conclusion that section 54 applies only to process finds support in Code of Civil Procedure section 411, subdivision 8, which provides, in essence, that if suit is brought against a candidate for public office and he cannot be found within the state after diligent search, *summons* may be served upon him as provided in section 54.

Was There a Waiver of Compliance With Section 20052?

(19) Compliance with the provisions of section 20052 may be waived. (*Patterson v. Hanley,* 136 Cal. 265, 277 [68 P. 821, 975].) In *Patterson* it was held that absence of an objection to the failure to furnish the list of illegal votes in the trial court amounted to a waiver of compliance with the statute. (20) We are of the opinion that there is such a waiver in the present case. While an objection was here interposed in the court below, it was not timely made. The objection was interposed at the time the witness, Kewell, was called to the stand. Testimony had been previously adduced through the county clerk without objection. It is obvious from a reading of the record that the testimony of the county clerk as to the maps and registration affidavits was presented as a foundation for the proof of illegal voting. In our opinion such objection must come before *any* testimony is received as to *any* illegal votes. We once again turn to the "bill of particulars" cases for analogy. The language of section 454 of the Code of Civil Procedure, providing that unless a copy of the account is delivered as therein provided the party will "be precluded from giving evidence thereof," has been interpreted to mean that if the adverse party proposes to object to the introduction of evidence, he may not wait until the trial, but previous to the trial must move for and obtain an order excluding the evidence. (*McCarthy v. Mt. Tecarte L. & W. Co., supra,* 110 Cal. 687, 693; *Connor v. Hutchinson,* 17 Cal. 279; *Glogau v.*

Hagan, 107 Cal.App.2d 313, 321 [237 P.2d 329].)

It is therefore ordered that a peremptory writ issue directing the respondent court to receive relevant and material testimony ***566** of the 189 votes asserted by the contestant to be illegal votes.

Bray, P. J., and Sullivan, J., concurred.
The petition of the real party in interest for a hearing by the Supreme Court was denied May 22, 1963.

Cal.App.1.Dist.
Benson v. Superior Court In and For Napa County
214 Cal.App.2d 551, 29 Cal.Rptr. 760

END OF DOCUMENT

F. W. BRAUN, Appellant,

v.

LEO G. MACLAUGHLIN COMPANY (a Corporation), Respondent.

Civ. No. 6323.

Court of Appeal, First District, Division 2, California.

July 9, 1928.

[1] LEASES--RENEWAL OF LEASE--OPTION--NOTICE--INTENT.

Notice by the lessee to the purchaser of leased premises that the lessee "has decided" to exercise an option granted to it for an additional lease, was sufficient to show a clear intention on the part of the lessee to exercise the option; the word "decided" being defined as meaning resolved or determined.

[2] ID.--EXERCISE OF OPTION--OFFER--ACCEPTANCE--EVIDENCE.

A provision in a notice by the lessee to the purchaser of leased premises, following the lessee's unqualified exercise of an option to lease the premises for an additional term, that the lessee is prepared to execute a new lease in proper form, obliging itself for the additional term, together with the testimony of the president of the lessee corporation, did not show that the acceptance of the terms of the option did not meet the terms of the offer in the option, but was, in effect, a counter-offer.

2. Sufficiency of notice of exercise of option of renewal, note, 1 A. L. R. 343. See 25 **Cal. Jur.** 523.

[3] ID.--DECLARATORY RELIEF--SECTION 1060, CODE OF CIVIL PROCEDURE--OPTION FOR ADDITIONAL LEASE--PLEADING--ISSUES--APPEAL.

In an action for declaratory relief, under section 1060 of the Code of Civil Procedure, involving the question whether a lessee had exercised an option for an additional lease, where plaintiff in his complaint treated the option as valid, and the only issue was whether the option could be withdrawn at any time before acceptance because of lack of consideration, plaintiff could not on appeal contend that the option was void for uncertainty.

[4] ID.--SUFFICIENCY OF OPTION--CONSIDERATION--CONSTRUCTION.

In such action, where the option was written on the back of, and referred to, the original lease, which contained the full terms and conditions and a full description of the property, the option was supported by a valuable consideration, and, to all intents and purposes, had the same effect as if it had been incorporated in the original lease.

[5] ID.--EXERCISE OF OPTION--TIME.

Where the lessee was granted an option for an additional lease on June 19, 1923, and the original lease ran until September 30, 1927, more than four years from the date of the option, and no time limit was stated in the option, the exercise by the lessee of the option in January, 1925, one year and seven months after the option was granted, and two years and eight months before the expiration of the original lease, was within a reasonable time.

[6] ID.--REASONABLE TIME--QUESTION OF FACT.

The question of what is a reasonable time in which a lessee is required to exercise an option for an additional lease, depends in each case upon its own particular circumstances and is primarily a question of fact for the determination of the trial court.

6. See 6 **Cal. Jur.** 348; 6 **R. C. L.** 896.

[7] ID.--RIGHT TO ADDITIONAL LEASE--EXERCISE OF OPTION--EXTENSION OF TERM--CONDITIONS--RIGHT OF LESSEE.

Where, by an option written on the reverse side of the lease, the lessee was granted the right of an additional lease for five years at a stipulated rental, whether the option be treated as a renewal or a mere extension of the old lease, the lessee, on exercising the option, was entitled to occupy the demised premises for five years from the expiration of the old lease under the same terms and conditions as the original lease, except as to time and rental.

7. See 15 **Cal. Jur.** 659.

APPEAL from a judgment of the Superior Court of Los Angeles County. John F. Pullen, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

*117 John E. Biby and Harry C. Biby for Appellant.

W. J. Carr and A. G. Allen for Respondent.

PRESTON (H. L.), P. J., *pro tem.*

This is an action for declaratory relief under section 1060 of the Code of Civil Procedure. The case was tried by the court sitting without a jury and judgment was entered in favor of the defendant, from which judgment the plaintiff prosecutes this appeal.

*118 The facts are, briefly, these: The plaintiff and appellant is the owner of the Chamber of Commerce building, situate in the city of Pasadena. Said building was formerly owned by the Chamber of Commerce Building Company. On May 21, 1920, the Chamber of Commerce Building Company executed a lease to the defendant and respondent, Leo G. MacLaughlin Company, a corporation, covering a portion of this building, to be used for store purposes. Respondent went into possession under this lease. The lease was for a term of eight years, commencing on October 1, 1919, and ending September 30, 1927. On June 19, 1923, the said Chamber of Commerce Building Company, for a valuable consideration, endorsed on the back of the original lease the following option:

"In accordance with action taken at the regular meeting of the board of directors of the Chamber of Commerce Building Co. held June 19, 1923, an option is hereby granted the party of the second part herein for an additional lease of five years from September 30, 1927, at a monthly rental of $300.00.

"Dated June 19, 1923.

"CHAMBER OF COMMERCE BUILDING COMPANY.

"By WM. C. CROWELL, President.

"By LEO G. MacLAUGHLIN, Secretary."

On the said nineteenth day of June, 1923, the Chamber of Commerce Building Company accepted the offer of one Louis Conrad to purchase said property covered by said lease, and at the request of the purchaser, the conveyance was made to the Angelus Realty Company, and through mesne conveyances, the title to the building was conveyed to appellant. The respondent, at all times since the making of the original lease, has occupied and used the premises.

The appellant and his immediate and mesne grantors, at and prior to their respective purchases, knew of the existence of said lease and said option.

On January 2, 1925, appellant wrote respondent the following letter:

"January 2, 1925.

"Leo G. MacLaughlin Co.,

"Pasadena, California.

"Gentlemen:

"As I think you know, I am, and have been for some months past, the owner of the Security Building at Colorado *119 and Broadway, Pasadena, of which building you are a tenant, being located on the ground floor, 119 East Colorado Street.

"In looking over the lease originally made between yourself, as lessee, and the Chamber of Commerce Building Company, as lessor, for a period expiring *December 30, 1927,* I note on the reverse thereof an option, dated *September 19th, 1923,* given you by the Chamber of Commerce Building Company, for a five year period after the expiration of your present lease, mentioned.

"Inasmuch as you have never exercised the option, mentioned, it, of course, cannot be binding in any way upon me as the present owner of this building and I hereby give you notice to this effect.

"Yours very truly,

"F. W. BRAUN."

Immediately upon the receipt of this letter, respondent, through its attorney, replied on January 6, 1925, in part as follows:

"You are hereby notified that the Leo G. MacLaughlin Company intends to and hereby does exercise its option to continue its occupancy of the premises now occupied by it, and covered by said option for the term of five years from October 1, 1927, at the rate of $300 per month."

Thereafter, and on January 22, 1925, a more formal notice was given appellant by respondent, as follows:

"Pasadena, Cal., January 22, 1925.

"Mr. F. W. Braun,

"2140 S. Main St.,

"Los Angeles, Calif.

"Dear Sir:

"You are hereby notified that the Leo G. McLaughlin Co. by resolution duly passed by its board of directors has decided to exercise the option which it holds covering the leasing of the premises now occupied by it in what was formerly known as the Chamber of Commerce Building, now known as the Security Building, in Pasadena, California, said option being dated June 19, 1923, and endorsed on the lease, copy of which lease and option we understand is in your possession and with which you are familiar.

"Under the terms of this option, we are given the right of an additional lease for a term of five years, commencing ***120** September 30, 1927, at a monthly rate of $300 per month; the premises being that certain room on the ground floor of said building at 119 E. Colorado Street, Pasadena, and being the same quarters now occupied by us and having been occupied by us for more than five years last past.

"If we are mistaken in our understanding that you have and are familiar with the copy of the lease and option, please advise us and a copy of the same will be furnished you promptly.

"We are prepared to execute a new lease in proper form, obliging ourselves for this additional term. Kindly prepare such a lease satisfactory to you at your early convenience and submit for our execution.

"Yours very truly,

"LEO G. MACLAUGHLIN Co.

"LEO G. MACLAUGHLIN, President.

"(Seal)

GEO. F. HOWELL, Secretary."

From the foregoing facts the trial court, among other things, found that "On January 22, 1925, the defendant elected to exercise, and did exercise, its option to have and take an additional lease of five years from the expiration of its then lease at a rental of three hundred dollars ($300) per month. Said election and exercise of said option was made by the defendant within a reasonable time."

(1) Appellant first contends that the court erred in finding that respondent exercised the option in question. There is no merit in this contention; it is based entirely upon the wording of the notice of January 22, 1925, which says, "You are hereby notified that the Leo G. MacLaughlin Company ... *has decided* to exercise the option ... " Appellant claims that this is equivalent to respondent saying "it intends to" or "it will exercise the option at some future time." We think this an entirely too narrow and technical interpretation to be placed upon the language used in the notice. The word "decided" is defined by Webster's International Dictionary as meaning "resolved" or "determined." Any form of expression, showing a clear intention on the part of respondent to exercise its option on the precise terms

stated in the option is sufficient. We think that the wording of the notice is amply sufficient to show a clear intention on the part of respondent to exercise the option in question. If, however, it be conceded that the ***121** language of the notice of January 22d is defective or insufficient; still, the notice of January 6th is amply sufficient. There can be no question but that respondent served upon appellant an unqualified acceptance of the option, and when this was done, what was before an option became an executory contract for a continuance of the lease for five years from October 1, 1927, upon a monthly rental of $300.

(2) Appellant further contends that the last paragraph of the notice of January 22, 1925, reading "We are prepared to execute a new lease in proper form, obliging ourselves for this additional term. Kindly prepare such a lease satisfactory to you at your early convenience and submit for our execution," coupled with the testimony of Mr. MacLaughlin, the president of the respondent corporation, shows that the purported acceptance of the terms of the option by respondent does not meet the terms of the offer in the option, and, in effect, is a counter-offer and, therefore, a rejection of the offer contained in the option. We think this contention is without merit. The portion of the notice complained of, and the testimony of Mr. MacLaughlin, had reference solely to the *performance* of the contract that came into existence by the acceptance of the terms of the option; that is to say, the manner in which the newly created contract for the extension of the old lease for five years, should be carried out--it has reference to something that would necessarily have to be done *after respondent had exercised its option;* it was merely a suggestion of a convenient mode or manner of closing up the transaction. Respondent had already, in the first paragraph of this notice and in the notice of January 6, 1925, unqualifiedly exercised the option. A similar notice was involved in *Cates v. McNeil,* 169 Cal. 697 [147 Pac. 944], and the ruling there fully sustains our conclusion here.

(3) Appellant next contends that the option is void for uncertainty and urges two points: (1) "That the offer was for 'an additional lease' and the terms of the additional lease were not stated, except that it was to be for a period of five years at a rental of $300 per month," and (2) "The failure to describe the property to which the additional lease relates, renders the option void." There are at least two answers to both of these contentions. In the first place, the pleadings do not raise this issue. Appellant, in his complaint,***122** treated the option as valid, but claimed that it could be withdrawn at any time before acceptance because of lack of consideration. In fact, this was the only issue raised by the complaint. Both parties, however, throughout the entire case have treated the option as valid.

(4) The terms of the "additional lease," are fixed in the option at five years and the rental at $300 per month. It is clear that the other terms and conditions of the "additional lease" were to be the same as in the old lease for the option itself is written upon the reverse side of the old lease and refers to it, which contains the full terms and conditions and a particular description of the property, etc. The option is supported by a valuable consideration, and, to all intents and purposes, has the same effect as if it had been incorporated in the original lease itself.

(5) Appellant next contends that the court erred in finding that respondent exercised said option within a reasonable time. No time limit is stated in the option. The option was granted on June 19, 1923; one year and seven months later, and in January, 1925, respondent exercised the option for an additional lease of five years from October 1, 1927. The original lease ran until September 30, 1927, more than four years from the date of the option, and two years and eight months after the option was exercised.

Under all these circumstances, we think the trial court was correct in finding that the option was exercised within a reasonable time. It is true that appellant offered evidence tending to show that the value of the leasehold had increased between the date of the option and the date it was exercised by respondent, but respondent also offered testimony to the effect that the rentals were about the same when the option was given and when it was exercised, so that was a disputed question of fact for the trial court to determine.

(6) The rule is well settled that the question of what is a reasonable time depends in each case upon its own particular circumstances; it is primarily a question of fact for the determination of the trial court. (*Hoppin v. Munsey,* 185 Cal. 678 [198 Pac. 398]; *Smith v. Bangham,* 156 Cal. 359 [[[[[28 L. R. A. (N. S.) 522, 104 Pac. 689]; *Adams & McKee Land Co. v. Dugan,* 68 Cal. App. 226 [228 Pac. 681]; *Cambridge v. Ramser,* 43 Cal. App. 722 [[185 Pac. 862]; ***123** *Luckart v. Ogden,* 30 Cal. 547; *Weatherbee v. Sinn,* 73 Cal. App. 98 [238 Pac. 134].)

(7) Appellant further contends that the court erred in finding that said option was granted on the same terms and conditions as the original lease, except as to rent, and also erred in rendering judgment that it was appellant's duty to execute a new lease on the same terms and conditions as the old lease, except as to time and rental.

A careful examination of the entire record convinces us that there is no merit in either of these contentions. We are well aware of the fact that there is a clear distinction between the meaning of the expression "renewing a lease" and "extending the term" thereof (*Shamp v. White,* 106 Cal. 220 [39 Pac. 537]; *Robertson v. Drew,* 34 Cal. App. 143 [166 Pac. 838]; 15 Cal. Jur. 659), but we think the distinction is wholly immaterial under the facts of the case at bar. If the expression "an additional lease," used in the option, be construed as meaning "a renewal of the old lease," then it was incumbent upon respondent to give notice of his election to renew the lease within a reasonable time before the expiration of the original lease. This respondent did. If it be construed merely "as an extension of the terms of the old lease" (there being no special form of notice required by the option), respondent could have stayed in possession after the expiration of the old lease and that would have been a sufficient notice of its intention to exercise the option to extend the lease. But in this case the old lease had not expired when the notices of January 6 and January 22, 1925, were given, and respondent was in possession under the old lease; therefore, if the option be construed merely as providing for "an extension of the old lease," and respondent had stayed in possession after the expiration of the old lease, the notices would have been unnecessary. On the other hand, if the option be construed as calling "for a renewal," meaning a new lease, respondent has fully complied with all the requirements entitling it to a new lease upon the same terms and conditions as the old one, except as to time and rental. Therefore, whether it be treated as an option for a "renewal," as the trial court did, or as a "mere extension of the old lease," is wholly immaterial, for in either case the *terms and conditions are to be exactly the same.*

***124** Respondent is clearly entitled to occupy the demised premises for five years from October 1, 1927, by paying a rental of $300 per month, and complying with all the terms and conditions of the old lease, and whether it does this under an extension of the old lease, or under a new lease containing the same terms and conditions, is wholly immaterial as far as appellant is concerned, and he certainly could not be prejudiced by being required to execute a new lease containing the same terms and conditions as the old one, with the exception that the rent would be increased to $300 per month, and the term five years.

We have examined the entire record with care and find no error that could be considered in any way prejudicial to the rights of appellant.

Appellant sought to have the option declared void solely on technical grounds, none of which has any substantial merit. The equities of the case are all on the side of respondent. Respondent paid a large consideration for the option, acted seasonably in exercising it, and should not be deprived of enjoying the fruits thereof, merely because some of the language used in the negotiations was awkward or ambiguous, when the intent and purpose thereof were clearly understood by all parties to the transaction. Appellant was not a party to the original lease or the option, but purchased the leased premises with full knowledge of respondent's lease and option, and also knew that respondent was in possession under the original lease.

The judgment should be affirmed, and it is so ordered.

Nourse, J., and Sturtevant, J., concurred.

Cal.App. 1 Dist. 1928.
Braun v. Leo G. MacLaughlin Co.
93 Cal.App. 116, 269 P. 191

END OF DOCUMENT

WILLIAM J. CITRON, Respondent,
v.
J. J. FRANKLIN, Appellant.
S. F. No. 16763.

Supreme Court of California
Oct. 6, 1943.

HEADNOTES

(1) Corporations § 305--Transfers of Stock--Sales--Option--Construction.
In a contract granting a purchasing agent an option to purchase 25 per cent of the optionor's corporate stock and providing that if the optionor sold his stock to others prior to exercise of the option, the optionor would pay the optionee 10 per cent of the amount received on such sale over and above the amount which the optionor had paid into the corporation, the parties intended that the optionee was to be entitled to the benefit of the 10 per cent provision immediately upon sale to others at any time during the option, and the optionee was not required to exercise his option after the optionor had sold all of the stock to others.

(2) Evidence § 348--Extrinsic Evidence--Options.
It was proper to sustain objections to questions relating to the optionee's understanding as to the proportion of the proceeds that he was entitled to receive from a sale of corporate stock covered by a written option agreement, where such questions had no bearing on the issue whether the optionee was required to exercise the option, and where they were directed, not to the interpretation that the parties placed on the contract, but simply to the subjective understanding of one party.

(3) Corporations § 305--Transfers of Stock--Sales--Options--Extension of Time.
Where a contract granting a purchasing agent an option to purchase corporate stock provided that the price should be computed upon the amount which the optionor had paid into the corporation, but stated no method by which the optionee could determine that amount, the option impliedly required the optionor to furnish the optionee with accurate information concerning that amount whenever the optionee expressed a desire to exercise the option, and any delay in furnishing such information would extend the option until a reasonable time after such information had been given. If no accurate information was ever given, though the optionee made timely requests therefor, the option was extended to the time of the sale of the stock to third persons.

SUMMARY

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Elmer E. Robinson, Judge. Affirmed.

Action to recover upon a contract granting an option to purchase a designated percentage of the stock of a corporation. Judgment for plaintiff affirmed.

COUNSEL

B. E. Kragen, George Olshausen, Lionel B. Benas and Keyes & Erskine for Appellant.

Clarence A. Linn for Respondent.

THE COURT.

A petition for hearing in this case was granted to the end that further consideration be given to the contentions of the appellant. On such consideration we agree with the disposition of the appeal by the District Court of Appeal of the First Appellate District, Division Two, and adopt as the opinion of this court the opinion of that court prepared by Justice Spence, with the modifications that hereinafter appear.

"Plaintiff sought to recover upon a contract. The

cause was tried by the court sitting without a jury and plaintiff had judgment against defendant J. J. Franklin in the sum of $2646.33." Defendant appeals from the judgment.

"Plaintiff had been engaged for many years in purchasing and booking motion pictures for use in the Hawaiian Islands. Defendant had been engaged for many years in exhibiting motion pictures. In 1934, defendant conceived the idea of organizing a corporation in the Hawaiian Islands and of forming a chain of motion picture theatres there together with a film exchange. In pursuance of this idea, defendant negotiated with plaintiff and, as a result of the negotiations, two written contracts were entered into on the same day, July 20, 1934.

"One of said contracts, attached to the complaint as Exhibit B, purported to be entered into between plaintiff and the corporation which had not then been organized. It was called a 'Purchasing Agency Agreement' and plaintiff was thereby employed by the corporation to act as its purchasing agent. It further provided that plaintiff should be elected vice-president of the corporation 'as soon as same may be conveniently done.' ***49**

"The other of said contracts, attached to the complaint as Exhibit A, was entered into by plaintiff and defendant personally. This is the contract upon which the present action was based. It recited that defendant was the owner of all the stock of the corporation, that plaintiff was the purchasing agent thereof and that defendant desired to grant plaintiff the option to purchase 25 per cent of all the stock owned by defendant. It was then agreed as follows:

" '1. That first party does hereby give and grant unto second party an option to purchase not more than twenty-five per cent (25%) of all the stock owned and held by first party in the Franklin Theatres Enterprises, Inc., a corporation.

" '2. That the purchase price to be paid by second party upon the exercise of the aforesaid option shall be computed upon the amount of money or other consideration which first party has advanced and paid into the said corporation upon the date that the said option shall be exercised.

" '3. It is distinctly understood and agreed that the aforesaid option shall remain in force for a period of one year from the date of the execution of this agreement, it being understood in this respect, however, that first party shall in no way be precluded from selling or disposing of the said stock to persons other than second party, provided, however, that second party shall share the proceeds from the sale of said stock as is provided hereafter.

" '4. It is distinctly understood that in the event first party shall sell his stock in the aforesaid corporation to any one other than second party prior to the exercise by second party of his option, then and in that event first party agrees to pay unto second party ten per cent (10%) of all monies and other consideration realized by first party over and above the amount of money and other consideration which first party has paid for the aforesaid stock or has advanced to the said corporation.'

"After entering into these contracts, defendant went to the islands and acted as the head of the new venture while plaintiff remained on the mainland and acted as purchasing agent. The corporation was formed, it prospered and defendant finally sold his stock on May 31, 1937, before plaintiff had exercised his option to purchase the stock but during the ***50** extended time for the exercise of the option as found by the trial court.

"There was but little conflict in the evidence. Such conflict as there was relating to the sale price of the stock and the amount which defendant had paid into the corporation was resolved by the trial court in favor of defendant. The sale price was found to be $30,000 and the amount paid in by defendant was found to be $3536.61. The trial court gave plaintiff judgment for 10 per cent of the difference between these amounts. On this appeal the findings concerning these amounts are not challenged.

(1) "Defendant first contends that the trial court erred in imposing any liability upon him as the trial court found that plaintiff never exercised his option. The trial court found, however, that the option had been extended from time to time up to and including the time of the sale on May 31, 1937. Assuming for the moment that this latter finding was sustained by the evidence, we find no merit in defendant's contention. The intent and purpose of the parties appears entirely clear and unambiguous from a reading of the option agreement. Plaintiff desired and the agreement granted to him an option to purchase 25 per cent of all stock owned by defendant. Defendant desired to retain and the agreement reserved to him the privilege of selling all of his stock to others at any time. The agreement then provided that in the event defendant sold his stock to others 'prior to exercise by second party of his option,' defendant would pay to plaintiff 10 per cent of the amount received on such sale over and above the amount which defendant had paid into the corporation. It is apparently defendant's claim that plaintiff was not entitled to the benefit of the last mentioned provision upon the sale of the stock but only in the event that plaintiff exercised the option after the sale had taken place. He stresses the words 'prior to the exercise by second party of his option' and claims that those words cannot be construed to mean 'during the life of the option.' In other words, defendant urges a construction under which plaintiff would have been required to go through the formality of exercising his option to purchase the stock after defendant had sold all of his stock to others and at a time when defendant was no longer in a position to sell any stock to plaintiff. Such a construction is wholly unreasonable. The law does not ***51** require idle acts (Civ. Code, sec. 3532) and the clear intention of the parties, as evidenced by the terms of the agreement, was that plaintiff was to be entitled to the benefit of the 10 per cent provision immediately upon the sale to others at any time during the life of the option"

(2) Defendant also contends that the court erroneously sustained objections to questions put to plaintiff on cross-examination, claiming that defendant was thus prevented from proving that plaintiff understood that he had to accept his option as a condition precedent to claiming rights in the proceeds from the sale. Objections were sustained to the first and third of the following questions: "You understand, Mr. Citron, that you were to receive ten percent of Mr. Franklin's net profit upon the sale of stock he held in this corporation? " "You knew, did you not, that Mr. Franklin sold 62 1/2 per cent of his stock to Mr. Rosen?" "What did you understand you were to receive from the balance of the 37 1/2 per cent under your agreement?" These questions were concerned with the proportion of the proceeds that plaintiff understood he was entitled to receive under the contract and had no bearing on the issue whether plaintiff was required to exercise the option. In any event, they were directed, not to the interpretation that the parties placed upon the contract, but simply to the subjective understanding of one of the parties. (*Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133 [48 P.2d 13].)

(3) "Defendant further contends that the evidence was insufficient to support the trial court's finding 'That the terms of said agreement, Exhibit A, were extended from time to time and up to and including the date of which defendant, J. J. Franklin, sold all of his capital stock in the Franklin Theatrical Enterprises, Ltd., to Adolph Ramish, to wit: May 31, 1937.' The evidence on this issue is quite voluminous and includes both letters and conversations. Neither the writing of the letters nor the making of the oral statements was denied by defendant. We need refer only to some portions of these letters and statements.

"The written agreement was made on July 20, 1934, and, by its terms, the option was to remain in force for one year. After executing the agreement, defendant spent most of his time in the islands while plaintiff spent most of his time on the mainland. At an early date, two men, Ramish and Rosen, ***52** had also become financially interested in the venture, Mr. Ramish being made president and Mr. Rosen a

vice-president of the corporation. On May 23, 1935, and before the expiration of the one year, plaintiff wrote to defendant, 'I informed him (Rosen) I was ready to put up my end of it and I presume either you or he will call on me shortly to cover my 25% interest. Am glad everything is going along fine. Feel confident the four of us will be on the easy side of the street.' On May 31, 1935, defendant replied: 'Regarding your interest you need not worry about that in the least. Whenever you are ready, you will make the deal with me as I suppose you know that my word is as good as a bond even if you didn't have a contract. ... We all of course, are directors. I am glad that you realize that we are on the way and that we are almost reaching the goal we set out to reach. I am not forgetting for one moment, regardless of what you say I accomplished, the fine work that you did and without which I could not have accomplished what we did so far. A company with four men with experience that we have had must go places. We have everything in our favor.'

"On June 6, 1935, plaintiff again wrote defendant: 'You may be assured that I have the utmost confidence in what you say and when you come to the mainland we can arrange all matters pertaining to my interest with the company.' On July 5, 1935, defendant wrote plaintiff, 'I have been held up here because of the many changes that we have had to make in the plans of the King Theatre but hope to get away very shortly and then we will be able to get together with you on your contract. ... I cannot forget your loyalty throughout the storm, and I want to say to you that I am happy to have you as one of my partners.'

"Defendant did not come to the mainland as soon as expected and on September 25, 1935, he wrote plaintiff: 'As I told you in previous correspondence that my word is as good as any bond and that I would live up to my agreement with you. ...' On November 7, 1935, plaintiff wrote defendant: 'I would like to know what amount of your stock and interest you would want me to take and just what it would cost me in round numbers? Of course, you know that I am not a man of means and have very little cash that I can place my fingers on.' On November 14, 1935, defendant wrote plaintiff: 'Regarding the stock, when you are out here (Honolulu) we will discuss that matter further. We had an understanding ***53** and when you come here we will discuss it further. When you see what we have here you will realize the opportunity.'

"In December 1935, plaintiff, Rosen and Ramish visited Honolulu and conferred with defendant. Plaintiff's testimony of the conversations then held and subsequently held concerning the option was corroborated by Rosen and was not denied by defendant. Plaintiff said, 'How about my end of it? I want to take up my option.' Defendant said, 'We are too busy. I can't talk now. You don't have to worry. My word is my bond. You can come in any time you want.' When plaintiff asked for the information concerning the amount defendant had invested, defendant told him that he was 'very, very busy,' that it was the 'wrong time' to talk about it but that he would give him the information in the 'very near future.'

"In 1936, defendant came to the mainland and conferred with plaintiff, Rosen and Ramish. The subject of the option was again discussed. It will be remembered that the unchallenged finding of the trial court shows that defendant had paid into the corporation only $3536.61. In their conversations, plaintiff said: 'Jack, now that you are here from Honolulu, I want to know definitely how much I am to put up for my option of twenty-five per cent. Tell me what it is.' Defendant said 'Listen, I put up $42,000 of my own money.' Both plaintiff and Rosen took exception to this figure, plaintiff saying it was 'ridiculous' and Rosen saying 'You haven't got that kind of money.' Plaintiff asked defendant for a statement of the amounts advanced but defendant 'put it off' saying, 'I am too busy. I have to go back to the islands.'

"The correspondence continued after defendant's return to the islands but the tone of the letters

gradually became less cordial. On October 16, 1936, defendant wrote to plaintiff, 'Consolidated are now very anxious to make a deal along the lines we discussed and if our partners will not be thinking only of themselves we will come out with flying colors. Everything points to success.' On the same day, plaintiff wrote to defendant: 'As you must know, had you given me the exact amount you put into the theatre project, as now appears on the books of the company, I certainly would have handed you my check and I feel confident I could have put over a deal you now have in mind. You have always informed me that you had invested. At one time you told me $32,000, ***54** at another time $40,000. Both Mr. Ramish and Mr. Rosen on several occasions, informed me that you had been credited with $15,000 on the company's books. So you see, Jack, my reason for hesitating. You assured me many times that I could come in any time I desired. That your word with me was always good and that whenever I was ready I could come in. I have always been ready but the above held me back.'

"Defendant replied on November 11, 1936: 'As to what Ramish says I have invested, he can say what he likes, the books will show I invested over $41,000.00 and not $15,000.00 as he says. The statement I gave you some time ago was made out by Mr. Turner, in that one it was $32,000.00, but I have since shown that it is $41,000.00.' On December 14, 1936, defendant again wrote: 'Regarding Mr. Ramish's statement of what I invested, it does not interest me in the least for it is contemptible falsehood. I showed you my investment, made up by Mr. Turner, from my invoices. Since then other invoices were given to Mr. Turner which made it $42,000, but that is neither here nor there. Our deal was not predicated on what I invested. You have certainly had every opportunity to come in but so far you never took advantage of it. It would be ridiculous to base the business on the amount of money Mr. Ramish suggests My books speak for themselves.'

"On January 5, 1937, defendant wrote: 'I always told you I would take care of you, meaning that you would not have to take up your stock according to the time limit in your contract, but if we should sell the business and you have not taken up your stock by that time you certainly couldn't expect me to close with you at such time ... you have the same opportunity today that you had when we signed the contract, but it must be exercised before a sale of the business is made, otherwise same will not be recognized by me.' Plaintiff replied on January 25, 1937: 'For a long time past, Jack, I have been willing and anxious to take up the option according to our agreement. I asked you for a statement of the amount invested by you so that I would know the amount of my prorata, but was unable to get a clear, definite statement. If you will give me an exact statement of the amount invested in the company by you, I will act on the option as soon as I can verify your statement. As ***55** you know, I have not access to the books and must depend on the officers of the company to furnish me the figures.' Defendant replied to this letter on February 3, 1937: 'Regarding the stock again I don't know how I could make myself clearer than I have in my last letter, no one in the world could ever accuse me of ever taking advantage of anyone or ever breaking my word. Ramish and Rosen have nothing whatsoever to do with our transaction and again let me advise you that I do not care what either of them say I invested, because whatever they say in this respect is not the facts. However, what I invested in the business has nothing whatever to do with our contract, but let me again remind you that I handed you a statement made out by Mr. Turner while he was in L. A. of all expenditures I had made and that amounted to $38,000.00. I again explained to you that I gave them additional $8000.00 worth of bills when Turner came to Honolulu, but in a thousand years, you, nor anyone else, will be able to make out his books the way he has them set up now. ... How then, can you ever expect to get any proper figures even if you should want them from him. As per the contract which I made with you, which stated that you could come in on twenty-five per cent of my holdings, none can say that you have offered to take up

your option and that I refused it, but circumstances occur where options cannot last forever, because of certain conditions. Therefore, I again say that although your option ran out, you can take advantage of the opportunity providing you take it immediately, otherwise you cannot expect me to feel any further obligation in the matter as I have been more than fair in this entire transaction. You realize that a sale of the business may be made any day or a deal may be made that requires quick action and unless you have made your investment before that time, you can't expect me to hold up deals as that is asking too much.' On February 18, 1937, plaintiff replied: 'Note what you say regarding the option. Just as soon as I can get the necessary data be assured Jack I want to take advantage of the option you have extended me.'

"Defendant apparently concedes, at least for the purpose of argument, that the time for the exercise of the option was extended but claims that the evidence was insufficient to support the finding that the time was extended to and including the time of the sale on May 31, 1937. It is argued ***56** that the extension was for an unspecified time, that it therefore covered only a reasonable time and that a reasonable time expired prior to May 31, 1937. Defendant further argues under a separate heading that the evidence was insufficient to support the finding that the extension was based upon a good and sufficient consideration. Plaintiff argues that the time provision for the exercise of the option was waived by both written and oral agreements for extensions based upon good and sufficient consideration and that defendant, by his fraudulent conduct, prevented the exercise of the option and was estopped. In the reply brief, defendant argues that as neither prevention of performance nor estoppel was pleaded, plaintiff may not rely thereon.

"As we view the situation, many of these contentions need not be considered here for the reasons hereinafter stated. The action was one upon an option agreement which was admittedly made upon a good and sufficient consideration. It was executed contemporaneously with an agreement for the employment of plaintiff by the corporation as its purchasing agent. Plaintiff served in that capacity with the corporation until the time of the sale and continued to serve thereafter. The option agreement provided that the option price should be computed upon the amount which defendant had paid into the corporation. No method was provided by the express terms of the agreement to enable plaintiff to determine the amount which defendant had so paid. We therefore believe it necessary, in order to make the agreement reasonable, to read into the agreement the implied terms that defendant would furnish plaintiff with accurate information concerning that amount at any time that plaintiff expressed his desire to exercise said option during the life thereof and that any delay on the part of the defendant in furnishing such information would extend the life of the option until a reasonable time after such information had been furnished by defendant. (Civ. Code, sec. 1655.) If these terms were not implied terms of the agreement, then plaintiff would have had no way of determining (1) whether it was desirable to exercise the option or (2) the amount to be tendered to defendant in the exercise thereof.

"Under the express terms of the option agreement, the life of the option was from July 20, 1934, to July 20, 1935. The evidence shows that plaintiff expressed his desire to exercise ***57** the option as early as May 23, 1935, in a letter written to defendant on that date. Thereafter plaintiff reaffirmed his desire to exercise the option on numerous occasions and made repeated requests to defendant to furnish him with the necessary information. No accurate information was furnished to plaintiff by defendant at any time. For some period of time after May 23, 1935, and despite repeated requests by plaintiff, defendant gave no information whatever concerning the amount but gave plaintiff the broadest assurances that his option could be exercised at any time. Thereafter defendant grossly misrepresented the amount which he had paid into the corporation, insisting that he had paid into the corporation approximately ten times the amount which he had actually

so paid. Plaintiff took exception to these misrepresentations and reaffirmed his desire to exercise his option upon the basis specified in the option agreement. In his letters of December 14, 1936, and February 3, 1937, defendant denied that the amount that he had actually invested in the corporation had anything to do with the exercise of the option thereby repudiating the terms of the option agreement. In the first of said letters he stated 'My books speak for themselves' indicating that he considered the parties bound by the figures shown by the books. In the second of said letters, he repudiated the figures shown by said books. The only conclusion that can be drawn from the admitted facts is that defendant, through fraudulent representations, endeavored to gain an unconscionable advantage over plaintiff either by persuading plaintiff to refrain from exercising a valuable option or by obtaining from plaintiff thousands of dollars to which defendant was not entitled in the event that plaintiff did exercise said option. In any event, the uncontradicted evidence shows that defendant wholly failed to furnish plaintiff with accurate information at any time, and under our view of the implied terms of the option agreement, the life of the option was thereby extended at least to and including the time of the sale as found by the trial court."

The judgment is affirmed.

Appellant's petition for a rehearing was denied November 4, 1943. ***58**

Cal.
Citron v. Franklin
23 Cal.2d 47, 142 P.2d 16

END OF DOCUMENT

83 Cal.App.4th 677, 99 Cal.Rptr.2d 809, 00 Cal. Daily Op. Serv. 7504
(Cite as: 83 Cal.App.4th 677)

COAST PLAZA DOCTORS HOSPITAL, Plaintiff and Respondent,
v.
BLUE CROSS OF CALIFORNIA, Defendant and Appellant.
No. B132500.

Court of Appeal, Second District, Division 3, California.
Aug. 10, 2000.

SUMMARY

A hospital filed an action against a health care services provider claiming unfair competition and unfair trade practices related to the reimbursement rates paid by the provider that it alleged to be too low. The provider moved for arbitration pursuant to an arbitration clause in the service agreement that provided for arbitration of any problem or dispute that arose under or concerned the terms of the service agreement. The hospital opposed the motion on the grounds that it had terminated the agreement two days before filing suit, that its action sought injunctive relief which, as a matter of law, is not arbitrable, and that the arbitration provision was unconscionable and therefore unenforceable. The trial court denied defendant's motion for arbitration. (Superior Court of Los Angeles County, No. BC206298, John W. Ouderkirk and Morris Bruce Jones, Judges.)

The Court of Appeal reversed and remanded with directions to conduct further proceedings. The court held that a broadly worded arbitration clause, such as this one, may extend to tort claims that may arise under or from the contractual relationship, and there is no requirement that the cause of action arising out of a contractual dispute must be itself contractual. It was immaterial that plaintiff had terminated the agreement before filing its action. The court held that the fact that defendant was a much larger and financially stronger company than plaintiff and thus was able to impose reimbursement rates that were unfavorable to plaintiff did not make the clause procedurally unconscionable, and it was not substantively unconscionable on the ground that plaintiff's right to discovery was much more restricted in arbitration. The court also held that a claim for injunctive relief under the Unfair Practices Act, Bus. & Prof. Code, § 17200 et seq., which was not subject to arbitration, did not preclude arbitration of other monetary damage claims subject to the arbitration clause. (Opinion by Croskey, J., with Klein, P. J., and Aldrich, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Arbitration and Award § 5.5--Arbitration Agreements--Disputes Covered--Tort Claims.
An arbitration clause in a service agreement between a hospital and a health care services provider applied to an action by the hospital against the provider based on numerous tort theories related to the reimbursement rates paid by the provider that were alleged to be too low. The parties agreed to arbitrate any problem or dispute that arose under or concerned the terms of the service agreement. Plaintiff alleged that defendant's refusal to renegotiate lower rates was the result of its intent and purpose of discriminating against and eventually eliminating smaller hospitals in less affluent communities. A broadly worded arbitration clause, such as this one, may extend to tort claims that arise under or from the contractual relationship. There is no requirement that the cause of action arising out of a contractual dispute must be itself contractual. At most, the requirement is that the dispute must arise out of contract.

(2) Arbitration and Award § 3--Arbitration Agreements--Public Policy.
California has a strong public policy in favor of ar-

bitration, and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration. This strong policy has resulted in the general rule that an arbitration clause should be upheld unless it can be said with assurance that the clause is not susceptible to an interpretation covering the asserted dispute. The burden falls on the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute. The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.

(3a, 3b) Contracts § 13.4--Legality--Unconscionable Contracts-- Arbitration Clause.

In an action by the hospital against the provider based on numerous tort theories related to the reimbursement rates paid by the provider that were alleged to be too low, an arbitration clause in a service agreement between a hospital and a health care services provider was not unconscionable and thus unenforceable. The fact that defendant was a much larger and financially stronger company than plaintiff and thus was able to impose reimbursement rates that were unfavorable to plaintiff did not make the clause procedurally unconscionable, and it was not substantively unconscionable on the ground that plaintiff's right to discovery, which it might have enjoyed in a judicial proceeding, was much more restricted in arbitration. There was no basis to conclude that the requirement of arbitration as the agreed manner of dispute resolution was either a surprise to plaintiff or, in anyway, disappointed its reasonable expectations. Moreover, there was nothing about the presence of the arbitration clause in the service agreement that would support the conclusion that it was so one-sided as to shock the conscience. The existence of substantive unconscionability depends on such a conclusion.

(4) Contracts § 13.4--Legality--Unconscionable Contracts.

There are two alternative analytical models of the defense of unconscionability to the enforcement of a contract. The first asks initially whether the contract is one of adhesion. Since a contract of adhesion is still fully enforceable, the inquiry then turns to whether enforcement should be denied. Enforcement will be denied if the contract or provision falls outside the reasonable expectations of the weaker party, and it will also be denied even if it does fall within the reasonable expectations of the parties, but it is unduly oppressive or unconscionable. The alternative model states that unconscionability has both a procedural and a substantive component. The procedural component focuses on the factors of oppression and surprise. Oppression results where there is no real negotiation of contract terms because of unequal bargaining power. Surprise involves the extent to which the supposedly agreed upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. The substantive component looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner. To be unenforceable there must be both substantive and procedural unconscionability, though there may be an inverse relation between the two elements.

(5) Arbitration and Award § 14--Arbitration Proceedings--Injunctive Relief and Damages--Severance.

In an action by a hospital against a health care services provider based on numerous unfair competition and trade practice theories related to the reimbursement rates paid by the provider that were alleged to be too low, a claim for injunctive relief under the unfair competition law, Bus. & Prof. Code, § 17200 et seq., which was not subject to arbitration, did not preclude arbitration of other monetary damage claims subject to an arbitration clause in the parties' service agreement. The appropriate procedure was to stay proceedings in the trial court until completion of arbitration of the claims subject to arbitration, whereupon the court would address the

question of an injunction, unless the arbitration rendered that issue moot.
[See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 488.]
COUNSEL

Musick, Peeler & Garrett, William H. Hastie, Cheryl A. Orr and Nancy A. Ramirez for Defendant and Appellant.

Payne & Fears, Daniel L. Rasmussen, Thomas L. Vincent and Paul A. Bokota for Plaintiff and Respondent.

CROSKEY, J.

In this case, appellant Blue Cross of California (Blue Cross) attacks the trial court's denial of its motion to compel the arbitration of a dispute with respondent Coast Plaza Doctors Hospital (Coast Plaza). After Coast Plaza filed an action against Blue Cross on numerous tort theories, all related to the reimbursement rates paid by Blue Cross pursuant to a service agreement with Coast Plaza, Blue Cross filed a petition to compel arbitration of Coast Plaza's claims. The service agreement contained an arbitration clause, but Coast Plaza argued that it did not apply because (1) Coast Plaza had terminated the agreement two days before filing suit, (2) its action sought injunctive relief which, as a matter of law, is not arbitrable, and (3) the arbitration provision was unconscionable and therefore unenforceable. The trial court denied Blue Cross's motion.

After a review of the record, we are persuaded that the arbitration clause does apply to this dispute and is enforceable. Coast Plaza's claim for injunctive relief can be severed and stayed pending the conclusion of the arbitration which may have the effect of resolving all issues between the parties. We therefore will reverse the order denying Blue Cross's petition, issue an order staying all further proceedings in the trial court, including all discovery, pending completion of the arbitration, and remand for appropriate proceedings. ***681**

Factual and Procedural Background [FN1]

Coast Plaza is an acute care hospital operating in Norwalk, California. Blue Cross is a managed health care services provider. On January 1, 1996, Coast Plaza and Blue Cross entered into a comprehensive contracting service agreement (Service Agreement) under which Blue Cross agreed to reimburse Coast Plaza at set rates (hereinafter the Reimbursement Rates) for specified health care services supplied by Coast Plaza to patient members of Blue Cross's health care plans. The Service Agreement was for an initial fixed term of two years, but was terminable thereafter upon 180 days' written notice by either party. The Service Agreement also had a very broad arbitration clause. [FN2]

FN1 Apart from their differences as to the interpretation to be given to the service agreement between them, the parties have no dispute as to the relevant facts.

FN2 The arbitration clause in the Service Agreement provided: "9.2. *Any problem or dispute arising under this Agreement and/or concerning the terms of this Agreement,* other than a Utilization Review decision as provided for in Article VII, that is not satisfactorily resolved under Section 9.1, *shall be arbitrated.* Blue Cross and Hospital agree to use binding arbitration for any such problem or dispute under the Commercial Rules of the American Arbitration Association, unless otherwise mutually agreed in writing by Blue Cross and Hospital. The arbitration shall also be subject to California Code of Civil Procedure, Title Nine, Section 1280, et seq., unless otherwise mutually agreed. Such arbitration shall be initiated by either party making a written demand for arbitration on the other party. [¶] 9.3. Hospital and Blue Cross agree that the arbitration results shall be binding on both parties in any subsequent litigation or other dispute." (Italics added.)

For several months beginning in the fall of 1998 and ending in January 1999 Coast Plaza sought to renegotiate Blue Cross's Reimbursement Rates. Coast Plaza claimed that it needed an increase in such rates if it were going to continue serving patients who were Blue Cross members; at the rates specified in the Service Agreement Coast Plaza lost money with respect to Blue Cross patients. When Blue Cross refused to negotiate satisfactorily higher Reimbursement Rates, Coast Plaza, in December of 1998, "informed" Blue Cross that it was terminating the Service Agreement, effective February 28, 1999. FN3

> FN3 The record does not disclose whether Coast Plaza "informed" Blue Cross in writing or otherwise and does not explain how a notice given in December of 1998, whether or not in proper form, would satisfy the contractual requirement of a 180-day notice of termination "effective *February 28, 1999.*"

Two days later, on March 2, 1999, Coast Plaza filed the instant action and alleged causes of action for (1) unfair trade practices in violation of Business and Professions Code section 17020 et seq., (2) unfair trade practices based on acts of intimidation, (3) intentional, and (4) negligent interference with prospective economic advantage, and (5) unfair business practices in violation of Business and Professions Code section 17200. ***682**

The basic charging allegations upon which each of these causes of action is based are that Blue Cross's Reimbursement Rates, as specified in the Service Agreement, are too low to allow Coast Plaza to recover its costs, much less make a profit. When Coast Plaza sought in, good faith, to renegotiate these rates Blue Cross unreasonably refused to consider or agree to any adequate increase, although it did agree to pay significantly higher rates to other larger hospitals in Southern California. Thus, Coast Plaza alleges Blue Cross discriminates against smaller hospitals in less affluent communities and does so with the purpose of putting them out of business. Indeed, Blue Cross unilaterally stated that if Coast Plaza did not accept a rate increase limited to .8 percent, Blue Cross would be forced to institute "certain administrative actions" which Coast Plaza interpreted to mean that all physicians and providers in the area would be advised not to utilize Coast Plaza for any Blue Cross patient services. All of this, Coast Plaza alleged, was done with the intent to "financially ruin Coast Plaza and other small hospitals who principally serve low-income patients and/or neighborhoods." In effect, Blue Cross was depriving these smaller hospitals of access to a large segment of business controlled by Blue Cross and precluding low-income patients from seeking health care services from the chosen provider in the community. Coast Plaza claims that the Reimbursement Rates imposed by Blue Cross are unreasonable, discriminatory and anticompetitive, and will have a serious adverse financial impact on Coast Plaza. In its complaint, Coast Plaza sought both compensatory and punitive damages as well as injunctive relief.

As soon as permitted under Code of Civil Procedure section 2025, subdivision (a)(2), Coast Plaza initiated discovery proceedings. It served document production subpoenas on six hospitals seeking (1) records of reimbursement from Blue Cross for medical services provided to Blue Cross subscribers, (2) copies of contracts with Blue Cross, (3) internal documents relating to its negotiations with Blue Cross, (4) documents relating to any dispute with Blue Cross regarding reimbursement rates and amounts, and (5) records reflecting Blue Cross's own evaluation of each hospital. Blue Cross objected to these broad discovery requests on a number of grounds, as did at least three of the hospitals involved. On April 1, 1999, Blue Cross filed a motion to quash these subpoenas.

On the same day Blue Cross also filed a petition to compel arbitration of the matters raised by Coast Plaza's complaint. While it is true that the Service Agreement had been terminated by Coast Plaza, effective February 28, 1999, it provided (in par. 12.4)

that: "After the effective date of termination, this Agreement *shall remain in effect for the resolution of all *683 matters unresolved as of that date.*" (Italics added.) Although, all of Coast Plaza claims sounded in tort, and its complaint was filed *after* the date of termination, Blue Cross argued that the dispute clearly arose under the Service Agreement and thus fell within the arbitration clause. Coast Plaza opposed the motion, arguing that the arbitration clause was unenforceable as it was unconscionable, did not apply since the Service Agreement had been terminated and, in any event, was precluded because Coast Plaza was seeking injunctive relief. Finally, Coast Plaza also contended that if the matter was sent to arbitration it would be deprived of needed discovery.

On May 14, 1999, the trial court denied the petition to compel arbitration. FN4 It appears that the court's ruling was "without prejudice on the grounds that more discovery was necessary to decide the issue." Blue Cross filed a timely appeal on May 26, 1999.

FN4 On May 14, 1999, the trial court also denied Blue Cross's motion to quash the third party document subpoenas. We thereafter summarily denied Blue Cross's petition for a writ of mandate. However, after Blue Cross filed its notice of appeal from the denial of its petition to compel arbitration, there was a mandatory stay of all proceedings (Code Civ. Proc., § 916) that the trial court refused to lift and thereafter enforced when Coast Plaza attempted to continue pursuit of third party discovery efforts despite the stay.

Contentions of the Parties

Blue Cross contends that Coast Plaza's claims constitute a dispute arising under the clear and unambiguous provisions of the Service Agreement's arbitration clause. It also argues that the arbitration provision is not unconscionable and must be enforced as to all of Coast Plaza's claims and prayers for relief, except its request for injunction. Pending conclusion of the arbitration, all proceedings in the trial court should be stayed, including discovery.

Coast Plaza, as already noted, makes three arguments for affirmance of the trial court's order: (1) there is no applicable arbitration provision as the Service Agreement had been terminated before this action was filed, (2) in any event, the arbitration clause is unenforceable as it is unconscionable, and (3) the claim for an injunction precludes any arbitration. Coast Plaza also opposes a stay of proceedings pending conclusion of any arbitration which may be required.

As we explain, we conclude that Blue Cross is correct. This matter should be submitted to arbitration pursuant to the agreement between the parties.

Discussion

Unsurprisingly, this case is resolved by the application of clear statutory authority and settled decisional law. First, an order denying a petition to ***684** compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd. (a); *Wilson v. Kaiser Foundation Hospitals* (1983) 141 Cal.App.3d 891, 895 [190 Cal.Rptr. 649].) Second, the critical issues raised in this case turn on the interpretation of the Service Agreement, particularly the arbitration clause. There is no *factual* dispute as to the language of that agreement. Thus, we are required to determine the legal interpretation to be given that language and that is something we do de novo. We are not bound by the trial court's construction or interpretation. (See *Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.* (1994) 25 Cal.App.4th 809, 817 [30 Cal.Rptr.2d 785]; *Titan Group Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1127 [211 Cal.Rptr. 62].)

With those basic principles in mind, we now turn to the three issues raised by Coast Plaza.

1. *The Arbitration Clause Applies to the Claims Asserted in Coast Plaza's Complaint*

(1a) Coast Plaza contends that the tort claims it has asserted against Blue Cross reflect a dispute that is beyond the scope of the arbitration clause. However, an examination of the real nature of that dispute and the broad language of the arbitration clause causes us to reject that argument.

It is clear that the parties agreed to arbitrate "*any* problem or dispute" that arose under or concerned the terms of the Service Agreement. That contractual language is both clear and plain. It is also very broad. In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal.Rptr.2d 538, 833 P.2d 545]; Civ. Code, §§ 1636, 1638 and 1644.) We interpret this language to mean just what it says. The question then becomes, does the action filed by Coast Plaza constitute a "problem or dispute" that arose under or concerns the terms of the Service Agreement? We think the answer to that question must be yes.

Coast Plaza's complaint centers around and is clearly based upon the Reimbursement Rates provided for in the Service Agreement and Blue Cross's alleged refusal to renegotiate them in a manner satisfactory to Coast Plaza. [FN5] It is alleged that such refusal to renegotiate was the result of Blue Cross's intent and purpose of discriminating against and eventually eliminating smaller hospitals in less affluent communities. Coast Plaza also ***685** complains that "Coast Plaza had prospective economic relationships with future Blue Cross patients and their referring physicians." Coast Plaza claims these relationships with Blue Cross's subscribers were disturbed when Blue Cross declined to renegotiate more favorable rates than those set forth in the Service Agreement. Coast Plaza complains that because it was forced to terminate the Service Agreement with Blue Cross, Coast Plaza now no longer has access to Blue Cross patients.

FN5 We summarily reject Coast Plaza's characterization of its negotiations with Blue Cross as being solely related to a "new" contract with satisfactory rates, rather than a *renegotiation* of the existing agreement. This is mere "spin" and ignores the reality of the circumstances presented by this record. Coast Plaza's only problem with the Service Agreement was the Reimbursement Rates provided for therein. It was those Coast Plaza sought to change and it was Blue Cross's alleged unreasonable refusal to make the requested modifications, which serves as the basis for this action.

These claims unquestionably have arisen under the Service Agreement and are inextricably related to its terms and provisions. Coast Plaza argues, however, that the arbitration clause is not implicated because the Service Agreement had been terminated prior to the filing of its complaint and its causes of action were not directed to the *enforcement* of any part of the Service Agreement, but rather to Blue Cross's tortious misconduct. Their prior contractual relationship may serve as context for the dispute, Coast Plaza contends, but it is not otherwise relevant to Coast Plaza's claims. Coast Plaza argues that the dispute arose "from Blue Cross' conduct after the [Service Agreement] was terminated." (Italics added.)

These arguments seem to be premised on the assumption that if one is not suing on a claim that is *based upon* the contract, but rather upon the alleged tortious misconduct of the other contracting party, then the contract's requirement of an arbitration process can be ignored. This is simply wrong and actually amounts more to wishful thinking than careful analysis. For example, to assert, as Coast Plaza seems to do in its brief, that this dispute arose during the two days between the February 28 termination date and the March 2 filing of its complaint is ludicrous. [FN6] Coast Plaza's own pleading demonstrates that Blue Cross's alleged misconduct

took place during the four to five months prior thereto when Coast Plaza was unsuccessfully seeking to renegotiate the terms of the Service Agreement. It was Blue Cross's alleged actions during this period that clearly form the basis of Coast Plaza's claim. The conclusion that this amounts to a "problem or dispute" *arising under* the Service Agreement or *concerns* the terms thereof cannot logically or reasonably be avoided.

> FN6 This position was properly abandoned at oral argument.

Certainly, the fact that Coast Plaza's complaint consists of alleged tort causes of action, rather than contractual claims that are directly based on ***686** the provisions of the Service Agreement, does not assist Coast Plaza's argument. It has long been the rule in California that a broadly worded arbitration clause, such as we have here, may extend to tort claims that may arise under or from the contractual relationship. "There is no requirement that the cause of action arising out of a contractual dispute must be itself contractual. At most, the requirement is that *the dispute* must arise out of contract." (*Crofoot v. Blair Holdings Corp.* (1953) 119 Cal.App.2d 156, 182 [260 P.2d 156], italics added; see also *Hatchwell v. Blue Shield of California* (1988) 198 Cal.App.3d 1027, 1033 [244 Cal.Rptr. 249] [compelling arbitration of all claims against an insurer, stating: "[a]lthough an action for bad faith breach of the covenant of good faith and fair dealing sounds in tort, the duty of good faith and fair dealing derives from and exists solely because of the contractual relationship between the parties."]; *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315-1316 [231 Cal.Rptr. 315] [reversing an order denying a petition to compel arbitration, holding that plaintiff's tort claims for fraudulent concealment, negligence and breach of statutory and fiduciary duties were subject to the arbitration clause because the tort claims had their roots in the relationship between the parties created by the contract containing the arbitration clause].)

(2) California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration. (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782 [191 Cal.Rptr. 8, 661 P.2d 1088] [the court should " ' " 'indulge every intendment to give effect to' " ' " an arbitration agreement]; *Valsan Partners Limited Partnership v. Calcor Space Facility, Inc., supra,* 25 Cal.App.4th at pp. 816-817; *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist., supra,* 164 Cal.App.3d at p. 1127.) As the Supreme Court recently noted, "... the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels ...." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 [10 Cal.Rptr.2d 183, 832 P.2d 899].) This strong policy has resulted in the general rule that arbitration should be upheld "unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute. [Citation.]" (*Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 105 [186 Cal.Rptr. 740] [a terminated dealer's tort causes of action against a manufacturer, including claims for breach of the covenant of good faith and fair dealing, were all required to be arbitrated under their dealership agreement].)

It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause *cannot* be interpreted to require ***687** arbitration of the dispute. Thus, if there is any reasonable doubt as to whether Coast Plaza's claims come within the Service Agreement's arbitration clause, that doubt must be resolved in favor of arbitration, not against it. (*Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 Cal.App.4th 775, 788 [43 Cal.Rptr.2d 650]; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189 [33 Cal.Rptr.2d 188]; *United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808 [9 Cal.Rptr.2d 702].) As Blue Cross argues, in no other way can the courts protect a party's bargained-for right to arbitration. " 'The policy of the law in recognizing arbitration agree-

ments and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.' " (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 9.)

Code of Civil Procedure section 1281.2, states that if a court determines that an agreement to arbitrate a controversy exists then it "shall order the petitioner and the respondent to arbitrate the controversy [in the absence of circumstances not relevant here]." This language is mandatory, not precatory. (*Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1511-1513 [55 Cal.Rptr.2d 443].) (1b) Thus, the trial court erred in refusing to grant Blue Cross's petition to compel FN7 unless either or both of Coast Plaza's remaining arguments have merit. We now turn to them.

> FN7 We are not dissuaded from reaching this conclusion by the fact that the trial court's denial of Blue Cross's petition was "without prejudice" pending further discovery into the nature of Coast Plaza's claims. The record before the trial court was sufficient to demonstrate that the arbitration clause applied to Coast Plaza's claims. Nothing more was needed; Code of Civil Procedure section 1281.2 required the trial court to make an order compelling arbitration.

2. *The Arbitration Clause Is Neither Procedurally Nor Substantively Unconscionable*

(3a) Coast Plaza argues that the arbitration clause is (1) procedurally unconscionable because Blue Cross was a much larger and financially stronger company than Coast Plaza and thus was able to impose terms (i.e., the Reimbursement Rates) that were unfavorable to Coast Plaza and (2) substantively unconscionable because Coast Plaza's right to discovery, which it might enjoy in a judicial proceeding, is much more restricted, thus permitting Blue Cross to engage in tortious misconduct that Coast Plaza would be unable to uncover. In our view, Coast Plaza misapprehends the principles applicable to the doctrine of unconscionability. Those principles were set out in *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659 [18 Cal.Rptr.2d 563], where the court reviewed two alternative analytical models of the defense of unconscionability that, it ***688** concluded, " 'should lead to the same result.' " (*Id.* at p. 1664; see also *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925, fn. 9 [216 Cal.Rptr. 345, 702 P.2d 503].)

(4) "The first model set out in *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807 [171 Cal.Rptr. 604, 623 P.2d 165] asks initially whether the contract is one of adhesion. (*Id.* at p. 819.) Since a contract of adhesion is still fully enforceable, the inquiry then turns to whether enforcement should be denied. First, enforcement will be denied if the contract or provision falls outside the reasonable expectations of the weaker party. (*Id.* at p. 820,) Second, enforcement will be denied even if it does fall within the reasonable expectations of the parties, but it is unduly oppressive or unconscionable. (*Ibid.*)

"The alternative analytical model [is] set out in *A & M Produce Co.* v. FMC Corp. [(1982)] 135 Cal.App.3d 473 [186 Cal.Rptr. 114]. It sought to define what rendered a contract or a contractual provision unconscionable and hence unenforceable under Civil Code section 1670.5 (135 Cal.App.3d at p. 485.) *A & M* concluded that unconscionability has [both] a procedural and a substantive component. (*Id.* at p. 486.) The procedural component focuses on the factors of oppression and surprise. (*Ibid.*) Oppression results where there is no real negotiation of contract terms because of unequal bargaining power. (*Ibid.*) ' "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.' (*Ibid.*) The substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreason-

able or unexpected manner. (*Id.* at p. 487.) To be unenforceable there must be both substantive and procedural unconscionability, though there may be an inverse relation between the two elements. (*Ibid.*)" (*Patterson v. ITT Consumer Financial Corp., supra,* 14 Cal.App.4th at p. 1664.)

(3b) It must be remembered that it is the arbitration clause that Coast Plaza claims is unconscionable. Such unconscionability must be measured *as of the time it was made.* (Civ. Code, § 1670.5) [FN8] What evidence did Coast Plaza present which demonstrated that the arbitration clause was either procedurally or substantively unconscionable? Our review of the record ***689** reflects that it consisted of (1) a declaration from its attorney who had no personal involvement with negotiation of the Service Agreement; and (2) two newspaper articles, one of which generously quotes an officer of Coast Plaza's on the subject of his reasons for filing this lawsuit. None of this material was competent evidence sufficient to establish unconscionability as a defense to mandatory arbitration.

> FN8 Civil Code section 1670.5 provides: "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [¶] (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."

Even assuming that a disparity in size and certain economic considerations would permit the Service Agreement to have been adhesive (thus perhaps satisfying the "oppression" prong of the *A & M Produce* case), there is nothing in the showing made by Coast Plaza which prove that it was, or would have been, "surprised" by the clause imposing mandatory arbitration as the required means of dispute resolution. The arbitration clause was prominent and conspicuous as well as simple and straightforward. Its terms and burdens applied equally to both parties. Unlike the arbitration clause condemned in *Patterson v. ITT Consumer Financial Corp., supra,* 14 Cal.App.4th 1659 (where California customers unknowingly agreed to an arbitration that could only be conducted in Minnesota and was subject to undisclosed procedural rules and prepayment of substantial fees before the process could be initiated), there were no unfair, unequal, or undisclosed burdens or hurdles imposed on Coast Plaza; nor does Coast Plaza make any claim that it was unaware of the existence of the arbitration requirement.

We simply see no rational basis to conclude from this record that the requirement of arbitration as the agreed manner of dispute resolution was either a surprise to Coast Plaza or in any way disappointed its reasonable expectations. Moreover, there is nothing about the presence of the arbitration clause in the Service Agreement that would support the conclusion that it was so one-sided as to shock the conscience. The existence of substantive unconscionability depends on such a conclusion. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1330 [83 Cal.Rptr.2d 348].)

We also reject the proposition advanced by Coast Plaza that the mere fact that the opportunities for formal (and time-consuming and expensive) discovery are limited under the commercial rules of the American Arbitration Association (which rules expressly apply here) makes the arbitration agreement "one-sided" and so unfair as to "shock the conscience." We are not aware of any case that has ever held that an arbitration provision is substantially unconscionable merely because a party's discovery rights are limited in arbitration. Limited discovery rights are the hallmark of arbitration. (*Sy*

First Family Ltd. Partnership v. Cheung (1999) 70 Cal.App.4th 1334, 1342 ***690** [83 Cal.Rptr.2d 340] ["Unless the parties otherwise agree, the rules of evidence and judicial procedure do not apply" in arbitration].) Discovery is *not* a right in arbitration as it is in judicial proceedings. (*Christensen v. Dewor Developments, supra,* 33 Cal.3d at p. 783, fn. 1 [only arbitrators can order discovery in arbitration proceedings]; see also *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1802 [13 Cal.Rptr.2d 678] [same].) The fact that an arbitration may limit a party's discovery rights is not "substantive unconscionability." If it were, *every* arbitration clause would be subject to an unconscionability challenge on that ground. FN9

> FN9 Unquestionably, discovery is limited in arbitrations (except in injury or death cases or where the parties have expressly agreed otherwise). (See Code Civ. Proc., §§ 1283, 1283.05 and 1283.1.) However, given the clarity and prominence of the statutory provisions dealing with this issue, we again see no basis for a claim of surprise or disappointment of reasonable expectations.

We thus must conclude that Coast Plaza cannot avoid arbitration upon a claim of unconscionability. It is simply not supported in this record; nor does Coast Plaza claim that any further discovery would have produced sufficient evidence to change this result. FN10

> FN10 Indeed, the discovery that Coast Plaza pursued, and sought to pursue even pending Blue Cross's appeal, was and is related to the *merits* of its claims against Blue Cross. Those evidentiary matters may be addressed in the arbitration, which will take place upon remand.

3. *While Coast Plaza's Claim for Injunctive Relief Is Not Subject to Arbitration, Its Other Claims Must Be Addressed in That Forum*

This issue was recently addressed by our Supreme Court in *Broughton v. CIGNA Healthplans* (1999) 21 Cal.4th 1066 [90 Cal.Rptr.2d 334, 988 P.2d 67] (*Broughton*). In a decision under the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq., CLRA), the court held that in a case where a plaintiff was pursuing claims under a statute that provided for both damages and injunctive relief designed to protect the public at large, an arbitration agreement would be enforced as to the damage remedies, but not as to the injunction.

In *Broughton*, a minor and his mother sued their health insurer alleging causes of action for medical malpractice based on severe injuries suffered by the minor at birth. In the suit, the plaintiffs sought monetary damages for such tortious misconduct as well as for violations of the CLRA. In addition, the plaintiffs sought injunctive relief with respect to the insurer's allegedly deceptive advertising practices. The insurer moved to compel arbitration pursuant to the provisions of the health insurance plan it had with the ***691** plaintiffs. The trial court granted the motion as to the malpractice claims but denied it as to the statutory claim under the CLRA. The Supreme Court reversed, concluding that arbitration was an inherently unsuitable forum for the resolution of a claim for an injunction under the CLRA and therefore it could not be arbitrated. (*Broughton, supra,* 21 Cal.4th at p. 1088.) However, the damage claims under the statute, as well as plaintiffs claims for malpractice, were subject to arbitration. (*Ibid.*)

Broughton rationalized its conclusion on the ground that there is an inherent conflict between private arbitration before a nonjudicial officer (who would be at an institutional disadvantage in administering a public injunctive remedy) and the underlying purpose of the remedy of injunctive relief under a statutory scheme authorizing a private plaintiff to act in the capacity of a private attorney general to enforce the statute for the benefit of the general public. (*Broughton, supra,* 21 Cal.4th at p. 1082.) Based upon this inherent conflict, the Supreme Court con-

cluded that the Legislature did not intend for the injunctive relief claims under the CLRA to be arbitrated. (*Ibid.*; see also Civ. Code, § 1780, subd. (c) [a CLRA action is to be filed in "any court ... having jurisdiction of the subject matter"].) The court expressly declined the parties' invitation to reach the broader issue of whether arbitrators have the power to grant injunctive relief at all. (*Broughton, supra,* 21 Cal.4th at p. 1079.)

After deciding that the remedy of injunction for a claim under the CLRA was not arbitrable, the court went on to reject the plaintiff's contention that the inclusion of an inarbitrable remedy in plaintiff's complaint precluded arbitration of all of the plaintiff's claims in the case-the very proposition advanced below by Coast Plaza. (*Broughton, supra,* 21 Cal.4th at p. 1084.) Rather, the court expressly held that the inarbitrable claims or remedies pursued by the plaintiff were severable from the arbitrable claims or remedies and that the plaintiff was required to arbitrate everything *but* the request for injunctive relief under the CLRA. (*Id.* at p. 1088.)

(5) *Broughton* is controlling here. Much like a claim for injunctive relief under the CLRA, a claim for injunctive relief under the unfair competition law, Business and Professions Code section 17200 et seq., is brought by a plaintiff acting in the capacity as a private attorney general. (Bus. & Prof. Code, § 17203 ["Any person who engages, has engaged ... in unfair competition may be enjoined in any court of competent jurisdiction."].) Although the private litigant controls the litigation of an unfair competition claim, the private litigant is *not* entitled to recover compensatory damages for his own benefit, but only disgorgement of profits made by the defendant ***692** through unfair or deceptive practices in violation of the statutory scheme or restitution to victims of the unfair competition. (*Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 45 [32 Cal.Rptr.2d 200, 876 P.2d 999] [no compensatory damages recoverable for Bus. & Prof. Code, § 17200 claim]; *Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1266 [only disgorgement or restitution recoverable, not damages under Bus. & Prof. Code, § 17200].)

In contrast to a Business and Professions Code section 17200 claim, a party suing for violation of section 17020 et seq., under one of the many provisions of the Unfair Practices Act, *may* bring a private right of action for damages suffered directly by the party, and also seek injunctive relief for the protection of the party and the public at large. (See, e.g., Bus. & Prof. Code, § 17070 ["Any person ... may bring an action to enjoin and restrain any violation of this chapter and, in addition thereto, for the recovery of damages"].)

In this case, Coast Plaza, like the plaintiff in *Broughton*, has requested injunctive relief, not as a separate cause of action, but as a remedy with respect to its stated causes of action for unfair trade practices under section 17020 et seq. and unfair competition under section 17200 et seq. Specifically, Coast Plaza has alleged: "In addition to monetary damages, on behalf of Coast Plaza, and the public, Coast Plaza seeks an injunction prohibiting Blue Cross from providing reimbursement rates at unreasonable and anti-competitive levels." Such relief would certainly constitute a public injunctive remedy within the meaning of *Broughton*. Indeed, we are unable to distinguish Coast Plaza's requests for public injunctive relief from those asserted by the plaintiff in *Broughton*.

Coast Plaza's requests for injunctive relief for the benefit of the public at large as a remedy under the two statutory schemes are the *only* requests for relief that are inarbitrable. Applying *Broughton* here, Coast Plaza *must* arbitrate the remainder of its causes of action and noninjunctive remedies, including its purported entitlement to monetary damages. (*Broughton, supra,* 21 Cal.4th at pp. 1080-1081, fn. 5.) [FN11] (*Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 624 [105 S.Ct. 3346, 3352, 87 L.Ed.2d 444] [claims designed primarily to compensate injured private party must be arbitrated even though purpose of

statutory scheme is to promote a public interest].) ***693**

> FN11 *Broughton* actually appears to have left open the question of whether an injunctive claim that stands to benefit a CLRA plaintiff *uniquely without public benefit* would be subject to arbitration. (21 Cal.4th at p. 1081, fn. 5.) However, that is not a question we need address as Coast Plaza is not seeking injunctive relief under either of the relevant statutes which will provide a benefit *unique* to itself.

Thus, we reject Coast Plaza's argument that its claim for public injunctive relief precludes enforcement of the arbitration clause in this case. As we have already concluded that Coast Plaza's claims are subject to the Service Agreement's arbitration clause, we must conclude that all of those claims, save those seeking public injunctive relief, must be severed and resolved in arbitration. (*Broughton, supra,* 21 Cal.4th at p. 1088.)

4. *Pending Outcome of the Arbitration, All Further Proceedings in the Trial Court Should Be Stayed*

Upon remand, the trial court will order the claims asserted by Coast Plaza to be arbitrated in accordance with the terms of the arbitration clause. We agree with Blue Cross that pending the conclusion of that arbitration, all further proceedings in the trial court should be stayed. To do otherwise would undermine the very statutory purpose of the agreement to arbitrate. A stay is appropriate where "[i]n the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective." (*Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1375 [71 Cal.Rptr.2d 164].)

The only issue that will decided by the trial court is the question of an injunction to preclude Blue Cross's alleged discriminatory and anticompetitive behavior. The litigation of Coast Plaza's right to such relief should be stayed until the arbitration resolves Coast Plaza's substantive causes of action and issues of whether Blue Cross has engaged in unfair trade practices or unfair competition. The outcome of the arbitration on those claims may render entirely moot the issue of Coast Plaza's entitlement to injunctive relief. If no violations of the Business and Professions Code actually occurred and/or no such claim will lie, the arbitrator's award, when reduced to a final judgment, would preclude the right to injunctive relief. (Code Civ. Proc., § 1287.4 [judgment on arbitration award has same force and effect of a judgment in civil action]; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831-832 [88 Cal.Rptr.2d 366, 982 P.2d 229] [arbitration award is entitled to res judicata or collateral estoppel effect in subsequent proceedings before the *same* parties].) Without a stay, there is a threat of inconsistent judgments-risk of a judgment on Coast Plaza's substantive claims decided in a private arbitration that is incompatible and inconsistent with the determination by the court of Coast Plaza's entitlement to injunctive relief for those same substantive claims.

Disposition

The trial court's order of May 14, 1999, denying Blue Cross's petition to compel arbitration is reversed and the matter is remanded with directions to ***694** conduct further proceedings, which are not inconsistent with the views expressed herein. Blue Cross shall recover its costs on appeal.

Klein, P. J., and Aldrich, J., concurred.
On September 7, 2000, the opinion was modified to read as printed above. Respondent's petition for review by the Supreme Court was denied October 25, 2000. ***695**

Cal.App.2.Dist.
Coast Plaza Doctors Hosp. v. Blue Cross of California
83 Cal.App.4th 677, 99 Cal.Rptr.2d 809, 00 Cal. Daily Op. Serv. 7504

83 Cal.App.4th 677, 99 Cal.Rptr.2d 809, 00 Cal. Daily Op. Serv. 7504
(Cite as: 83 Cal.App.4th 677)

END OF DOCUMENT

209 Cal.App.2d 41, 25 Cal.Rptr. 504
(Cite as: 209 Cal.App.2d 41)

C

EDITH CONFORTI, an Incompetent Person, etc., Plaintiff and Appellant,
v.
LEO C. DUNMEYER et al., Defendants and Respondents.
Civ. No. 6840.

District Court of Appeal, Fourth District, California.
Oct. 26, 1962.

HEADNOTES

(1) Evidence § 69--Judicial Notice--Matters Pertaining to Courts.
A court may take judicial notice of proceedings of other cases in the same court.

(2) Judgments § 227--Equitable Relief.
An action to set aside a default judgment of forfeiture in a foreclosure proceeding is an action in equity.

(3) Vendor and Purchaser § 136--Forfeiture--Relief.
Proceedings to set aside a default judgment in a foreclosure action where the defaulting purchaser was incompetent at the time of default and during the foreclosure proceedings may be commenced at any time by motion or by an independent action in equity.

(4) Judgments § 268(6)--Equitable Relief--Complaint--Allegations of Fraud.
In an action to set aside a default judgment in a foreclosure proceeding where plaintiff claims she was incompetent at the time of default and during the foreclosure proceedings, that there is no allegation of fraud such as that the party who foreclosed knew that plaintiff was incompetent, makes no difference in the application of the principle that through no fault of her own the party foreclosed was not permitted to participate in the proceedings.

(5) Judgments § 229--Equitable Relief--When Relief May Be Granted.
Equity will not interfere with an unjust judgment unless it appears that the one whose interest is infringed can present a meritorious case.
See **Cal.Jur.2d,** Judgments, § 173.
(6) Judgments § 229--Equitable Relief--When Relief May Be Granted.
In seeking equitable relief from a judgment, the requirement that the complaint allege a meritorious case does not require an absolute guaranty of victory. It is enough that the complaint presents facts from which it can be ascertained that plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding.

(7) Judgments § 230--Equitable Relief--Limitations on Right.
Although the law allows a proceeding to set aside a default judgment in foreclosure proceedings where the defaulting party was incompetent at the time of the default and during the foreclosure proceedings, it is still necessary for the defaulting party to state a cause of action before equity can grant relief.

(8) Forfeitures § 12--Relief--Pleading.
Where a party who was incompetent at the time of default and during foreclosure proceedings seeks to set aside the forfeiture, she must allege that there would be a different result by showing her ability to pay and a tender of the amount due.
See **Cal.Jur.2d,** Forfeitures and Penalties, § 23; **Am.Jur.,** Forfeitures and Penalties (1st ed § 15).
(9) Judgments § 230--Equitable Relief--Limitation on Right--Doing Equity.
A person asking for equity must be willing to do equity. Where a party seeks to set aside a default judgment in a foreclosure proceeding claiming that she was incompetent at the time of default and during the proceedings, she must make a valid tender of the amount due to be placed back in possession as of the date of the default judgment, or have the property reconveyed, without conditions attached to the offer of payment.

(10) Tender § 9--Requisites--Amount.
The party making a tender acts at his own peril and must tender a sufficient amount where the correct amount is not within the exclusive knowledge of the creditor. An offer of partial performance is of no effect.

(11) Forfeitures § 12--Relief--Pleading.
In an action to set aside a default judgment in a foreclosure proceeding, an allegation that plaintiff conditioned her offer to tender the amount due on a deduction of the amounts received as rent for the use of the property invalidated the tender.

(12) Pleading § 175(4)--Amendment--Discretion of Court.
Where a party submitted four complaints, all similar in defects, the refusal to allow her to amend was not an abuse of discretion by the court.

SUMMARY

APPEAL from a judgment of the Superior Court of San Bernardino County. Joseph T. Ciano, Judge. Affirmed.

Action to set aside a default judgment of foreclosure of an interest in real property. Judgment of dismissal after demurrer to the third amended complaint was sustained without leave to amend, affirmed.

COUNSEL

Marshall Miles for Plaintiff and Appellant.

Wilson & Wilson for Defendants and Respondents.
***43**

BROWN, J. [FN*]

FN* Assigned by Chairman of Judicial Council.

Appellant and her deceased husband entered into an agreement of sale with respondents to purchase a home for $14,000, payable $3,000 down and $75 per month, in which time was of the essence. They made payments thereon until March 1955. In September 1956 respondents filed an action to foreclose the appellant's interest in said real property because of default in payments. Summons and complaint were served on appellant on September 27, 1956, and a default judgment was granted October 16, 1956.

Appellant's complaint alleged that since the date of default on the contract in March 1955 and during the time of this first suit she was mentally ill, insane and incompetent and that no guardian had been appointed. On November 1, 1956, appellant was committed to Patton State Hospital and was discharged in October 1959 as a person not recovered but whose discharge would not be detrimental to public welfare.

Thereafter, a guardian was appointed for appellant and a suit was filed in July 1960 seeking to set aside the forfeiture in the foreclosure proceedings, alleging that the balance due under the contract at time of judgment was approximately $9,276.77; offering to pay the balance due on the contract as of October 16, 1956, plus sums for improvements, taxes and repairs, plus interest, and less any amounts received by respondents as rent and the reasonable value of their use of said property since that date; and asking for an accounting under section 707 of the Code of Civil Procedure (statutory rights of redemptioner), alleging that an accounting had been demanded and that appellant had offered to pay respondents the sum due for a reconveyance of said property, which was refused.

In *Bolln v. Petrocchi,* 95 Cal.App.2d 589, 592 [213 P.2d 513], the court said, "Accordingly, relief will be granted whether or not time has been made of the essence."

In *Benedict v. Calkins,* 19 Cal.App.2d 416 [65 P.2d 831], the court exercised discretion under Civil Code section 1492. Where time is not of the essence, the court may grant a period of time for de-

faulting party to make the payment.

Respondents successfully demurred to the first three complaints and their demurrer, general and special, to the third amended complaint was sustained without leave to amend. Appellant appeals from the judgment of dismissal.

This court augmented the record by having all the prior ***44** pleadings in this action added to the clerk's transcript. (1) The court may take judicial notice of proceedings of other cases in the same court such as the foreclosure action. (*Pike v. Archibald,* 118 Cal.App.2d 114, 117 [257 P.2d 480].)

(2, 3) This is a proper action in equity and proceedings to set aside a judgment in an action such as this may be made at any time by motion or an independent action in equity. (*Dei Tos v. Dei Tos,* 105 Cal.App.2d 81, 84 [232 P.2d 873]; *Olivera v. Grace,* 19 Cal.2d 570, 575 [122 P.2d 564, 140 A.L.R. 1328]; *Hammell v. Britton,* 19 Cal.2d 72 [119 P.2d 333].)

(4) While in this action there is no allegation of any fraud on the part of the respondents in the conduct of the foreclosure action such as the respondent knew that the appellant was incompetent, as in the *Dei Tos* case, *supra,* the fact that there is no fraudulent design makes no difference in that the principle of the law involved is that "... through no fault of his the defendant was not permitted to participate in the proceedings." (See Civ. Code, § 3275; 50 Cal.Jur.2d, Vendor and Purchaser, § 565, pp. 726-727.) Incompetent defendants are entitled to relief in equity such as are characterized as extrinsic mistake. (5) The general rule is that equity will not interfere with a judgment which is unjust unless it appears that the one whose interest is thus infringed can present a meritorious case. (*Olivera v. Grace, supra,* 19 Cal.2d 570; 5 Pomeroy, Equity Jurisprudence, (2d ed.) pp. 4671-4672; 29 Cal.Jur.2d, Judgments, § 170, p. 124; 15 Cal.Jur., Judgments, § 128, p. 29; 3 Freeman, Judgments (5th ed.) p. 2465.)

(6) The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory. "It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding." (*Olivera v. Grace, supra,* p. 579.)

(7) While the law allows this type of proceeding, it is still necessary for appellant to state a cause of action.

Where the complaint is sufficient against a general demurrer it has been held that a trial court ought not to sustain a special demurrer without leave to amend. (*Olivera v. Grace, supra*; *Kauffman v. Bobo & Wood,* 99 Cal.App.2d 322 [221 P.2d 750].) In the *Kauffman* case, *supra,* the court also held that pleadings and amendments should be construed liberally with the object of affording every litigant his day in court and rendering substantial justice to all parties. (***45***Wennerholm v. Stanford University Sch. of Medicine,* 20 Cal.2d 713 [128 P.2d 522, 141 A.L.R. 1358].)

Failure to Plead Ability to Pay

The appellant claims that she has shown ability to make the payments which were due. In her complaint she admits that no payments had been made or tendered to respondents since March 1, 1955, and up to and including the date of foreclosure judgment on October 16, 1956, the amount would be approximately $1,425, plus interest and taxes. She alleges that she gave to her son the sum of $630 in September 1955, and on her committal to the hospital she had approximately $300 in cash. She does allege that she had money on hand available to make each payment as due at that time or now. In her complaint she states that she believes that at the time of her commitment she had enough money to pay all the payments, but in her prayer she prays for the court to allow her a reasonable time to make the payments.

In *Bennett v. Hibernia Bank,* 47 Cal.2d 540, 554 [305 P.2d 20], the court said: "Ordinarily equity will not interfere with a judgment on the ground of extrinsic fraud or mistake unless the one whose interests were infringed can present a meritorious case; the plaintiff must plead and prove facts from which it appears, at least prima facie, that if the judgment were set aside and the proceedings were reopened, a different result would probably follow."

Appellant also alleges in her brief that the lower court in its exercise of equitable power would have provided her a redemption period in which she could redeem her property by paying all the sums due under the contract and that a different result would have followed. It is not necessary to guarantee that she definitely would win, but cases where a different result might follow cover situations where testimony by witnesses who would be called upon to testify might or might not prove the case. (*Los Angeles Auto Tractor Co. v. Superior Court,* 94 Cal.App. 433 [271 P. 363].) (8) In the present case she must definitely allege that there would be a different result by showing ability to pay and tender of the amount due.

It is stated in 18 California Jurisprudence, 2d, Equity, section 57, at page 240:

"There is but one form of action, and that form applies as well to a suit in equity as it does to an action at law. Likewise, the pleadings in all civil actions, as well as the rules ***46** by which their sufficiency is determined, are prescribed by statute. A bill in equity for any kind of equitable relief, therefore, with its formal parts governed by the old rules of chancery practice, does not obtain in this state. Instead, the same form of complaint is used in both equitable and legal actions; and this complaint consists simply of a statement, in ordinary and concise language, of the facts that constitute the plaintiff's cause of action. Thus, although the substantive distinction between law and equity is still as naked and as broad as ever, there is no difference, under the California system, between the form of what would otherwise be a bill in chancery and a common-law declaration. Nevertheless, a plaintiff who invokes the aid of equity is bound by the rules that apply to equitable proceedings; ..."

Failure to Plead a Tender

In plaintiff's third amended complaint she states that she is able and willing to pay the balance due on the contract as of October 16, 1956, plus sums expended for improvements, taxes, repairs, upkeep, and interest at 6 percent, less amounts received by respondents as rent and the reasonable value of their own use of said property, and further, that she "... has demanded an accounting and has offered to pay defendants the sum due them for reconveyance of said property, but defendants have refused said offer and have refused to render an accounting."

In the present case the allegation of the offer also includes the refusal of the respondents to accept.

(9) A person asking for equity must be willing to do equity and this would require in this case that the appellant make a valid tender to the respondents in order to be placed back in possession as of October 1956, or have the property reconveyed, without conditions attached to the offer. (18 Cal.Jur.2d, Equity, §§ 30, 31, pp. 190-195.)

(10) "The general rule is that the party making a tender acts at his own peril and must see to it that the amount tendered is large enough, at least where the correct amount is not within the exclusive knowledge of the creditor. An offer of partial performance is of no effect. A tender is not invalidated, however, by insufficiency in the amount tendered if no objection is made by the creditor to the amount." (47 Cal.Jur.2d, Tender, § 6, pp. 258-259; § 19, pp. 277-278.)

In *Christin v. Story,* 119 Cal.App. 326, 334 [6 P.2d 301], the court said: "He had made neither a tender to respondent ***47** nor into court and has failed to plead or prove that he is ready, willing and able to make the payments due." (See also *Wilson v. Secur-*

ity-First National Bank, 84 Cal.App.2d 427, 432 [190 P.2d 975].)

(11) Both parties in their briefs have failed to be of much help to the court in citing but a few authorities as to their positions. We do find, however, that in this case the appellant alleges her offer with a condition to deduct amounts received as rent for the use of the property by respondents, and we think that this invalidates the tender.

In *Sutter St. R.R. Co. v. Baum,* 66 Cal. 44, 52, 53 [4 P. 916], it is stated that such a tender was not necessary where the plaintiff cannot determine in advance of the suit the amount due because of the need to base the ascertainment of the sum due on facts independent of the terms of the contract. In the present case we have a contract which by its terms can be easily ascertained, not only as to principal, but interest and taxes. To the same effect is *Miller v. Cox,* 96 Cal. 339 [31 P. 161], which required an appraisement of property outside the information of the party to become liable.

Appellant makes no request for leave to amend again (which was not necessary), but requested only a reversal of the judgment, basing her statement on the belief that the complaint did state a cause of action, and now makes no argument or request that she could properly amend the complaint if the judgment is reversed. (Code Civ. Proc., § 472c.) Had appellant made an offer to pay all amounts regardless of credits, she would be offering full equity. It is well accepted law that forfeitures are not favored in law or equity.

(12) Here, appellant has submitted four complaints, all similar in defects, and refusal to allow her to amend was not an abuse of discretion by the court. (*Findley v. Garrett,* 109 Cal.App.2d 166 [240 P.2d 421].)

Appellant's complaint contains many conclusions of law-she is able and willing to pay and has offered to pay, with no definite fixed sum or no allegation of her ability to pay. However, she has not alleged a proper tender, nor has she shown ability to pay.

In *Black v. Arnold Best Co.,* 124 Cal.App.2d 378, 383 [268 P.2d 513], the court said, "The right to relief from default there authorized is not a matter of right under all circumstances, and that section [Civ. Code, § 3275] presupposes that the party seeking relief from a forfeiture is in default, and ***48** in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application."

The judgment is affirmed.

Griffin, P. J., and Shepard, J., concurred.
A petition for a rehearing was denied November 21, 1962.

Cal.App.4.Dist.
Conforti v. Dunmeyer
209 Cal.App.2d 41, 25 Cal.Rptr. 504

END OF DOCUMENT

J. E. HENCK, Respondent,
v.
LAKE HEMET WATER COMPANY (a Corporation), Appellant.
L. A. No. 15354.

Supreme Court of California
June 24, 1937.

HEADNOTES

(1) Property--Estates--Conditions.
In the case of a determinable fee which terminates on the happening of a contingency the estate is at an end without any further act on the part of the grantor, while in the case of a vested estate subject to defeasance upon condition broken-a condition subsequent-the grantor, upon the happening of the contingency, is entitled only to the right to terminate the estate, or a right of reentry.

(2) Waters and Water Rights--Contracts--Default in Payment--Forfeiture-- Equity.
Where a contract provided that a company which sold a tract of land and agreed to deliver specified quantities of water at designated times and at a stipulated point for use upon the land described in the contract, the contract holder agreeing to pay at certain times a certain sum for every year the agreement remained in force and the contract stating that the payment of the sums at the times stated was a condition precedent to the right of the second party to receive or use any water thereunder and that the failure to make such payment should give the first party the right, without notice, to terminate the contract, the contract itself negatived the view that the proprietary interest or estate of the second party was determinable *ipso facto* by the mere failure to make a payment in any year upon the date specified, there being no condition stated in the contract which limited the duration of the latter's estate; and if the breach of the condition warranted a forfeiture, equity in a proper case may grant relief.

(3) Waters and Water Rights--Action to Reinstate Rights--Former Judgment-- Construction--Res Judicata.
In an action to have the contract holder's rights reinstated, in such case, after the company attempted to terminate them for failure of payment of the stipulated charge on the specified date, a judgment in a prior action does not support a plea of *res judicata,* where the only issue decided, or necessarily involved in the prior case, was whether the plaintiff in the present case was one of those persons for whose benefit the proceeding was taken, and the issues in the present case were not involved in that action.

(4) Waters and Water Rights--Contracts--Time.
Under section 1492 of the Civil Code, where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due.
See 6 **Cal. Jur.** 409.
(5) Waters and Water Rights--Forfeiture--Relief.
Under section 3275 of the Civil Code, whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in the case of a grossly negligent, wilful or fraudulent breach of duty; but the provisions of this section are necessarily qualified by the language of section 1492 of said code so that generally in a case where time is made the essence of an agreement a party may not obtain relief under that section.
See 12 **Cal. Jur.** 640.
(6) Waters and Water Rights--Construction of Contract--Time of Essence-- Equity.
The general rule of equity is that time is not of the essence of a contract unless it clearly appears from

the terms of the contract, in the light of all the circumstances, that such was the intention of the parties.

(7) Waters and Water Rights--Form of Contract--Intent.
It is not necessary that any special words should have been employed in order that the intent to make time of the essence of a contract be apparent; but where the contracting parties, in such case, used the time element as a means to insure prompt payment, rather than an indication that failure to perform at the time stipulated would result in the immediate termination and forfeiture of the other party's rights, the latter may be relieved in equity from his default in a payment due on January 1st, which he tendered on January 11th, after notice that the contract was terminated for failure to make the payment, especially where it was shown that for two years the company, immediately preceding the due date, had notified the plaintiff of the amount due for the ensuing year, which he had promptly paid, but the company failed to notify him in advance of the payment on which he defaulted.

SUMMARY

APPEAL from a judgment of the Superior Court of Riverside County. G. R. Freeman, Judge. Affirmed.

The facts are stated in the opinion of the court.

COUNSEL

Cosgrove & O'Neil and John M. Clayton for Appellant.

James A. Hall, Fred A. Wilson and Wilson & Coughlin for Respondent.

SHENK, J.

The plaintiff was the holder of a water contract or certificate issued by the defendant, Lake Hemet Water Company. The defendant gave notice of the termination of the contract and the plaintiff's right to receive water thereunder by reason of nonpayment of the stipulated rate. After the defendant's refusal of a tender of the amount due with interest, the plaintiff brought this action to have the certificate reinstated. The plaintiff had judgment, from which the defendant appealed.

The plaintiff's predecessors acquired a tract of 25 acres from the Hemet Land Company. The land was part of a larger acreage in Riverside County under one ownership. The owners also were possessed of rights to take and divert water from the San Jacinto River and its tributaries. The history of the promotion and sale between the years 1889 and 1915 of small parcels of said acreage and with each parcel the right to receive water through the distributing system of Lake Hemet Water Company, then formed, is related in the opinion in *Allen v. Railroad Com.*, 179 Cal. 68 [175 Pac. 466, 8 A. L. R. 249].

The plaintiff's predecessors became the owners of the 25-acre tract and of water contract numbered 1284 in January, 1911. The instrument is captioned "Certificate Water Contract", and is in the form of an agreement signed by both parties. The company agreed to deliver specified quantities of water at designated times and at a stipulated point in the water company's water-way for use on the 25 acres described in the certificate. The contract holder agreed to pay to the company on the first of January the sum of $50 for every year that the agreement remained in force. The following then appears: "The payment of said sums at the time stated is a condition precedent to the right of the party of the second part to receive or use any water hereunder, and the failure to make such payment shall give the party of the first part the right without notice to terminate this contract." Similar contracts were issued to purchasers of other acreage served by the water distributing system operated by the defendant. ***139** The rate prescribed in all of them was $2 per acre per year.

In 1915 the water company petitioned the Railroad Commission to fix the rates to be charged for the

sale and distribution of its water on the theory that the water company was a public utility subject to the supervision of the commission. The holders of water contracts appeared on that proceeding. The petition of some of them for review of the commission's order fixing rates was heard in the case of *Allen v. Railroad Com., supra.* In that case it was held that the water company, as to the holders of contracts such as the one here involved, was a private and not a public utility. Nevertheless, the water company refused to recognize the contracts held by the plaintiff and others who were not parties to the review proceeding. Subsequently actions were commenced by certain of the contract holders, including the plaintiff herein, to compel the water company to recognize the rights of such holders. In a decision which disposed of all such actions (*Nelson v. Lake Hemet Water Co.,* 212 Cal. 94 [297 Pac. 914]), it was held that the decision in the Allen case determined the private character of the water company as to all contract holders whether or not they were parties to the review proceedings. After the decision in the Nelson case, and on October 29, 1931, judgment for the plaintiff in the similar action theretofore commenced by Henck against the water company, numbered 11236, was entered. In December of that year the water company notified Henck that $50 would be due under such contract on January 1, 1932, for the ensuing year, which sum he promptly paid. A similar notice was sent to him in December of 1932, and he promptly paid the sum due. In December, 1933, however, the defendant changed its custom and omitted the usual notice. Payment of the $50 due from the plaintiff herein on January 1, 1934, for water for the ensuing year was not made, and on January 8, 1934, the defendant notified him that for failure to make payment by January 2, 1934, "said Contract is and has been terminated, as well as your right to receive or use any water thereunder. Therefore, water will be delivered in future only under the public service rules and regulations of this Company". On January 11, 1934, the plaintiff tendered to the defendant the sum of $50 together with interest on that sum from January 1, 1934, to the date of tender, and ***140** requested a continuance of the service of water pursuant to the terms of the contract. The defendant refused the tender and compliance. The present action followed.

The trial court found and concluded that the failure of the plaintiff to pay the sum of $50 on or before January 1, 1934, was not due to gross neglect or wilful or fraudulent breach of duty on his part, but resulted solely from his inadvertence and excusable neglect, and from the lack of any notice that that amount would be payable on that date; further that the failure of the plaintiff to pay the sum promptly on January 2, 1934, occasioned no loss or damage to the defendant other than the loss of interest from January 1 to 10, 1934, and that the payment of such interest represents full compensation to the defendant for the failure of the plaintiff to pay said sum promptly. The court also found the plaintiff's contract to be of the value of $3,000. It concluded that the plaintiff was entitled to be relieved of any forfeiture or any loss in the nature of a forfeiture upon payment by him to the defendant of the sum of $50 with interest as tendered.

The question thus presented is whether the court has correctly applied the principles of equity in granting relief to the plaintiff.

(1) The defendant relies on the decision in the case of *Allen v. Railroad Com., supra,* and on the judgment in the prior Henck action numbered 11236 and alleged by the plaintiff in his complaint in this action, as establishing the defendant's right under the contract to terminate the plaintiff's rights upon his failure to make the required annual payment at the stipulated time. It is contended that the estate vested in the plaintiff is one upon limitation, and not upon condition subsequent; that is, that it is a determinable estate which existed so long as the plaintiff made the payments as specified, and not one which was subject to be defeated upon the happening of a condition subsequent. The difference is a distinct one, and in the case of a determinable fee which terminates upon the happening of the contingency the estate is at an end without any further act

on the part of the defendant; while in the case of a vested estate subject to defeasance upon condition broken-a condition subsequent-the defendant, upon the happening of the contingency, is entitled only to the right to terminate the estate, or a right of reentry. (***141***First Universalist Soc. of North Adams v. Boland,* 155 Mass. 171 [29 N. E. 524, 15 L. R. A. 231]; *Lyford v. City of Laconia,* 75 N. H. 220 [72 Atl. 1085, 139 Am. St. Rep. 680, 22 L. R. A. (N. S.) 1062]; *University of Vermont, etc., v. Ward,* 104 Vt. 239 [158 Atl. 773]; 10 Cal. Jur., pp. 603, 604; 12 Cor. Jur. 410.)

(2) In the present case the court concluded that the contract created an estate subject to be defeated upon the happening of a condition, viz., a condition subsequent; and that the same condition, payment of the annual water rate, was a condition precedent to the plaintiff's right to receive water under the contract. The defendant contends that in the Allen case the property right or easement was held to be a single right and that the court may not split the easement from the servitude. When the court in that case spoke of the easement and servitude as being a single entity which could not be separated without destroying both, it had in mind the impossibility of separating the right to receive water from the property right in the distributing system for the purpose of changing the contractual rate. It concluded that such a separation would be an impairment of a contract right and a taking of private property without compensation. It was not called upon to define the nature of the estate or its duration.

In support of its contention that the judgment in the prior Henck action defined the estate as one upon limitation, the defendant quotes the following portion of the judgment in that case: "The plaintiff as long as he shall henceforth comply with the requirements and conditions of said contract on his part, is entitled to have water delivered upon said land by the defendant as aforesaid, under and pursuant to the terms and conditions of said contract, and the defendant is hereby required and ordered to make such delivery of water, so long as the plaintiff shall henceforth comply with the requirements and conditions of said contract on his part."

The language of the contract is that the "payment of said sums at the time stated is a condition precedent to the right" of the plaintiff to receive or use any water, "and the failure to make such payment shall give" the defendant "the right without notice to terminate this contract".

We are of the opinion that the trial court correctly defined the rights and obligations of the respective parties as contemplated by the contract. In its interpretation it did not ***142*** split or separate the contractual right or easement. It was not attempting to lift anything out of the contract for the purpose of applying to it new rights and obligations. It merely recognized what this court defined in the Allen case, a right to receive water upon payment of a stipulated sum coupled with a property right or interest subject to be defeated upon failure of payment and the exercise of the defendant's right to terminate the contract. Its view was undoubtedly inspired by the language of the contract itself, wherein payment of the sum at the time stated was made a condition precedent to the right to receive water, and upon the failure to make the payment the defendant was given the right to terminate the contract. The language of the contract itself negatives any possible view that the proprietary interest or estate of the plaintiff is determinable *ipso facto* by the mere failure to make a payment in any year upon the date specified. There is no condition stated in the contract which limits the duration of the plaintiff's estate. The condition stated is one by which the vested estate is subject to be defeated upon the exercise by the defendant of the right to terminate it if the condition is not performed-a condition subsequent. If the breach of such a condition works a forfeiture, equity in a proper case may grant relief. (Civ. Code, secs. 1492, 3275.)

(3) Assuming that the judgment in the prior Henck case was sufficiently pleaded so as to permit the defendant to rely upon it as a plea of *res judicata,* nevertheless there is nothing in that judgment to

prevent the court in the present case from enforcing the contract between the parties in accordance with its language. The only question in the prior case and the only issue decided or necessarily involved therein, and concluded by the judgment, was whether the plaintiff was one of those persons for whose benefit the review proceeding was taken in the Allen case. The issues here presented were not involved in that action nor determined by that judgment, and it therefore does not constitute an estoppel against the parties to the present action. (*Beronio v. Ventura County Lumber Co.,* 129 Cal. 232 [61 Pac. 958, 79 Am. St. Rep. 118]; Code Civ. Proc., sec. 1911.) Furthermore, the use of the specific language quoted from the judgment rendered in the prior action is consistent with the definition herein of the rights of the parties. Our conclusion is that ***143** the court may grant relief from the forfeiture occasioned by the nonpayment of the amount due on January 1, 1934, upon equitable grounds being shown, unless it must refuse relief because the parties have made time the essence of the contract.

(4) The defendant contends that time is made the essence of the contract because payment on a date specified is made a condition precedent to the right to receive water. The contract does not contain an express declaration that time is of the essence of the plaintiff's obligation. Section 1492 of the Civil Code provides: "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due ..." (5) Section 3275 of the same code states: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty." The provisions of section 3275 are necessarily qualified by the language of section 1492, so that generally in a case where time is made the essence of the agreement a party may not obtain relief under that section. (*Collins v. Eksoozian,* 61 Cal. App. 184 [214 Pac. 670].) In the cited case, however, relief was granted on the ground that even though time was an essential element the showing justified the interposition of a court of equity.

(6) The general rule of equity is that time is not of the essence of the contract, unless it clearly appear from the terms of the contract, in the light of all the circumstances, that such was the intention of the parties. (*Steele v. Branch,* 40 Cal. 3, 11; *Beverly v. Blackwood,* 102 Cal. 83 [36 Pac. 378].) It was recognized in *Glock v. Howard & Wilson Colony Co.,* 123 Cal. 1, 10, 11 [55 Pac. 713, 69 Am. St. Rep. 17, 43 L. R. A. 199], that equity will relieve a party from the effect of a breach of a covenant to pay upon a day certain upon the showing of fraud, mistake, surprise or other ground of purely equitable cognizance excusing the breach, where damages on account of the breach can be accurately measured and compensation made by the allowance of interest. (See, also, *Hopkins v. Woodward,* 216 Cal. 619 [15 Pac. (2d) 499].) ***144**

(7) It is true, as the defendant contends, that it is not necessary that any special words should have been employed in order that the intent to make time of the essence be apparent. But the cases relied upon by it for the most part involve the obligation of the buyer to make payment upon a day certain under a contract for the sale of real property. The theory upon which the courts hold that in such cases time is of the essence, is that damage resulting to the seller by reason of delay in performance on the part of the purchaser cannot be estimated nor compensated. (See *Grey v. Tubbs,* 43 Cal. 359; *Glock v. Howard, supra; Skookum Oil Co. v. Thomas,* 162 Cal. 539 [123 Pac. 363]; *Troughton v. Eakle,* 58 Cal. App. 161, 172 [208 Pac. 161].)

The parties herein concede and the Allen case decides that the plaintiff has become vested with a perpetual property right. The defendant urges that since a specific date has been indicated when pay-

ment of annual water dues must be made as a condition precedent to the right to receive water, time is therefore of the essence of the contract within the meaning of the statute and the cases relied upon by it. The conclusion appears unavoidable, however, that the trial court correctly viewed the use of the time element as a means to insure prompt payment rather than as an indication that failure to perform at the time stipulated would result in an immediate termination and forfeiture of the plaintiff's rights. It is undoubtedly true that the defendant is desirous and even anxious to unburden itself of the private contracts which the court in the Allen case recognized might have been unwise and improvident and might lead to the defendant's inability to carry on its service. But no contention is made that the defendant is no longer able to function under the yoke of these perpetual contracts or that payment of interest does not constitute full compensation for the breach. On the record presented we adhere to the view expressed in the Allen case that the court has no greater power in this than in any other case to make a different contract for the parties, and that is should not deny to the plaintiff the relief to which he is obviously entitled. Furthermore, even assuming that time should be deemed an essential element in the contract, nevertheless it may be said that under the pertinent authorities hereinabove cited, the interposition of equity to grant relief under the facts was justified by the showing that for ***145** two years the water company, immediately preceding the due date, notified the plaintiff of the amount due for the ensuing year, and that the plaintiff's failure to make payment on January 2, 1934, was excusable because it was in part if not largely induced or provoked by the defendant's own conduct. (*Collins v. Eksoozian, supra.*)

The judgment is affirmed.

Curtis, J., Langdon, J., Edmonds, J., and Seawell, J., concurred.

Cal.
Henck v. Lake Hemet Water Co.
9 Cal.2d 136, 69 P.2d 849

END OF DOCUMENT

C

Estate of LUCILLE CROSSMAN, Deceased.
SHARON LOU SMITH, as Executrix, etc., et al.,
Plaintiffs and Respondents,
v.
PERCIVAL C. MILLS, Defendant and Appellant.
Civ. No. 21984.

District Court of Appeal, First District, Division 3, California.
Dec. 18, 1964.

HEADNOTES

(1a, 1b) Contracts § 22--Consent--Mode of AcceptanceVendor and Purchaser § 36--Options--Requisites.
An option to purchase real property which contained a provision that "Any notice that either party hereto desires or shall be required to give shall be ... sent by prepaid registered mail" did not require acceptance by registered mail; the broad inclusion therein of all notices, regardless of importance, implied mere suggestion of a permissive method of communication, and registered mail was not a prescribed requirement or an absolute condition.
See **Cal.Jur.2d,** Contracts, § 21; **Am.Jur.2d,** Contracts, § 48 et seq.
(2) Contracts § 22--Consent--Mode of Acceptance.
An offer which merely suggests a permitted manner of acceptance does not preclude another method of acceptance.

(3) Contracts § 22--Consent--Mode of Acceptance.
Care must be taken in the interpretation of offers to determine whether a particular mode of acceptance is required, and it is frequently necessary to look beyond the literal meaning of the language used.

(4) Vendor and Purchaser § 49--Options--Acceptance.
Where a provision in an option to purchase real property providing for the time of acceptance emphasized the sending rather than the receipt of the acceptance, the court may look to Civ. Code, § 1583, providing that an acceptance is deemed fully communicated when placed in the course of transmission to the offeror.
See **Cal.Jur.2d,** Vendor and Purchaser, § 169 et seq.; **Am.Jur.,** Vendor and Purchaser (1st ed § 40).
(5) Vendor and Purchaser § 49--Options--Acceptance.
Where, under an option to purchase real property which called for notices to be sent by registered mail, but did not make such provision a condition of acceptance, and provided that acceptance would be deemed received 24 hours after being mailed, the offeree deposited his acceptance in the ordinary mail, his notice of exercise of the option was complete, without registration, on its deposit in the mail or, giving utmost effect to the 24- hour clause, at the same hour the next day, at which time the contract came into existence.

(6) Decedents' Estates § 1129--Appeal--Decisions Appealable.
An order of one department of the superior court retransferring an estate proceeding to the probate department for the steps remaining in a real property sale confirmation procedure is not appealable. (Prob. Code, § 1240.)

SUMMARY

APPEAL from orders of the Superior Court of Alameda County retransferring an estate matter and confirming sale of estate real property. Homer W. Buckley FN* and A. J. Woolsey, Judges. Order confirming sale affirmed; appeal from other order dismissed.

FN* Judge pro tem., assigned by the Chairman of the Judicial Council.

COUNSEL

Thiel, Sassone, Howard & Wallace and John H. Wallace for Defendant and Appellant.

Foley & Foley, Stark & Champlin, Herbert P. Moore, Jr., and Richard H. Rahl for Plaintiffs and Respondents.

DRAPER, P. J.

This appeal is from an order in probate confirming sale of real property, but the sole question is whether there is a contract between appellant, as vendee, and respondent executrices, as vendors.

The parties executed a written agreement by which the executrices for a cash consideration, granted appellant an option to purchase the land upon specified terms. Sale was specifically made subject to confirmation by the probate court. One of the 17 paragraphs of the agreement provided: "Any notice that either party hereto desires or shall be required to give to the other hereunder shall be given in writing, either delivered personally or sent by prepaid registered mail ... Notice by registered mail shall be deemed to have been consummated upon the expiration of twenty-four (24) hours from the time of deposit thereof in any United States depositary for mail."

The option was to expire at midnight, October 27, 1962. On October 26, appellant telephoned the attorney for the estate to advise that it was being exercised. The same day, he wrote to the estate attorney, whose address was specified in the option agreement for notices to the executrices: "May this letter serve as notice to the Co-Executors of the Estate of Lucille Crossman, No. 156057, that I am exercising my option ***372** to purchase under said terms of the option dated May 29, 1962 and expiring on October 27, 1962. You will please notify me in writing of the steps needed to be taken for confirmation." Postage was prepaid, but the letter was sent by ordinary mail. The envelope is postmarked at 6:30 p.m. October 26, and presumptively was delivered to the attorney's office the next day, Saturday. It was not actually received by counsel until Monday, October 29. He promptly wrote appellant, acknowledging exercise of the option. At appellant's requests, petition for confirmation of sale was continued some 46 days. Appellant wrote December 13, saying that he was not able to perform the agreement then, but was "continuing to perform on the purchase as soon as possible." This petition for confirmation followed.

(1a) Appellant argues that there is no contract because the letter sent by ordinary mail was either wholly ineffective to exercise the option, or was too late because effective only upon its actual receipt after the option had expired.

Respondents assert that the use of registered mail, even if held to be required by the option agreement, was for their benefit and thus could be waived by them (*Artukovich v. Pacific States etc. Pipe Co.*, 78 Cal.App.2d 1, 3 [176 P.2d 962]). It has been pointed out that this rule, broadly applied, would grant the offeror an unwarranted option to affirm or reject the acceptance and the contract without communication to the offeree and without limitation of time (1 Williston, Contracts (3rd ed.) § 92; 1 Witkin, Summary of Cal. Law (1960) p. 69). This criticism may not apply under the facts of our case, but we do not resolve this question, since in our view the option agreement does not require acceptance by registered mail.

(2) Distinction must be made between an offer which makes a "positive requirement" (Rest., Contracts, § 61, com. a) or imposes "an absolute condition" (1 Williston, Contracts, § 76) of a specified manner of acceptance, on the one hand, and on the other an offer which "merely suggests a permitted ... manner" (Rest., Contracts, § 61; see also 1 Williston, Contracts, p. 250). In the latter case, another method of acceptance is not precluded. "If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted" (Civ. Code, § 1582). (3) "Care must be taken in the interpretation of offers" to determine this question, and "it ***373** is frequently necessary to look beyond the literal meaning of the language

used." (1 Williston, Contracts, p. 250.)

(1b) This option agreement itself contains indications that it but suggests a mode acceptable to respondent offerors. The provision for use of registered mail is not limited to notices required by the agreement, but extends "to any notice that either party ... desires ... to give to the other." This broad inclusion of all notices, regardless of importance, implies mere suggestion of a permissive method of communication. The extrinsic evidence shows that both sides for a long period treated the option as exercised, and the contract of purchase as complete. This contemporaneous construction lends support to the trial court's view that registered mail was not a prescribed requirement or an absolute condition, but a mere suggestion. Moreover, the trial court found, upon substantial evidence, that both vendee and vendors waived the provision for registered mail.

Thus the determination that the option was exercised, and a contract of purchase and sale formed, is fully supported.

(4) There remains the question of time. If the notice had been sent by registered mail, it would have been "deemed to have been consummated upon the expiration of" 24 hours from time of deposit in the mail, i.e., at 6:30 p.m. October 27. Appellant argues that since it was sent by ordinary mail, it was not effective until actually received by respondents' attorney Monday, October 29, after expiration of the option. We cannot agree.

The agreement required that all notices be "given"-not "delivered" or "received". The same paragraph provides that notice be "sent" by registered mail, thus equating "sent" with "given", and emphasizing the lack of requirement of actual delivery. These considerations, as well as those set forth in our determination that registration of the letter was not a "condition," lead to the view that effectiveness of notice was not predicated upon registration. Since the agreement did not require registration and emphasized sending rather than receipt, we may look to the code provision that an acceptance is deemed fully communicated when placed in the course of transmission to the offeror (Civ. Code, § 1583).

We do not look to that section in interpreting the agreement (see *Morello v. Growers Grape Products Assn.*, 82 Cal.App.2d 365 [186 P.2d 463]; and criticism thereof in 1 Witkin, Summary of Cal. Law (1960) 68, 69). Rather, we rely upon it only after having determined from the face of respondents' ***374** offer and from the extrinsic evidence that no "conditions concerning the communication of its acceptance" are prescribed (Civ. Code, § 1582). (5) Thus appellant's notice of exercise of the option was complete, without registration, upon its conceded deposit in the mail at 6:30 p.m. October 26 (see *State of California v. Agostini*, 139 Cal.App.2d 909, 915 [294 P.2d 769]), or, giving utmost effect to the 24-hour clause, at 6:30 p.m. the next day. The contract of purchase and sale came into existence then.

(6) This case was transferred from probate to another department for trial of the issues we have discussed. After filing findings and conclusions, the trial department retransferred the proceeding to probate for the remaining steps in the confirmation procedure. Appeal was taken from this order, but it is not appealable (Prob. Code, § 1240).

Appeal from order of retransfer dismissed. Order confirming sale affirmed.

Salsman, J., and Devine, J., concurred.

Cal.App.1.Dist.
In re Crossman's Estate
231 Cal.App.2d 370, 41 Cal.Rptr. 800

END OF DOCUMENT

63 Cal.App.3d 806, 134 Cal.Rptr. 101
(Cite as: 63 Cal.App.3d 806)

C

RUDOLPH JOHNSON, JR.,Plaintiff and Respondent,
v.
WILLIAM D. ALEXANDER et al., Defendants and Appellants
Civ. No. 48537.

Court of Appeal, Second District, Division 4, California.
November 16, 1976.

SUMMARY

The trial court denied defendants' motion to dissolve a writ of attachment obtained by plaintiff in an action for breach of an agreement entered into in settlement of a prior lawsuit. The prior lawsuit that was settled was based on defendants' alleged refusal to pay plaintiff for services rendered in connection with the making of a motion picture. (Superior Court of Los Angeles County, No. C 108033, Bruce R. Geernaert, Temporary Judge. FN*)

The Court of Appeal affirmed, holding, on the basis of the nature of the action that gave rise to the settlement, that the attachment was based on a claim for services rendered by plaintiff so as to make the action one in which attachment is proper. The court further held that the claim was for a liquidated amount. It was pointed out that defendants had made two payments on the agreed settlement, one before and one after the attachment issued, and had not denied their obligation to pay the money to plaintiff. In holding that plaintiff had established the absence of a reasonable probability that a successful defense could be asserted, as required by Code Civ. Proc., § 538.4, the court noted that defendants' theory was failure of consideration or of a condition precedent based on plaintiff's delay in dismissing the prior lawsuit after the signing of the settlement agreement, that defendants offered no evidence that plaintiff acted wrongly or that they suffered any harm from the delay, that the agreement contained no stipulation as to when the lawsuit was to be dismissed, and that it did not put plaintiff on notice that time was of the essence. The property attached was held to have been an asset of a corporate defendant at the time the writ was levied, and the court affirmed the trial court's finding that there was still a substantial danger that defendants would "transfer, other than in the ordinary course of business, remove or conceal the property sought to be attached," within the meaning of Code Civ. Proc., § 538.5.

FN* Pursuant to Constitution, article VI, section 21.(Opinion by Kingsley, Acting P.J., with Dunn and Jefferson (Bernard), JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Attachment and Garnishment § 4--Claims and Actions Enforceable by Attachment and Garnishment--Claims for Services.
On defendant's motion to dissolve a writ of attachment obtained by plaintiff in an action for breach of an agreement entered into in settlement of a prior lawsuit, the trial court properly found that the attachment was based on services rendered by plaintiff so that the action was one in which attachment was proper, where the lawsuit that was settled was based on defendants' alleged refusal to pay plaintiff for services rendered in connection with the making of a motion picture.

(2) Attachment and Garnishment § 4--Claims and Actions Enforceable by Attachment and Garnishment--Liquidated Claim.
On defendants' motion to dissolve a writ of attachment obtained by plaintiff in an action for breach of an agreement entered into in settlement of a prior lawsuit, the trial court properly found that plaintiff's claim was for a liquidated amount so that the action was one in which attachment was proper, where the

settlement agreement provided for payment to plaintiff of $30,000 of which defendants had paid $10,000 before the filing of the action and $2,000 at a meeting of the parties after plaintiff had obtained the attachment order, and where defendants did not at any time during that meeting deny their obligation to pay the money to plaintiff.

(3a, 3b) Attachment and Garnishment § 4--Claims and Actions Enforceable by Attachment and Garnishment--Absence of Reasonable Probability of Successful Defense.
On a motion to dissolve a writ of attachment obtained by plaintiff in an action for breach of an agreement entered in settlement of a prior lawsuit, the trial court properly found that plaintiff, as required by Code Civ. Proc.,§ 538.4, had established the absence of a reasonable probability that a successful defense could be asserted, where defendants' theory of defense was failure of consideration or of a condition precedent in that the prior lawsuit was not dismissed until a few months after the signing of the settlement agreement, where defendants offered no evidence that plaintiff acted wrongly in dismissing the suit when he did or that they suffered any harm from the delay, where the agreement contained no stipulation as to when the lawsuit was to be dismissed and did not put plaintiff on notice that time was of the essence, where defendants at no time demanded that plaintiff dismiss the suit, and where there was no showing that the time of dismissal was unreasonable.
[See **Cal.Jur.3d**, Creditors Rights and Remedies, § 194; **Am.Jur.2d**, Attachment and Garnishment, § 435.]
(4) Contracts § 42--Sufficiency of Performance--Effect of Delay.
Delay in the performance of an agreement is a material failure only if time is of the essence, i.e., if prompt performance is, by the express language of the contract or by its very nature, a vital matter, and when no time is specified for the doing of an act, other than the payment of money, a demand for performance is necessary to put the promisor in default.

(5) Attachment and Garnishment § 6--Property Subject to Attachment and Garnishment--Assets of Corporation.
On defendants' motion to dissolve a writ of attachment obtained by plaintiff in an action for breach of an agreement entered into in settlement of a prior lawsuit, the evidence established that real property attached was an asset of a corporate defendant at the time the writ was levied, where the property had been conveyed to the corporation some 7 months prior to issuance of the writ and a corporate grant deed conveying the property to an individual was not executed until 18 days after such issuance.

(6) Attachment and Garnishment § 10- Release, Discharge and Dissolution-- Lack of Continued Existence of Grounds for Attachment.
On defendants' motion to dissolve a writ of attachment obtained by plaintiff in an action for breach of an agreement entered into in settlement of a prior lawsuit, the trial court properly found that there was still a substantial danger that defendants would "transfer, other than in the ordinary course of business, remove or conceal the property sought to be attached," within the meaning of Code Civ. Proc., § 538.5, where an individual defendant testified that the transfer of title to the attached property to her after the writ of attachment issued was made to avoid any possible attachment, where defendants failed to take advantage of the alternative to attachment of posting of an undertaking pursuant to Code Civ. Proc., § 489.310, where they failed to move for an order of preference should the attachment remain, and where another individual defendant testified that he might have indicated that he might take any means to protect himself if a reasonable settlement could not be reached.

COUNSEL

Walter L. Gordon III for Defendants and Appellants.

Pollock, Rigrod & Bloom and David Alkire for Plaintiff and Respondent.

KINGSLEY, Acting P. J.

This is an appeal by defendant-appellants, William D. Alexander, Nina B. Alexander and W&N Enterprises, Inc., a California corporation, from an order denying their motion to dissolve a writ of attachment previously obtained by plaintiff-respondent, Rudolph Johnson, Jr. We affirm.

On October 3, 1972, plaintiff Rudolph Johnson, Jr., and defendant [FN1] William D. Alexander entered into a written contract whereby plaintiff agreed to provide certain services for defendant in connection with the making of the feature length motion picture entitled "The Klansman." Plaintiff was to "package the production" which included financing of the film, obtaining the services of Terrance Young to direct the picture and selecting the right stars for the picture. In return for these services, plaintiff was to receive 50 percent of defendant's share in the picture with all other percentages to be mutually agreed upon necessary to complete ***810** the production, and the title and screen credit of executive producer. Plaintiff provided defendant with an introduction to Mr. Young, the result of which ended in the contracting of Mr. Young to direct the picture. Mr. Young proceeded to contact and persuade Richard Burton to star in the picture. Subsequently, the film was completed and released to the general public.

> FN1 Defendant hereinafter will refer to William D. Alexander unless otherwise indicated. Defendants hereinafter will include William D. Alexander, Nina B. Alexander and W&N Enterprises, Inc.

Plaintiff instituted a suit against defendant in Los Angeles Superior Court, case No. C-84893, based upon defendant's refusal to pay plaintiff those sums of money due and owing to plaintiff for services rendered in connection with the "packing" of "The Klansman." This prior suit was settled pursuant to a "Settlement and Release Agreement" dated September 3, 1974. Under the agreement, defendant agreed to pay plaintiff the sum of $30,000. To-date, the sum of $12,000 has been paid to plaintiff, leaving a balance due and owing of $18,000.

Subsequently, plaintiff filed on January 13, 1975, a "First Amended Complaint for Breach of Contract and to Set Aside Fraudulent Conveyances." On the same day plaintiff also obtained, without notice or hearing, a prejudgment writ of attachment attaching the business assets of defendant W&N Enterprises, Inc., the alleged alter ego of defendant William D. Alexander. The only asset presently under attachment is real property, a house, located at 3975 Kenway Avenue in Los Angeles, California.

At a hearing on January 5, 1976, defendant's motion to dissolve the attachment was denied. The court found that: (1) the claim pursuant to the settlement agreement was based upon services rendered for a liquidated amount; (2) the plaintiff had established, by a preponderance of the evidence, that he will probably succeed at the time of trial in recovering the liquidated sum of $18,000 over and above all counterclaims and set-offs; and (3) based on the evidence introduced at the hearing, the original grounds for issuing the writ of attachment still prevailed.

Defendants urge that there was insufficient evidence to support the trial court's decision. These contentions are all aimed at the fundamental issue of whether they are entities in the category of those whose property is subject to attachment and whether the action was of the type in which attachment is proper. ***811**

It has been established that, if the court finds on the basis of the preponderance of the evidence, that grounds for the issuance of an attachment exists and that plaintiff has established the probable validity of his claim and the absence of any reasonable probability that a successful defense can be asserted by the defendant, the court shall issue the writ of attachment; otherwise, the court shall dissolve the temporary restraining order. (Code Civ. Proc., § 538.4.) Thus, it was plaintiff's burden at the hearing on January 5, 1976, to demonstrate that this case

was one in which an attachment was allowable and that his claim was probably valid.

(1) We conclude that plaintiff has met these burdens. At the hearing plaintiff demonstrated that the writ of attachment was based on his services previously rendered to defendants in connection with the production of "The Klansman." It was undisputed by defendants that the first amended complaint was based upon the breach of the settlement and release agreement, which settled a prior lawsuit that was based upon the nonpayment of plaintiff for services rendered to the defendants. Further, nowhere in the record does defendant William Alexander contend that he was not satisfied with the caliber of the director or the main star obtained for the production of the picture. Defendant is merely seeking to escape his legal obligation to compensate plaintiff based on a very technical reading of their contract. This we will not allow, especially in light of the fact that defendant received everything he had bargained for in his contract with plaintiff. It is clear that it was plaintiff's introduction of defendant to Mr. Young which led to the eventual signing of Young to direct the picture. Mr. Young's signing in turn led to the signing of Richard Burton to star in the film and to the film's eventual production. Under these circumstances, to assert that plaintiff did not fulfill his part of the bargain, merely because he did not personally contact Burton or Marvin, is to assert form over logic.

If defendants' motion to dissolve the attachment were allowed, this would enable defendant William Alexander to escape liability for his breach of the contract. Under defendants' theory, a plaintiff could sue a defendant under a claim giving rise to a right of prejudgment attachment; the defendant could then settle the claim and agree to pay plaintiff the money owed to him; the action giving rise to the attachment would be dismissed; then the defendant could default on his obligation to make payments under the settlement agreement, and contend that plaintiff is not entitled to obtain a writ of attachment in an action brought to enforce a settlement agreement. By following these steps, a defendant ***812** would be able to avoid the attachment when in reality the basis of plaintiff's claim was not the settlement agreement giving rise to the second lawsuit, but the circumstances that initially led to the existence of that agreement. It has been frequently held that the legality of the attachment must be determined from the pleadings, proceedings and entire record in the attachment suit to ascertain therefrom what, in fact, the real grievance is for which relief is sought. The question is not what plaintiff has pleaded, but what in truth and in fact is his grievance. (*Samuels v. Superior Court*, 276 Cal.App.2d 264, 267 [81 Cal.Rptr. 216].)

Based on the foregoing reasons, we concur with the trial court's finding that the instant attachment was indeed based on services rendered by plaintiff to defendant in the production of the picture.

(2) Defendants next contend that, even if the claim was properly based on services rendered, the writ was still improperly issued because the claim was not for a liquidated amount. Defendants assert that a claim is not liquidated where there is a legitimate argument regarding the extent of the obligation. In support of this contention, defendants assert that two set-offs exist in the amount of $10,000. We do not agree. Substantial evidence exists to support the trial court's finding that this action is for a liquidated sum of $18,000 based on services rendered by plaintiff. The settlement agreement sued upon by plaintiff herein provides for the payment to him of $30,000. Prior to the filing of the first amended complaint, $10,000 of this amount was paid to plaintiff. After plaintiff obtained the attachment order,defendant William Alexander made a further $2,000 payment to plaintiff at a meeting in January 28, 1975, in partial satisfaction of his obligation under the settlement agreement. It is relevant to note that at no time during this meeting did defendant deny his obligation to pay the money to plaintiff. This evidence of partial satisfaction of a claim was admissible at the hearing to prove the validity of the claim since no question was raised as to its

validity. (Evid. Code, § 1152, subd. (b)(1).) Further, defendants cite no authority for the proposition that set-offs render a claim unliquidated within the meaning of Code of Civil Procedure section 537.1, subdivision (a).

Notwithstanding the above, if defendants can establish by a preponderance of the evidence that it is reasonably probable that they will assert a successful defense, the writ will not issue. (See Code Civ. Proc., § 538.4.) (3a) Defendants allege in their opening brief that there is a reasonable "possibility" of asserting a successful defense based on the ***813** theories of "failure of consideration" or "failure of a condition precedent." These theories were based on the fact that the prior lawsuit was not dismissed until a few months after the signing of the settlement agreement and that plaintiff's attorneys threatened to reinstate a lawsuit against Paramount Pictures. The insubstantiality of this contention is demonstrated by the fact that defendants offer *no* evidence that plaintiff acted wrongly in dismissing the suit when he did or that they suffered any harm from plaintiff's waiting a few months before dismissing the prior action. Plaintiff further testified that neither during a telephone conversation between him and defendant in November 1974 nor during the January 28, 1975 meeting did defendant ever mention to plaintiff that he was having problems because the prior action had not been dismissed.

Moreover, a delay of a few months does not amount to a "failure of consideration" under the circumstances of the instant case. (4) *Delay* in performance is a material failure only if *time is of the essence*, i.e., if prompt performance is, by the express language of the contract or by its very nature, a vital matter. (*Henck* v. *Lake Hemet Water Co.*, 9 Cal.2d 136, 143 [69 P.2d 849], 1 Witkin, Summary of Cal. Law (8th ed.) Contracts, § 585 at p. 502.) When no time is specified for the doing of an act, other than the payment of money, a demand for performance is necessary to put the promissor in default. (*World Sav. & Loan Assn. v. Kurtz Co.*, 183 Cal.App.2d 319, 326 [6 Cal.Rptr. 665]; Civ. Code, § 1491.)

(3b) On the face of the settlement agreement, there was no stipulation as to when the lawsuit was to be dismissed, but only that it be dismissed. The lawsuit was dismissed by plaintiff in May 1975. The agreement did not put plaintiff on notice that time was of the essence, nor did defendants at any time demand that plaintiff dismiss the suit. Thus, in the absence of any showing that the time of dismissal was so unreasonable as to render the settlement agreement so oppressive or result in injury to the defendant, the court's finding that the time was reasonable will not be disturbed. It is not the province of this court to reweigh the evidence or to read into the agreement anything the parties failed to provide for themselves.

(5) Defendants' final contention is that the remedy of attachment cannot be used to seize those assets not used in defendants' business. In support of this contention, defendants assert that the Kenway property was a private residence and that it was never involved in the business of W&N Enterprises, Inc. While we are in agreement with defendants' general contention, the evidence contained in the record of the January ***814** 5, 1976, hearing indicates that the Kenway property was, in fact, an asset of W&N Enterprises, Inc., at the time the writ of attachment originally issued. By a grant deed dated June 11, 1974, William and Nina Alexander conveyed the Kenway property to W&N Enterprises, Inc. The writ of attachment was issued on January 13, 1975. By a corporate grant deed dated January 31, 1975, W&N Enterprises, Inc. reconveyed the Kenway property back to Nina Alexander. These documents conclusively establish that the Kenway property was a corporate asset at the time the writ was levied.

Code of Civil Procedure section 537.3, subdivision (a) expressly authorizes the attachment of *all* corporate property. This section provides that all property of a corporation is subject to levy of a writ of attachment, since all such property is necessarily

devoted to business use and has been contributed by the owners of the business entity as a trust fund for creditors of the enterprise.

(6) We further affirm the trial court's finding that the original grounds on which the attachment was based still prevail, i.e., there is still a substantial danger that the defendants would transfer, other than in the ordinary course of business, remove or conceal the property sought to be attached.(See Code Civ. Proc., § 538.5.) In support of this conclusion, we point to a few indicators of defendants' intentions, to wit: (1) defendant Nina Alexander's testimony that the transfer of title of the Kenway property to her was made to avoid any possible attachment on the residence; (2) defendant's failure to take advantage of a viable alternative to the instant attachment, i.e., the posting of an undertaking pursuant to Code of Civil Procedure sections 544 and 555; (3) defendant's failure to move for an order of preference should the attachment remain; and (4) defendant William Alexander's testimony that he may have indicated that he might take any means to protect himself if a reasonable settlement could not be reached. An inference can be drawn from these circumstances reasonably to indicate that dissolution of the attachment would not be appropriate in the instant case.

The order is affirmed.

Dunn, J., and Jefferson (Bernard), J., concurred.
Appellants' petition for a hearing by the Supreme Court was denied January 27, 1977.

Cal.App.2.Dist.
Johnson v. Alexander
63 Cal.App.3d 806, 134 Cal.Rptr. 101

END OF DOCUMENT

GEORGE KATEMIS et al., Appellants,
v.
IONE M. WESTERLIND, Respondent.
Civ. No. 19721.

District Court of Appeal, Second District, Division 2, California.
Oct. 2, 1953.

HEADNOTES

(1) Contracts § 148--Interpretation--Construing Instruments Together.
Where an agreement is expressed through medium of series of writings, such documents must be construed collectively in ascertaining whole contract between the parties. (Civ. Code, § 1642.)
See **Cal.Jur.,** Contracts, § 181; **Am.Jur.,** Contracts, § 246.

(2) Escrows § 4--Escrow Instructions--Effect.
Escrow instructions which are merely a customary and conventional means of consummating an underlying contract for sale of real property do not supplant such agreement, but merely serve to carry it into effect.

(3) Vendor and Purchaser § 100--Construction of Contract--Several Instruments Constituting One Contract.
Where terms of executory agreement for sale of realty are clarified and elucidated by provisions contained in escrow instructions, both instruments are to be considered together in arriving at total understanding of contracting parties and in fixing their correlative rights and obligations.

(4) Dismissal § 81(2)--Nonsuit--Appeal--Consideration of Evidence.
In reviewing a judgment of nonsuit an appellate court must construe the evidence most strongly against defendant and indulge in every inference and presumption fairly arising from evidence in favor of plaintiff.

(5) Contracts § 176--Interpretation and Effect--Time as of Essence.
The prescribing of a day at or before which, or a period within which, an act must be done, even with a stipulation that it shall be done at or before day named, does not of itself render the time essential.

(6) Contracts § 176--Interpretation and Effect--Time as of Essence.
The general rule in equity is that time is not of the essence unless it has been made so by express terms or is necessarily so from nature of contract.
Parties or obligations to which time-of-essence clause in contract applies, note, 107 A.L.R. 275.
See, also, **Cal.Jur.,** Contracts, § 211; **Am.Jur.,** Contracts, § 306 et seq.

(7) Contracts § 176--Interpretation and Effect--Time as of Essence.
To render time of essence of contract it must be clearly and expressly stipulated that it shall be so; it is not enough that a time is mentioned during which or before which something shall be done.

(8) Specific Performance § 7--Equitable Considerations.
Valuable contractual rights should not be surrendered or forfeitures suffered by slight delay in performance unless such intention clearly appears from contract or where specific enforcement will work injustice afted delayed tender.

(9) Escrows § 4--Escrow Instructions--Time as of Essence.
Escrow instructions do not constitute a declaration that time is of the essence where they merely provide that if conditions have not been complied with at designated time the escrow holder might complete escrow as soon as conditions (except as to time) have been fulfilled, since such ambiguous language does not clearly show an intent to make time of essence of contract nor expressly declare

such to be intention of parties.

(10) Vendor and Purchaser § 120(3)--Construction of Contract--Time as of Essence.
An instrument prepared by a real estate salesman containing purchaser's offer, which was accepted by vendor, that "Time is the essence of this contract, but the time for any act to be done may be extended not longer than thirty days by the undersigned agent," does not make time of the essence of the contract.

(11) Vendor and Purchaser § 120(3)--Construction of Contract--Time as of Essence.
A delay of three days by vendee in tendering full performance under a contract for sale of realty which is susceptible of extension by vendee's agent results neither in damage which cannot be estimated or compensated nor in tying up vendor's estate beyond fixed period without payment of agreed compensation, when such performance is given within period possible of extension contemplated by the parties.

(12) Escrows § 4--Escrow Instructions--Conditions.
Where under terms of escrow instructions vendee agrees to deposit in escrow a designated sum prior to a designated date, and vendor agrees that prior to such date she will deposit in escrow all instruments necessary for her to comply with escrow instructions, these respective obligations are concurrent conditions, that is, they are mutually dependent, each promise being given in consideration for the other and each being due at same time. (Civ. Code, § 1437.)

(13) Contracts § 180--Interpretation--Conditions--Dependent Promises.
Courts will construe promises as dependent unless a contrary intention clearly appears; all promises in a bilateral contract will be regarded as mutually dependent whenever it is possible so to construe them. See **Cal.Jur.**, Contracts, § 216; **Am.Jur.**, Contracts, § 298.

(14) Vendor and Purchaser § 153--Performance of Contract--Tender or Offer.
In a contract for sale of real estate calling for concurrent performance, neither party can place the other in default unless he is fully able to perform or make a tender of promised performance.

(15) Vendor and Purchaser § 153--Performance of Contract--Tender or Offer.
Where both parties to contract for sale of realty in which time is made of essence allow date of final payment to pass without action, neither party can be subsequently placed in default without a tender.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Alfred E. Paonessa, Judge. Reversed.

Action for specific performance and damages. Judgment of nonsuit reversed.

COUNSEL

W. T. Stockman for Appellants.

Obegi & High and Jack B. Clark for Respondent.

FOX, J.

This is an appeal by plaintiffs from a judgment of nonsuit in an action for specific performance and damages.

The facts adduced below show that plaintiffs, who are husband and wife and long-time residents of Chicago, visited Los Angeles with the intention of making a capital investment there. Through the offices of Mr. Solon C. Solaris, a real estate salesman employed by the Atomic Realty Company and who served as plaintiffs' representative or agent in the transaction subsequently ensuing, plaintiffs were advised on February 23, 1952, of the availability for purchase of several income units, complete with designated furnishings, owned by defendant. On the same day plaintiff George Katemis delivered to Mr. Solaris a check in the amount of $1,000 to be used

as a down payment in the purchase of the above property. A receipt dated February 23, 1952, was thereupon prepared by Mr. Solaris which, although failing to acknowledge the receipt of the $1,000 as a deposit on account of the purchase price, contains a description of defendant's property and describes Mr. Katemis as the purchaser thereof for the sum of $35,000. The document states that the balance is to be paid into escrow with the Security Bank within two days. In blank lines contained on the ***540** receipt appears the following handwritten language: "Seller to furnish rent schedule of all rents from the above mentioned property. No leases on any units which are on the above mentioned property. Termite clearance to be furnished by seller showing property free and clear of termites from a licensed termite operator."

The rest of the writing consists of a printed series of terms embodying more fully the proposed agreement of the parties. The first of these terms provides, in part, for a forfeiture of the amounts paid on account by the purchaser in the event he should fail to pay the balance of the purchase price or complete the purchase as required. Number six states that the property is sold subject to the approval of the owner. Number seven reads: "Time is the essence of this contract; but the time for any act required to be done may be extended not longer than 30 days by the undersigned agent." (Mr. Solaris.) Underneath Mr. Solaris' signature appeared the following: "I agree to purchase the above described property on the terms and conditions herein stated," which plaintiff George Katemis signed. Below this latter signature the instrument reads: "I agree to sell the above described property on the terms and conditions herein stated and agree to pay the above signed broker as a commission the sum of Five hundred dollars, or one-half the deposit in case same is forfeited by purchaser, provided the same does not exceed the full amount of the commission." This statement was signed by defendant seller.

On February 25, 1952, written duplicate escrow instructions were executed by the parties in counterpart on a form supplied by the escrow holder, the Security-First National Bank of Los Angeles. In the buyers' instructions appears the following pertinent language: "Prior to March 1, 1952, I will hand you $20,100.00 and any additional funds and instruments required from me to enable you to comply with these instructions, which you are to use provided on or before the date set forth on line 1 above (March 1, 1952), as qualified by the provision at the top of page 2 thereof, instruments have been filed for record entitling you to procure Standard Coverage Form or Joint Protection policy of title insurance ... on real property in the County of Los Angeles ... (description of property) showing title vested in George Katemis and Tula Katemis, his wife, as joint tenants, free of encumbrances except all general and special taxes for fiscal year 1952, 1953, ... and ... Mortgage or Trust Deed securing ***541** an indebtedness ... now of record ... of $14,900.00 ... and Seller herein will furnish a report from a pest control company, covering termites, dry rot and fungus ... at (description of property.) If said report discloses infestation, seller agrees to eliminate such infestation and repair damage at his expense, but no preventive work shall be required. Seller authorizes payment for making inspection report if a bill is presented in this escrow. ... Seller will deposit in escrow for delivery to buyer at close of escrow ... a Bill of Sale in favor of the buyer, covering furniture and fixtures situated in Apartments 2, 3 and 4 of the above described property ..." (Parentheses added.)

The provision at the top of page two, previously referred to, is as follows: "If the conditions of this escrow have not been complied with prior to the date set out on line one (March 1, 1952), or any extension thereof, you are nevertheless to complete the escrow as soon as the conditions, except as to time, have been complied with, unless written demand shall have been made upon you not to complete it." (Parentheses supplied.)

The seller's instructions, which follow immediately

after the buyers' and were signed at the same time, read in part as follows: "I Hereby Approve and Agree to Be Bound by the Foregoing Instructions and Provisions, Prior to the date set out on line 1 herein. (March 1, 1952.) I will hand you *all instruments* and money necessary for me to comply therewith, including a deed of the property described. ..." (Emphasis added.) Except for the further instruction to pay a commission of $500 to the Atomic Realty Company, seller's instructions were of a formal and conventional nature and require no recitation.

At the time the escrow was opened, plaintiffs' check for $1,000, previously deposited with Mr. Solaris, was placed in escrow, leaving a cash balance due of $19,100. Prior to March 1, 1952, defendant deposited with the escrow holder all instruments called for on her part by the instructions save a termite report. Meanwhile, plaintiffs had departed for Chicago immediately upon the opening of escrow on February 25, 1952, in order to procure the funds required of them. In the early afternoon of February 29, 1952, plaintiffs posted in the United States post office in Chicago, Illinois, a registered air-mail letter addressed to the escrow holder containing a cashier's check in the amount of $19,350. March 1 and 2, 1952, being respectively a Saturday and a Sunday, ***542** the escrow- bank was closed. The said cashier's check was therefore not applied to plaintiffs' escrow account until Monday, March 3, 1952. Similarly, the termite report to be furnished by seller, which was dated February 29, 1952, was received in escrow on March 3, 1952. This report disclosed a degree of dry rot and infestation with a suggestion as to corrective measures recommended and offered to perform the necessary work for $925.

On March 5, 1952, defendant wrote to the escrow holder instructing it to cancel the escrow because the "purchasers did not comply with their agreement in said escrow to deposit with you the sum of $20,100.00 prior to March 1, 1952."

On May 15, 1952, plaintiffs filed the present suit for specific performance and damages, appending as exhibits to their complaint the deposit slip constituting the offer and acceptance and the escrow instructions as evidence of the entire agreement between the parties. Upon plaintiffs' presentation at the time of trial of the evidence previously related, the court granted defendant's motion for a judgment of nonsuit, from which plaintiffs prosecute this appeal. Since the oral and documentary evidence developed below establish plaintiffs' prima facie right to specific performance, the judgment of nonsuit is clearly erroneous.

It may be well to advert here to several prefatory propositions of law relevant to the determination of this appeal. (1) It is well settled that where an agreement is expressed through the medium of a series of writings such documents must be construed collectively in ascertaining the whole contract between the parties. (Civ. Code, § 1642.) (2) Escrow instructions which are merely a customary and conventional means of consummating an underlying executory contract for the sale of real property do not supplant such agreement but merely serve to carry it into effect. (*King v. Stanley,* 32 Cal.2d 584, 589 [197 P.2d 321]; *Keelan v. Belmont Co.,* 73 CalApp.2d 6, 12 [165 P.2d 930].) (3) Thus, where the terms of an executory agreement for the sale of real property are clarified and elucidated by the provisions contained in escrow instructions, both instruments are to be considered together in arriving at the total understanding of the contracting parties and in fixing their correlative rights and obligations. (*Tetenman v. Malekov,* 90 Cal.App. 625 [266 P. 367]; *Hawes v. Lux,* 111 Cal.App. 21 [294 P. 1080]; *Pigg v. Kelley,* 92 Cal.App. 329, 332 [268 P. 463]; *Thompson v. Walsh,* 76 Cal.App.2d 188, 194 [172 P.2d 745].) (4) It is ***543** also to be borne in mind that where, as here, a judgment of nonsuit is granted, an appellate court in reviewing such judgment must construe the evidence most strongly against defendant and indulge in every inference and presumption fairly arising from the evidence in favor of plaintiff. (*Slater v. Shell Oil Co.,* 39 Cal.App.2d 535, 539 [103 P.2d 1043].)

It is beyond cavil that plaintiffs herein who are seeking specific performance have tendered in full the entire balance due on the purchase price. Defendant contends that since the time fixed for such performance in the escrow instructions was prior to March 1, 1952, the arrival of plaintiffs' funds on March 3, 1952, was too late and thus defeats their right to specific performance. This argument is untenable, since nowhere is it clearly manifest that deposit of the money by plaintiffs prior to March 1, 1952, is the essence of the contract. (5) Professor Pomeroy, in his treatise on Specific Performance, states "the prescribing a day at or before which, or a period within which, an act must be done, even with a stipulation that it shall be done at or before the day named, ... does not render the time essential with respect to such an act." (§ 392, p. 835.) (6) The general rule in equity is that time is not of the essence unless it has been made so by its express terms or is necessarily so from the nature of the contract. (Williston on Contracts, vol. III (rev.ed. 1936), p. 2385.) (7) In *Miller v. Cox,* 96 Cal. 339 [31 P. 161], it is stated that the intent to make a particular date, or time, "the essence of the contract must be clearly, unequivocally and unmistakably shown by an express declaration. ... In order to render time thus essential, it must be clearly and expressly stipulated that it shall be so; it is not enough that a time is mentioned during which or before which something shall be done [citations]." (P. 345.) (8) This language has in substance been reiterated in *Walsh v. Walsh,* 42 Cal.App.2d 287, 292 [108 P.2d 765]; *Cushing v. Levi,* 117 Cal.App.94, 104 [3 P.2d 958]; *Flagler v. Kroonen,* 61 Cal.App. 359, 366-367 [214 P. 1006] and is in consonance with the modern view that valuable contractual rights should not be surrendered or forfeitures suffered by a slight delay in performance unless such intention clearly appears from the contract or where specific enforcement will work injustice after a delayed tender. (*Cockrill v. Boas,* 213 Cal. 490 [2 P.2d 774]; *Mathews v. Davis,* 102 Cal. 202 [36 P. 358].)

(9) Nowhere in the escrow instructions is there any clearcut language manifesting an intent to make time of the ***544** essence. The sole reference therein to this matter appears in the buyers' escrow instructions, agreed to by defendant, providing that if the conditions had not been complied with at the time therein provided, the escrow holder might nevertheless complete the escrow as soon as the conditions (except as to time) had been fulfilled. This somewhat confusing and ambiguous language does not "clearly, unequivocally and unmistakably" show an intent to make time of the essence of the contract. It patently does not expressly declare such to be the intention of the parties, nor does it do so with any degree of reasonable certainty. Escrow instructions containing the identical language were held not to constitute a declaration that time was of the essence. (*Lifton v. Harshman,* 80 Cal.App.2d 422, 433-434 [182 P.2d 222].)

(10) In examining the instrument prepared on February 23, 1952, by Mr. Solaris containing the buyers' offer, which was accepted by defendant, the following time-clause appears: "Time is the essence of this contract, but the time for any act required to be done may be extended not longer than thirty days by the undersigned agent." Here we are confronted with an unmistakable indication that performance by the vendee, on the day nominally appointed, cannot be of crucial significance to the vendor, since Mr. Solaris, the agent of the plaintiffs in this case and under accustomed principles of agency susceptible to direction by his principal, is given the right to defer the performance of any act for an additional 30 days, without even a provision for notice. Under such circumstances, it hardly lies in the mouth of defendant to assert that payment by the vendee before March 1, 1952, was essential or of compelling materiality when the buyers' agent was empowered to extend the performance of this or any other act to a time beyond the dates here involved. To lodge such authority in the buyers' agent is inconsistent with the supposition that the precise time specified for the buyers' performance is of the essence of the contract.

In *Henck v. Lake Hemet Water Co.,* 9 Cal.2d 136, 144 [69 P.2d 849], the following language appears: "The theory upon which the courts hold that in such cases time is of the essence, is that damage resulting to the seller by reason of delay in performance on the part of the purchaser cannot be estimated nor compensated [citations]." Writing on the same theme, it is said in *Vorwerk v. Nolte,* 87 Cal. 236, 240 [25 P. 412]: "It is a matter of common understanding that when these words-'time is of the essence of this contract'-***545** are used ... their purpose is to protect the vendor against delays in payment of the purchase price, and the tying up of his estate beyond the fixed period, without the payment of the agreed compensation therefor. ..." (11) Clearly a delay of three days by vendee in tendering full performance under a contract susceptible of extension by vendee's agent results neither in damage which "cannot be estimated or compensated" nor in tying up the vendor's estate "beyond the fixed period, without the payment of the agreed compensation," when such performance is given within the period possible of extension contemplated by the parties. If any default can be said to have occurred, it was at most a technical and unintentional default, calling for the interposition of section 3392 of the Civil Code, which provides: "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default."

Defendant's purported cancellation of the contract of March 5, 1952, after full performance by plaintiffs and with no intervening change in circumstances as would render enforcement of the contract inequitable, was, therefore, thoroughly unwarranted.

It is apposite to point out that even were we to consider time of the essence of this agreement, the judgment of nonsuit was nevertheless erroneous. (12) Under the terms of the escrow instructions, plaintiffs agreed to deposit in escrow prior to March 1, 1952, the sum of $19,150. Defendant seller also agreed that prior to March 1, 1952, she would deposit in escrow all instruments necessary for her to comply with the escrow instructions. These respective obligations, viz., plaintiffs' deposit of the money and defendant's deposit of all requisite instruments, were thus concurrent conditions; that is, they were mutually dependent, each promise given in consideration for the other, and each being due at the same time. (Civ. Code, § 1437.) This principle is more elaborately set out in section 267 of the Restatement of Contracts as follows: "Promises for an agreed exchange are concurrently conditional, unless a contrary intention is clearly manifested, ***546** if the promises can be simultaneously performed ... where by the terms of the promises

(a) at the same time is fixed for the performance of each promise; or ...

(d) the same period of time is fixed within which each promise shall be performed." (13) That this is the accepted modern view is reflected in the following quotation from 12 American Jurisprudence, Contracts, page 850: "In brief, the courts will construe promises as dependent unless a contrary intention clearly appears. All promises in a bilateral contract will be regarded as mutually dependent whenever it is possible so to interpret them." California conforms to the rules set out in the sections of the Restatement quoted above. (*Lemle v. Barry,* 181 Cal. 6 [183 P. 148]; *Hanson v. Slaven,* 98 Cal. 377 [33 P. 266]; *Dennis v. Strassburger,* 89 Cal. 583 [26 P. 1070].)

(14) Applying these rules to the case at bar, it is clear that in a contract for the sale of real estate calling for concurrent performance, neither party can place the other in default unless he is fully able to perform or make a tender of the promised performance. (*Dennis v. Strassburger, supra*; *Downer v. Buehrle,* 90 Cal.App.2d 719 [203 P.2d 795]; *Mc-*

Dorman v. Moody, 50 Cal.App.2d 136 [122 P.2d 639].) "Before respondents could require appellant to perform his part of the agreement they must have fulfilled all conditions precedent imposed upon them and must have been able to fulfill and must have offered to fulfill all conditions concurrent imposed on them [citations]." (*Lifton v. Harshman,* 80 Cal. App.2d 422, 432-433 [182 P.2d 222].) It was not until March 3, 1952, that defendant delivered into escrow the termite report required by the agreement. It was at the same time that plaintiffs completed performance on their part by depositing the full amount of the balance due under the contract. (15) There was present, therefore, what was described in *Kerr v. Reed,* 187 Cal. 409, 414 [202 P. 142], as "... the simple situation where both parties to a contract in which time is made the essence thereof allow the date of final payment to pass without action. Under these circumstances neither party can be subsequently placed in default without a tender [citation]." Since defendant could not have demanded performance from plaintiffs until March 3, 1952, when they had themselves given full performance, and since plaintiffs had on that date deposited the full balance due, it follows that the contract was in full force and effect when ***547** on March 5, 1952, defendant attempted to place plaintiffs in default and terminate their rights under the contract. (*Kerr v. Reed, supra*; *Lamont v. Ball,* 93 Cal.App.2d 291, 293 [209 P.2d 9]; *Urban v. Yoakum,* 89 Cal.App. 202, 208 [264 P. 493].)

Defendant cites a number of authorities which are divergent in crucial aspects from the case here presented. In general, they constitute situations where the party praying judgment failed to adhere to the conditions of the agreement prior to commencing suit or where a nondefaulting party had given proper notice of the forfeiture of the defaulting party's rights under the agreement prior to the latter's tender of performance. Thus, in *Evarts v. Johnston,* 34 Cal.2d 6 [206 P.2d 633], the vendees deposited only $450 of an agreed $1,150 into escrow before seeking specific performance; the court found, therefore, that they had failed to comply with the conditions of the contract. In *Cockrill v. Boas,* 213 Cal. 490 [2 P.2d 774], the buyer was required to deposit $55,000 in escrow. This was not done, nor was tender made prior to suit; hence, he was disentitled to the relief sought. *Boulenger v. Morison,* 88 Cal.App. 664 [264 P. 256], was an action wherein the court found that the real estate broker and the buyer were colluding to defraud the seller into signing an agreement which, as to him, was not "just and reasonable." It was further found that the buyer never placed in escrow the money called for in the contract. In *Davy v. Ogier,* 87 Cal. App.2d 835 [198 P.2d 92], the purchaser seeking specific performance deposited into escrow the full amount due. But the escrow holder could not pay this sum over to the seller because of the buyer's instruction to "hold until O.K. from Mr. Bowman" (buyer's broker). Since this instruction was never revoked, the court ruled that the buyer had not performed within the prescribed time. In *Ward v. Downey,* 95 Cal.App.2d 680 [213 P.2d 523], the court had before it two written agreements which are not set out in full, but which together constituted the agreement of purchase and sale and which provided that time was to be of the essence. The time fixed for closing the escrow was October 10, 1947. On that day, plaintiffs were unable to supply the necessary instruments to convey title to defendants. On October 11, 1947, defendants served written notice of their termination of the escrow as provided by the contract. It was not until October 17, 1947, that plaintiffs were able to convey good title. The court denied specific performance, since plaintiffs had failed ***548** to provide the title required by the contract within the time prescribed and defendants thereupon terminated the contract in accordance with the express provision of the escrow instructions.

It would be a work of supererogation, and result in a profitless prolongation of this opinion, to discuss the remaining cases cited, in each of which the party seeking affirmative relief was in such flagrant default under the terms of the agreement as to preclude the award of specific performance. It is obvi-

ous no such considerations are here present to impel a similar result.

The judgment is reversed.

Moore, P. J., and McComb, J., concurred.

Cal.App.2.Dist.
Katemis v. Westerlind
120 Cal.App.2d 537, 261 P.2d 553

END OF DOCUMENT

192 Cal.App.2d 189, 13 Cal.Rptr. 346
(Cite as: 192 Cal.App.2d 189)

C

DAN KELLER, Appellant,
v.
PACIFIC TURF CLUB (a Corporation) et al., Respondents.
Civ. No. 18812.

District Court of Appeal, First District, Division 2, California.
May 17, 1961.

HEADNOTES

(1) Dismissal § 75--Nonsuit--When Motion Granted.
A nonsuit is warranted only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

(2) Frauds, Statute of § 8--Agreements not to Be Performed Within Year.
Oral contracts invalidated by the statute of frauds include only those which cannot be performed within a year. Though a promise may not by its terms be performed within that period, it is not inhibited by the statute if there is a possibility it may be; the contract itself must contain language whose reasonable interpretation shows a clear intention that it cannot be performed within the year.
See **Cal.Jur.2d,** Frauds, Statute of, § 4; **Am.Jur.,** Statute of Frauds, § 25.
(3) Frauds, Statute of § 9--Option for Renewal or Extension--Notice.
A provision in a written agreement stating that a one-year option for extension of the contract for an additional year was to "be exercised by notifying the second party ... at least 30 days prior to the expiration date" did not necessarily indicate that the option could be exercised only by written notice.
Option for renewal or extension of contract for a year or less as affecting applicability of statute of frauds regarding contracts not to be performed within a year, note, 111 A.L.R. 1105.
(4) Contracts § 17--Consent--Option.
In an option contract the optionor stipulates that, for a specified or reasonable period, he waives the right to revoke the offer.

(5) Contracts § 17--Consent--Option.
Since an optionor promises to perform the contract to which the option relates, subject to a condition at the optionee's discretion, an option contract involves on the part of the optionor a unilateral promise to perform the obligations of the contract to which the option relates.
See **Cal.Jur.2d,** Contracts, § 15; **Am.Jur.,** Contracts, § 27.
(6) Frauds, Statute of § 9--Option for Renewal or Extension.
The statute of frauds does not apply to the oral exercise of an option created by a written contract, the exercise of which operates to extend the terms of the written contract.

(7) Frauds, Statute of § 9--Option for Renewal or Extension.
Whether a one-year option in a written agreement for removal of straw and manure from a race track for each of the race meets during a year had been extended for an additional year was a question of fact for the jury, as was the question of whether, if renewed, it was abandoned by subsequent negotiations.

SUMMARY

APPEAL from a judgment of the Superior Court of Alameda County. Charles Wade Snook, Judge. Reversed.

Action for damages for breach of contract. Judgment of nonsuit reversed.

COUNSEL

192 Cal.App.2d 189, 13 Cal.Rptr. 346
(Cite as: 192 Cal.App.2d 189)

J. A. London, Boccardo, Blum, Lull, Niland & Teerlink and Edward J. Niland for Appellant.

Donahue, Richards & Gallagher, Joseph T. Richards and Thomas Schneider for Respondents.

KAUFMAN, P. J.

Plaintiff, Dan Keller, seeks to recover damages for breach of contract from Pacific Turf Club, a California corporation, and its officers, hereafter referred to as defendants. At the close of plaintiff's case, the court granted defendants' motion for a nonsuit and plaintiff appeals. We conclude that the matter should have gone to the jury.

(1) The granting of a motion for a nonsuit is warranted " '... when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' (*Card v. Boms* (1930), 210 Cal. 200, 202 [291 P. 190]; see, also, *Golceff v. Sugarman* (1950), *ante,* [36 Cal.2d 152] pp. 152, 153 [222 P.2d 665]; *Blumberg v. M. & T. Inc.* (1949), 34 Cal.2d 226, 229 [209 P.2d 1], and cases there cited.) 'Unless it can be said as a matter of law, that ... no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from ***191** the jury.' (*Estate of Lances* (1932), 216 Cal. 397, 400 [14 P.2d 768].) In other words, while in most appeals it is the duty of the reviewing court to indulge every reasonable intendment in favor of sustaining the trial court, substantially the reverse is true when the appeal is from an order of nonsuit ..." (*Raber v. Tumin,* 36 Cal.2d 654 at p. 656 [226 P.2d 574]; *Beal v. Blumenfeld Theatres, Inc.,* 177 Cal.App.2d 192, 193 [2 Cal.Rptr. 110]).

Stated in the light most favorable to the plaintiff, the evidence may be summarized as follows: Plaintiff, Dan Keller, also doing business as "West Coast Fertilizer," was in the business of hauling and selling manure to mushroom farmers throughout the state. Defendants operate the "Golden Gate Fields," a race track in Albany and Berkeley. On October 13, 1954, the parties entered into a written contract, whereby plaintiff agreed to remove all straw and manure from the stable area at Golden Gate Fields for each of the race meets during the one year immediately following the execution of the agreement for a consideration of $10,000. Plaintiff was to begin removing all straw and manure upon the arrival of the first horses for the racing meets scheduled to begin on November 1, 1954, and March 7, 1955. Plaintiff was authorized to dispose of the manure as he desired.

The contract also contained the following option provision: "15. Second party [plaintiff] hereby grants unto first party [defendant] the option, to be exercised by first party by notifying second party of such exercise, at least thirty days prior to the expiration hereof, [i.e. by September 13, 1955] to extend this contract for a period of one year from the termination date hereof; said one year extension to be upon all the terms, conditions and covenants herein contained, save and except that the consideration to be paid by first party to second party for any race meet during such extension is to be a total of $9000.00 for each such race meet; said $9000.00 to be paid by first party to second party upon the following basis..."

The next paragraph provided: "16. All notices to be given to first party shall be given to said first party, in writing, at Post Office Box 27, Albany 6, California; notices to be given to second party shall be given to said second party, in writing, at 691 Seventeenth Avenue, Menlo Park, California."

The agreement further provided that as security for plaintiff's performance, he was to deliver a corporate surety bond in the amount of $10,000. In lieu of this provision, however, ***192** the parties on the

same day [October 13, 1954] entered into a supplemental agreement, providing that the plaintiff would deposit in escrow with George E. Thomas, an attorney of the law firm representing the defendants, certain documents, including: (1) various certificates of registration and ownership [i.e., pink slips; Veh. Code §§ 4450, 4454]; (2) a list of plaintiff's current customers; and (3) an assignment of plaintiff's accounts receivable.

It was further agreed that the escrow holder was to keep the above mentioned documents in his possession pending full performance by the plaintiff, and that for the purposes of the supplemental agreement, plaintiff's failure to remove manure as agreed was deemed to be a failure of performance on his part. Such failure of performance required the escrow holder to deliver the documents in his possession to the defendants and entitled the defendants to the right to perform the balance of the agreement for the account of the plaintiff and to attempt to dispose of the manure to plaintiff's customers. Any profit realized thereby was to be paid to the plaintiff; in the event of a loss, the plaintiff's vehicles could be sold at a public sale.

The plaintiff negotiated the above mentioned agreements with Mr. Fred Burgoyne, who was the controller and secretary of the defendants. The agreements were drawn up by defendants' attorneys. In performance of the contract, the plaintiff removed all straw and manure during the race meets in the fall of 1954 and the spring of 1955.

Early in June, 1955, the plaintiff wrote to defendants' attorneys for certain information which appeared on the pink slips held in escrow. On June 13, 1955, he again wrote and thanked them [apparently for the information] and stated: "I was given to understand that these slips will now be forwarded to my lawyer..." The reply to the plaintiff from defendants' attorneys, dated June 16, 1955, stated that the pink slips were to remain in escrow for the term of the contract unless the defendants chose to exercise their option to extend the contract for an additional year. The letter continued: "... If this election is not made within the time provided, that is, by sometime in September, 1955, the slips are to be returned to you. If the option is exercised, the slips will remain in escrow pending performance of your obligations for the balance of the term." [FN1] Plaintiff testified that ***193** the slips were not returned to him until 1958, about 2 months before the trial in this matter, which began in November, 1958.

FN1 i.e. until the termination of the second year of the contract, September-October, 1956.

In July, 1955, Mr. Burgoyne told the plaintiff that the defendants had exercised their option [i.e., thus extending the term of the contract for an additional year from October 13, 1955, to October 13, 1956]. At this time, the plaintiff began negotiations with Mr. Burgoyne for a new contract for a duration of 6 or 7 years.

In a letter dated October 26, 1955, the defendants proposed to the plaintiff a new agreement relating to the removal of manure from Golden Gate Fields, extending from January 1, 1956, to December 31, 1962, on the terms of the October 13, 1954, agreement subject to a number of modifications. The final paragraph of the letter of October 26, 1955, provided: "If the foregoing proposal meets with your approval, please indicate your acceptance on the enclosed copy of this letter, returning it to the undersigned. This proposal is made subject to the approval of the Board of Directors of Pacific Turf Club, Inc., and it is contemplated that, if accepted by you and approved by the Board, the understanding of the parties as reflected by this letter will become the subject of a formal contract to be entered into between the parties.

"Pacific Turf Club, Inc.

"/s/

"By Fred Burgoyne, Secretary"

Plaintiff signed this letter to indicate his approval

and returned it to the defendants.

By a letter dated November 28, 1955, defendants proposed to plaintiff an agreement relating to the removal of rubbish and dry garbage [FN2] from Golden Gate Fields. This letter concluded with language identical to that quoted above from the letter of October 26. Plaintiff, likewise, signed and returned this letter to the defendants. About December 1, 1955, plaintiff went to Burgoyne's office to discuss the above letters. Plaintiff indicated that he was in the process of forming a corporation and wanted the contracts to be in the name of the corporation.

FN2 The agreement of October 13, 1954, related only to the removal of manure and straw.

Defendants sent copies of the letters of October 26 and November 28 to plaintiff's attorney, pursuant to his request on February 3, 1956. Defendants write: "These in fact are ***194** our understandings with Mr. Dan Keller and the information contained therein can be incorporated in a formal contract as soon as possible, subject to final ratification of our Board of Directors."

Mr. Burgoyne testified that at a meeting of the executive committee of defendants' board of directors early in April, 1956, the committee "approved the basic contents of the letters and directed me to have our attorney prepare a contract along these lines."

Thereafter, plaintiff's attorney received the following letter, dated April 13, 1956, from defendants' attorneys:

"Sometime ago Mr. Keller and representatives of Pacific Turf Club reached an understanding concerning manure and garbage removal from Golden Gate Fields for the period ending December 31, 1962. Their understanding has now received the approval of the Board of Directors of Pacific Turf Club, Inc., and we enclose a proposed form of agreement to be made between the parties covering these matters. We shall appreciate your comments. You will note that the enclosed form follows closely in many particulars the form which the parties used before respecting manure removal.

"In connection with paragraph 5 of the agreement, relating to performance bond, we understand that Pacific Turf Club will be willing to adopt the security arrangement established by the supplemental agreement in the previous transaction, in the event that Mr. Keller does not find it feasible to provide this specified bond. If that is the case, we suggest that the security aspect of the matter again be handled by supplemental agreement.

"We shall look forward to hearing from you at your convenience."

The proposed form of an agreement referred to in the letter was enclosed. Plaintiff's attorney then prepared another agreement, which changed certain terms, and forwarded it to defendants' attorneys under cover of a letter dated July 9, 1956, stating: "If the agreement is satisfactory I would appreciate your having Pacific Turf Club signed [*sic*] the same and return two signed copies to this office." Defendants' attorneys replied on July 12, 1956, and indicated that some of the proposed changes appeared quite serious and had been referred to them for their comment.

Thereafter, on August 15, 1956, defendants wrote to the plaintiff that the board of directors were not in accord with the suggested changes and informed the plaintiff that his ***195** services would not be required for the forthcoming meet [September 10-October, 1956]. When the plaintiff arrived at Golden Gate Fields to begin performance for this meet, he was informed that the defendants had retained others to remove the manure, rubbish, and garbage, and he was not allowed to perform.

Plaintiff filed his complaint in this action on March 5, 1957, alleging two alternative causes of action: the first, based on defendants' exercise of the one-year option in the October 13, 1954, contract [i.e.

extension of the contract from October 13, 1955, to October 13, 1956] and subsequent breach thereof; the second, based on the theory that the above quoted letters of October 26, 1955, and November 28, 1955, and defendants' retention of the pink slips constituted valid contracts subject only to the approval of defendants' board of directors and subsequent breach thereof. It is argued on appeal that the trial court erred in granting a nonsuit as to the first cause of action because there was evidence that the defendants had exercised their option, and as to the second cause of action, because there was sufficient evidence to support a finding that a written contract came into being immediately upon the approval of defendants' board of directors.

The first question on appeal is whether under the above summary of the facts, we can conclude that the matter should have gone to a jury on the issue of whether the option in the 1954 contract had been validly exercised to extend the agreement to October 13, 1956. We think so.

The record indicates that the trial court denied defendants' motion to strike the testimony tending to show the oral exercise of the option, and then granted defendants' motion for a nonsuit as to both causes of action. Thus, it appears that the basis for the granting of the nonsuit was the ground that the exercise of the option was required to be in writing under the statute of frauds (Code Civ. Proc., § 1973 ; Civ. Code, § 1624). Defendants argue that this ruling was proper as the agreement was one which by its terms could not be performed within a year from the making thereof. We cannot agree. (2) It is well settled that oral contracts invalidated by the statute of frauds, include only those which cannot be performed within that period. Even though a promise may not by its terms be performed within a year, yet, it is not inhibited by the statute if there is a possibility that it may be. The contract itself must contain language whose reasonable interpretation shows a clear intention that it cannot be performed ***196** within the year (*Hollywood M. P. Equipment Co. v. Furer,* 16 Cal.2d 184, 187 [105 P.2d 299]). The agreement here in question is not by its terms incapable of performance within one year.

(3) We note, however, that the agreement stated that the option is to "*be exercised by notifying* the second party ... at least 30 days prior to the expiration date." The agreement does not indicate that the exercise of the option must be by written notice. The provision relating to written notices would appear to apply to notices to be given under the various terms of the contract and the supplemental agreement and does not necessarily indicate that the option could be exercised only by written notice, as defendants suggest. It is undisputed that the agreements were drawn up by defendants' attorneys, and that the plaintiff's education had ceased after the second grade. Therefore, under all the rules of construction, the agreement must be construed in favor of the plaintiff.

(4) In an option contract, the optionor (plaintiff herein) stipulates that for a specified or reasonable period, he waives the right to revoke the offer. (5) Since the optionor promises to perform the contract to which the option relates, subject to a condition at the discretion of the optionee, an option contract involves on the part of the optionor a unilateral promise to perform the obligations of the contract to which the option relates (*Warner Bros. Pictures, Inc. v. Brodel,* 31 Cal.2d 766, 772-773 [192 P.2d 949, 3 A.L.R.2d 691]).

(6) Although there are conflicting views on the application of the statute of frauds to the oral exercise of an option created by a written contract, the exercise of which operates to extend the terms of the written contract (see 111 A.L.R. 1105; and *Beller v. Robinson* (1883), 50 Mich. 264 [15 N.W. 448], holding that an oral exercise of a three-year option to renew, in a written lease, violated the statute of frauds, we think that the rule in this state is that the statute is not applicable (*Pyrate Corp. v. Sorensen* (9 C.C.A., 1930), 44 F.2d 323, and *Sorensen v. Pyrate Corp.* (9 C.C.A., 1933), 65 F.2d 982; 2 Corbin on Contracts, § 450, p. 565). In *Pyrate Corp. v. Sorensen, supra,* the plaintiff entered into a written

contract with the defendants, for the exclusive right to manufacture and sell Pyrate products in California for one year, with an option to renew the contract at the end of that period for four years, and at the end of the four-year period, for an additional five years. The contract referred only to a "privilege of renewal" and did not specify how it was to be exercised. The defendants ***197** performed under the agreement for over two years without any written or formal notice of the exercise of the option. When the defendants attempted to terminate their relationship with the plaintiff, the plaintiff brought an action for breach of contract. In rejecting the argument of the bar of the statute of frauds, the Circuit Court of Appeals held that the defendants had manifested an intent to exercise the option and plaintiff had accepted the exercise, and pointed out that the original written contract satisfied the statute, since by its own terms, it provided for an extension at the election of the defendants. FN3 Similar reasoning was used in *Columbia Pictures Corp. v. DeToth,* 26 Cal.2d 753, 759 [161 P.2d 217, 162 A.L.R. 747], and *Columbia Pictures Corp. v. DeToth,* 87 Cal.App.2d 620, 625 [197 P.2d 580], although these cases involved the validity of an oral contract of employment for one year with options to renew or extend the agreement for additional one-year periods during each of the six succeeding years, to be exercised (like the option in the instant case) at least 30 days prior to the expiration of each preceding period of employment. Our Supreme Court, in reversing a judgment of dismissal, said at 26 Cal.2d 753, 759 [161 P.2d 217, 162 A.L.R. 747]: "... A contingency which may extend the period of employment for more than one year, such as that created by the option provisions here alleged, does not bring a contract within the operation of the statute [citations]." (Also *cf. Warner Bros. Pictures, Inc. v. Brodel, supra,* 31 Cal.2d 766, involving the extension of a written contract of employment, but no statute of frauds problem, and *Schmitt v. Felix,* 157 Cal.App.2d 642, 645 [321 P.2d 473], wherein this court [Division One], held that under a year lease granting lessees an option for an additional year lease on the same terms and ***198** conditions, a written exercise of the option was not necessary, as the tenants' prepayment of rental and the landlord's acceptance thereof constituted an exercise of the option.)

> FN3 *Byrne Mill Co. v. Robertson* (1907), 149 Ala. 273 [42 So. 1008], is also analogous to the instant case. There, a contract for the delivery of lumber contained the following clause: " 'This agreement to remain in full force and effect for one year; but said Hamilton has the right to renew the same for five years additional...' " The court said: "... we construe this to mean nothing more or less than an option to Hamilton to extend the contract for a period of five years. The same consideration which supported the original contract was sufficient to support the extended contract; and in the exercise of this option by Hamilton it was not necessary for the parties to enter into any new writing to save it from the statute of frauds. The original contract itself, which was in writing, was sufficient to this end, and in the exercise of the option or right any unequivocal notice by Hamilton to the defendants that the contract would be continued for five years, given before the expiration of the first period, would be sufficient. We do not think that the statute of frauds has any application." (P. 1012 [42 So.].)

(7) In view of the above, we think the question of whether the option in the 1954 contract had been exercised was one of fact for the jury. The same is true of the question of whether, if renewed, it was abandoned by the subsequent negotiations (*Ross v. Tabor,* 53 Cal.App. 605 [200 P. 971]; *Thomson v. Leak,* 135 Cal.App. 544 [27 P.2d 795]).

Judgment of nonsuit reversed.

Draper, J., and Shoemaker, J., concurred.

A petition for a rehearing was denied June 16, 1961, and respondents' petition for a hearing by the

Supreme Court was denied July 12, 1961. Gibson, C. J., did not participate therein. Traynor, J., was of the opinion that the petition should be granted.

Cal.App.1.Dist.
Keller v. Pacific Turf Club
192 Cal.App.2d 189, 13 Cal.Rptr. 346

END OF DOCUMENT

C

MAE C. LODGE, Respondent,
v.
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION (a Corporation), Appellant.
Civ. No. 276.

Court of Appeal, Fourth District, California.
April 9, 1930.

[1] CONTRACTS--COMPROMISE--OFFER AND ACCEPTANCE--INFERENCES--CONDITIONS--TENDER.
In this action upon a contract to compromise a claim for damages arising out of an automobile accident, where defendant wrote that in case of acceptance of its offer it would be necessary to have releases from plaintiff and the other occupants of the automobile, and there was a clear inference that the releases were to be prepared by defendant and presented for signature at the time the money was to be paid, which was not done, defendant's offer was not conditioned upon receiving releases signed by all the occupants of the car, and tender of the releases did not constitute a part of the acceptance.

[2] ID.--INTENT--CONSTRUCTION.
A fair construction of the correspondence between the parties in such action showed that plaintiff intended to accept defendant's offer of settlement when she wrote that if defendant would not reimburse her without suit, she would have to accept a loss, and that she would sign a release upon payment of the amount offered.

[3] ID.--ACCEPTANCE--NOTICE OF OBJECTIONS--WAIVER.
In such action, where plaintiff's letter was intended as an acceptance, it was incumbent upon defendant to promptly communicate to plaintiff any objection which it had to the form of the acceptance, or be subjected to the conclusion that it had waived such objection; and defendant failed to object promptly where it waited until the seventeenth day after the statute of limitations had run on plaintiff's cause of action for damages, before refusing to make payment on the ground that the statute had run.
3. See 6 **Cal. Jur.** 412.
[4] ID.--TENDER--REPUDIATION.
In such action, where the delivery of the releases was to coincide in point of time with the payment and receipt of money, defendant could not expect to demand and receive the releases before it tendered the money; and having failed to make a tender, and having repudiated the negotiations, not on the ground of any defect in the acceptance of defendant's offer, but upon the ground that the statute of limitations had run against plaintiff's claim, defendant was not entitled to urge any objection to the form of the acceptance for the first time in a subsequent action thereon.

APPEAL from a judgment of the Superior Court of Fresno County. C. E. Beaumont, Judge. Affirmed.

The facts are stated in the opinion of the court.

***161** Wakefield & Hansen for Appellant.

Harris & Hayhurst and Rue C. Gibson for Respondent.

MARKS, Acting P. J.

This action was brought by respondent to recover $350 alleged to be due under a contract with appellant. On February 6, 1927, Chris Jensen was the owner of an automobile upon which appellant had written a policy insuring him against claims made for injury to the persons of others. On the day in question his wife was driving the car, with his consent, and it was involved in an accident with another automobile driven by A. J. Cromer, in which respondent, mother-in-law of Cromer, and Mrs. Cromer were passengers. Respondent suffered injuries which came within the terms of the insurance policy.

Shortly after the accident respondent entered into negotiations with appellant through A. B. Brown, its agent in Fresno, California, in an endeavor to settle her claim for the damages suffered by her. She was postmistress in the town of Auberry, about forty miles from Fresno, and her negotiations were carried on by letter. The record shows the following communications regarding the attempted settlement. On the fifteenth day of June, 1927, appellant sent to Mr. A. B. Brown, its Fresno agent, the following telegram:

"San Francisco, Calif. 15, 3.45P

"A. B. Brown, Care Pacific Coast Adjustment Bureau.

"Pacific Southwest Bldg.

"Fresno, Calif.

"Your telephone message Lodge versus Jensen stop Will not pay more than three hundred fifty dollars.

"WILLIAM F. MURRAY,

"Manager Claims Dept."

On November 8, 1927, Brown wrote to Mrs. Lodge as follows:

***162** "Mrs. M. Lodge, Auberry, California.

"Dear Mrs. Lodge: Supplementing our recent conversation, I wish to advise that a further report was submitted to the company and their letter replying was received today without much encouragement. However, they requested that I procure from you an itemized list of your claim, which indicates some little interest. Therefore, I will kindly request that you mail me the list showing the items of expense of all those involved in the accident. When this is received I will submit it and again attempt to ascertain what I can accomplish towards getting the matter cleared up. With kind personal regards,

"I am very truly yours,

"A. B. BROWN,

"Adjuster.

"P. S. Attorney Harris called on the writer stating that any arrangements that you made would be satisfactory.

"A. B. B."

On November 19, 1927, Mrs. Lodge wrote Brown as follows:

"Auberry, California, November 19, 1927.

"Mr. A. B. Brown, Fresno, California.

"My dear Mr. Brown: Complying with your request, find enclosed list of our expenses and losses. The loss and the expenses on the old car were put upon us by the accident just as squarely as the other items of loss, damage and doctors. In the enclosed list I have not included my sickness, pain and suffering, from which I have not yet recovered, and which is greater than all the rest put together.

"Very truly yours,

"MAE C. LODGE."

On December 7, 1927, Brown wrote the following letter:

"Mrs. Mae C. Lodge, Auberry, California.

"Dear Mrs. Lodge: In reply to your communication of November 19, we wish to advise that we have not neglected answering your letter, but there has been some delay because of several exchanges of correspondence with the company, and today they wrote us stating that they did not desire to increase their original offer of $350.

"In checking over your itemized list of loss, we note you have an item of $57.50 for coat and hose, $25.00 for serge ***163** dress and undergarments, cleaners and laundry, $4.70, loss on old car $100.00. License, taxes and purchase of used tire,

$28.65, which total $215.85. These items all pertain to property damage and loss of use which are not covered under my company's policy.

"Since interviewing you, we have ascertained that Mr. Jensen did not have, at the time of the accident, any insurance covering property damage and loss of use, consequently your claim for these items should be against Mr. Jensen.

"Your entire list totaled $561.85, which amount, less the $215.85, for which the company would not be liable, in any event, equals $346.00 or four dollars less than the company offered you in settlement several months ago. We are advised that the sanitorium bill amounted to $46.45, and the doctor's bill for treatment of injuries resulting from the accident, amounted to $25.00. Undoubtedly you have had other medical and hotel expenses not chargeable to the accident, and it does not seem probable that you were obliged to make seven round trips to Fresno for treatment of injuries because of the accident, as it is probable some of these trips were in reference to getting your car repaired, trading it in, or other business affairs you may have had, consequently, according to your own statement of loss, it is evident that the company was very fair in making an offer to compromise the case for $350.00.

"The writer has thoroughly thrashed all of these items out with the company, and they have given us their final conclusion, which we are transmitting to you. You will understand that in case the proposition is accepted it will be necessary for us to have releases from Mr. and Mrs. Cromer and from you, but the releases will be so worded that they will not affect any claim you may have against Mr. Jensen for property damage, loss of use, etc.

"Trusting you understand my attitude in this matter, and with kind personal regards,

"I am very truly yours,

"A. B. BROWN,

"Adjuster."

On January 31, 1928, Mrs. Lodge replied as follows:

***164** "Auberry, California, January 31, 1928.

"Mr. A. B. Brown, Fresno, California.

"My dear Mr. Brown: The list of expenses which I sent you is correct, and my doctor's bill as stated was due entirely to the accident. But if your company will not reimburse me without suit, I must accept the loss rather than go on with further worry. On payment to me of the $350.00, as offered, I will sign a release.

"Very truly yours,

"MAE C. LODGE."

On February 23, 1928, Brown wrote to Mrs. Lodge as follows:

"Mrs. Mae C. Lodge, Auberry, California.

"Dear Mrs. Lodge: In reply to your letter of January 31st, which we promptly forwarded to the General Accident at Pine and Sansome streets, San Francisco, we wish to advise that we received their letter today stating that inasmuch as the statute of limitations had run on your case, they would not make any payment to you. Under the circumstances we will be obliged to close our file.

"Very truly yours,

"A. B. BROWN,

"Adjuster."

Upon these letters the trial court found that there was a written contract whereby appellant agreed to pay respondent the sum of $350, and rendered judgment accordingly.

(1) The sole question to be decided on this appeal is whether or not respondent's letter of January 31, 1928, was an acceptance of appellant's offer to pay her claim. Appellant maintains that its offer was

conditioned upon its receiving releases signed by all three occupants of the Cromer car. It does not appear that Mr. or Mrs. Cromer suffered any injuries in the accident or made any claim against appellant. It will be noted that in the letters to respondent, appellant used the pronoun "your" in referring to the losses and "you," in speaking of the payment, both seemingly being used in the singular. It seems clear from these letters that it was proposed to pay the money to respondent, and that it was not contemplated that any of it would be paid to either Mr. or Mrs. Cromer. In replying to these letters the respondent also made use of the personal pronoun, which is not surprising, as she was not ***165** an attorney nor was she learned in the technicalities and phraseology of the law. In the offer of appellant it was stated that in case it "is accepted, it will be necessary for us to have releases from you and Mr. and Mrs. Cromer." There is a clear inference that the releases to be signed were to be prepared by appellant and presented by it for signature at the time the money was paid. This was not done.

(2) We believe that a fair construction of the correspondence shows that respondent intended to accept the offer of setlement as made by appellant.

(3) As respondent's letter was intended as an acceptance it was incumbent upon appellant to promptly communicate to her any objection which it had to the form of the acceptance, or be subjected to the conclusion that it had waived such objection. (Sec. 1501, Civ. Code; *Lockhart v. J. H. McDougall Co.*, 190 Cal. 308 [212 Pac. 1]; *McClintick v. Leonards*, 103 Cal. App. 768 [285 Pac. 351].) Appellant did not do this. It waited until the seventeenth day after the statute of limitations had run upon respondent's claim for damages, and then its agent wrote "that inasmuch as the statute of limitations had run on your case, they (the appellant) would not make any payment to you."

(4) The offer was to pay money. The offeree agreed to accept money. The releases were not to be delivered at the time of the offer and acceptance. Their delivery was an incident to coincide in point of time with the payment and receipt of the money. Appellant could not expect to demand and receive the releases before it tendered the money to respondent and was ready to deliver it to her. This it failed to do, repudiating all prior negotiations, not upon the ground of any defect in form of the acceptance, but on the ground that the statute of limitations had run against respondent's claim. Under the circumstances disclosed by the record, respondent having accepted the offer in compromise of her claim, appellant should not be heard to urge an objection to the form of her acceptance for the first time in a subsequent action where it had failed to make such objection promptly, or at all, but relied upon the statute of limitations having run against her demand for damages.

Judgment affirmed.

Barnard, J., concurred.

***166** A petition for a rehearing of this cause was denied by the District Court of Appeal on May 6, 1930, and a petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on June 5, 1930.

Cal.App. 4 Dist. 1930.
Lodge v. General Acc. Fire & Life Assur. Corp.
105 Cal.App. 160, 286 P. 1065

END OF DOCUMENT

EMERSON MURFEE, Respondent,
v.
A. L. PORTER et al., Appellants.
Civ. No. 14154.

District Court of Appeal, First District, Division 1, California.
Feb. 8, 1950.

HEADNOTES

(1a, 1b) Vendor and Purchaser § 48--Options--Payment.
Under an agreement giving the lessee of real property an option to purchase at the end of a specified period, which was silent as to the time of payment, the lessee, on his election to exercise the option, had a reasonable time in which to tender payment and a tender made within about 35 days was within such time, where, at the date permitting the exercise of the option, the lessor had deposited the deed in escrow subject to invalid limitations on its delivery, and the lessee's bank had deposited the purchase price subject to conditions which the lessee could and did satisfy within such time.
Tender of purchase money within option period, note, 101 **A.L.R.** 1432. See, also, 25 **Cal.Jur.** 525; 55 **Am.Jur.** 506.
(2) Vendor and Purchaser § 50--Options--Effect of Exercise.
Where an option to purchase realty does not specify a time of payment nor make such payment a condition precedent to the exercise of the option, upon such exercise the option agreement disappears, a contract of purchase and sale arises, and the optionee has a reasonable time in which to tender payment.

SUMMARY

APPEAL from a judgment of the Superior Court of San Mateo County. Aylett R. Cotton, Judge. Affirmed.

Action to recover excess payment made under an option to purchase realty. Judgment for plaintiff affirmed.

COUNSEL

Norman S. Menifee and Henry F. Wrigley for Appellants.

Hugh F. Mullin, Jr., and John A. Cost for Respondent.

PETERS, P. J.

Murfee contracted with Doelger for the lease of a restaurant. The written lease gave Murfee an option to purchase the premises for $30,000, if such right were exercised at the end of the 30 months from the inception of the lease; otherwise, he was given the right to purchase for $35,000 during the next 30-month period. The first 30-month period expired on June 20, 1947. Prior to that date Murfee, through his agents, notified Doelger, or his agent, that he intended to exercise the option. Doelger, by his agent Porter, had deposited a deed in escrow on May 19, 1947. Various complications arose, hereafter discussed, and on June 24, 1947, Doelger demanded the return of his deed from the title company. On June 30, 1947, Doelger notified the title company that the deal should be closed only upon Murfee paying $35,000, plus $469.40 for insurance paid for by Doelger. On July 25, 1947, Murfee paid $35,469.40, under protest, and then brought this action to recover $5,469.40, the claimed excess. The trial court determined that Murfee was not liable for the insurance premiums; that he had notified Doelger prior to June 20, 1947, that he intended to exercise the option, and that, under the terms of the agreement, the money did not have to be in escrow on that date but that Murfee had a reasonable time thereafter to make the payment. Judgment was granted for Murfee for $5,469.40, and Doelger and his agent appeal.

In their respective briefs both counsel purport to make a detailed statement of facts. Appellants have not supported their statement with a single transcript reference, the respondent with but one such reference. Rule 15a of the Rules on Appeal requires that: "The statement of any matter in the record shall be supported by appropriate reference to the record." Such failure to comply with the rules has imposed an entirely unnecessary burden on this court.

The transcript shows the following: In December of 1944, Murfee desired to purchase the Villa Chartier, a restaurant and bar located in San Mateo County. The then owner wanted $30,000 for the realty and $25,000 for the stock and equipment. Murfee was able to raise the money to purchase the stock and ***11** equipment, but was unable to raise the money to buy the realty. Under these circumstances he asked Doelger, a friend of long standing, to invest in the property, offering to lease the premises from Doelger for $400 per month for some fixed period. Doelger agreed, and purchased the real property for $30,000, $20,000 of which was secured by means of a loan from the Bank of America, Doelger putting up the balance of $10,000 in cash. For purpose of convenience, Doelger took title in the name of appellant A. L. Porter, one of his employees, but admittedly Doelger was the real owner.

On December 20, 1944, respondent, and another person whose interest has since been purchased by respondent, and Porter, on behalf of Doelger, entered into a lease and option agreement. The instrument provided that the lease was to be for five years, and that the monthly rent of $400 per month should be payable on the 20th of each month. As security for the rent and the performance of the other obligations of the lease, Murfee gave appellants a chattel mortgage on all of the personal property located on the premises.

The instrument also gave Murfee an option to purchase the real property. It is the interpretation of this clause that presents the pivotal question on this appeal. It reads as follows: "In addition thereto, and as a material part hereof, the Lessees shall have, and they are hereby given the right or option, at the end of the first thirty months hereunder, but not before then, to purchase the said demised premises for the agreed sum or purchase price of Thirty Thousand Dollars ($30,000.00), plus the amounts, if any, Lessor may hereafter be required to expend for capital improvements or public assessments in connection with said demised premises; and if the said option is not exercised by the Lessees at the end of said first thirty months, the Lessees shall have, and they are hereby given, the right or option at any time thereafter and within the succeeding thirty months, to purchase said premises for the sum of Thirty-five Thousand Dollars ($35,000.00); plus the amounts, if any, Lessor may hereafter be required to expend for capital improvements or public assessments in connection with said demised premises; and upon the purchase of said premises by the Lessees at or after the expiration of the first thirty months, all liability for future rents hereunder shall terminate."

The lease expressly required that Murfee, at his own expense, should keep all improvements and personal property on ***12** the premises insured in favor of lessors against fire or other casualty in companies satisfactory to Doelger.

Murfee proceeded to operate the premises under this lease-option agreement. Between December of 1944, and July of 1947, he expended over $50,000 in improvements. At all times here relevant Murfee kept all the personal property and improvements fully and adequately insured. Neither Miss Porter nor Doelger ever made inquiry of Murfee concerning the insurance, or ever requested him to take out a policy.

In March of 1945, Doelger, at the request of the Bank of America to have the property insured to protect its loan, without inquiry of or consultation or notification to Murfee, took out $20,000 fire insurance. The premium on this policy was $469.40. Doelger's office wrote insurance, and that office

handled this policy, on which Doelger made a commission of about $90. Murfee was not billed for this premium until the escrow for the purchase was created, at which time he first learned that Doelger had taken out this duplicating policy.

About a year and a half before the first 30-month period had expired, Murfee offered to buy the property from Doelger, but the latter refused on the ground that he would rather have the $400 monthly rental during this 30-month period.

The 30-month period expired on June 20, 1947. In April of that year Murfee began negotiations with the Burlingame branch of the Bank of America to secure a loan to assist him in the purchase of the property pursuant to the terms of the option. The bank ordered a preliminary title search, which was issued on April 29, 1947. The manager of the bank testified that on May 20, 1947, he called Miss Porter, the holder of the record title, and informed her that Murfee was ready to close the transaction. She replied that the offer was a month too early. As a matter of fact, however, on the previous day, May 19, 1947, Miss Porter had deposited in escrow a deed naming Murfee as grantee, with a demand for $30,869.40, claiming $30,000 principal, $400 for rent not then due from May 20th to June 20th, and $469.40 for the insurance premium. Miss Porter placed no time limit on the escrow, and, in particular, gave no instruction that it could not be closed after June 20, 1947. She testified, however, that she construed the option clause to require the escrow to be closed no later than June 20, 1947.

Between May 20th and June 20th various complications arose which delayed the actual payment of the money into escrow. ***13**

Between these dates Murfee became involved in litigation with his wife, and the bank required that she sign releases to this property before it would complete the loan. On June 17, 1947, the bank sent instructions to the title company, and included therewith were releases from Mrs. Murfee and a deed from her to Murfee. At this same time the title company received authority from the bank to draw on it for an additional amount, and to pay that amount to Mrs. Murfee. Thus, the record shows that this complication was entirely cleared up prior to June 20, 1947. The bank manager did testify, however, that on June 20, 1947, a formal satisfaction from Mrs. Murfee had not been received, and that until the bank had received such a document it would not have financed the transaction.

Another complication developed over a tax lien on the property amounting to $5,743.73. This was paid by Murfee sometime prior to June 20, 1947, and the bank so informed the title company early in May of 1947. Nevertheless, no release of the lien appeared in the county records, and it was not until June 25, 1947, that the title company received a letter from the revenue department of San Mateo County acknowledging payment of the tax claim and stating that an official release would thereafter be issued.

Other difficulties arose over the chattel mortgage on the personal property held by appellants. When Miss Porter delivered the deed to the title company on May 19, 1947, she did not send a satisfaction of the chattel mortgage, and, in fact, such a satisfaction was not secured from appellants until late in July of 1947, the acknowledgment of the notary being dated July 31, 1947. The manager of the title company testified that this satisfaction was not indispensable, and that the title company could have closed the escrow without it, but the bank manager testified that, under the bank's rules, he could not advance the purchase price to Murfee until this satisfaction had been secured.

In order to secure the bank loan, Murfee was required to give a chattel mortgage to the bank. Notice of the mortgage was published on June 24, 1947, and the seven-day period of notice did not expire until July 2, 1947.

On June 17, 1947, the bank put up the $30,000 with the title company, but made no provision for the payment of the premium on the fire insurance. The title company received the vouchers in reference to

the deal on June 19th, but because of the required notice to be given on the chattel mortgage, the ***14** bank requested that the closing date be July 2, 1947. Miss Porter, however, demanded the payment of the insurance premium.

On June 24, 1947, Miss Porter, by messenger, demanded the return of her deed to Murfee, but the title company refused to surrender it. On June 30, 1947, Miss Porter sent additional instructions to the title company, ordering it not to close the deal unless Murfee paid $35,000 for the property, plus $469.40 for the insurance premium.

The transaction could have been closed on July 2, 1947, and perhaps on June 19, 1947, because on that date the money demanded had been deposited, but it was not actually closed until July 25, 1947, because of the dispute over the amount of the demand. Murfee paid the extra $5,469.40, under protest, in order to protect his rights, and then filed this action against Doelger and Porter to recover that sum.

The theory of the trial court in allowing Murfee to recover is disclosed in the following two findings:

"It is true that plaintiff had a reasonable time after the end of the thirtieth month, to-wit, after June 20, 1947, to tender payment of the $30,000.00 due as the purchase price; and it is true that said purchase price was tendered to defendants within a reasonable time after said 20th day of June, 1947. It is also true that the demands of the defendants contained in the instructions to the California Pacific Title Insurance Company, ... were excessive in the sum of $869.40, since the $400.00 rental for the period from May 20, 1947, to June 20, 1947, was not then due and was thereafter paid on the regular rental day of May 20, 1947, and that the sum of $469.40 alleged by defendants would be due for insurance was an improper demand on plaintiff."

"It is true that the demands of defendants contained in said instructions to said Title Company were excessive in the sum of $5,469.40 in that the $469.40 for insurance taken out by defendants was not chargeable to plaintiff ... and since the $5,000.00 in addition to the purchase price of $30,000.00 was not a valid demand on plaintiff inasmuch as plaintiff should have been allowed a reasonable time from June 20, 1947, to tender to defendants the sum of $30,000.00 as the option had been exercised by plaintiff prior to the thirty month period provided for in the above referred to option to purchase ..."

(1a) The basic legal question presented is whether, under the lease-option agreement, Murfee was not only required to ***15** notify Doelger of his election to purchase before June 20, 1947, but under conditions then existing, he was also required to tender the purchase price not later than that day.

Appellants contend that, under such an agreement, tender of the purchase money must be made before the expiration of the option.

Of course, the problem is one of intent. If the contract requires a tender of the purchase price before a specific date, time being of the essence of the option, the money must be tendered as specified, but the real question is whether, when a contract, such as the one here involved, confers an option which must be exercised on or before a fixed date, and is silent about the exact time of payment, the purchase price must be tendered on or before the date fixed for the exercise of the option, or whether the purchaser has a reasonable time thereafter to comply. The problem is discussed in an annotation in 101 American Law Reports, page 1432, where many cases involving various factual situations are collected and discussed.

The two California cases cited by appellants in support of their contention are cases where the contract was explicit as to time of payment. The following quotation from *Mariposa Commercial etc. Co. v. Peters,* 215 Cal. 134, at page 142 [8 P.2d 849], demonstrates the distinction between that case and the instant one: "As already stated the lease provided that if notice of election to exercise the

option were given to respondent by November 25, 1929, *and if the purchase price of $570,000 were paid by November 30, 1929,* appellants could purchase, providing that at that time they were not in default under the terms of the lease. ... In the second place appellants at no time paid or tendered the purchase price ... which by the provisions of the lease and option had to be paid by November 30, 1929. Not having complied with the terms thereof the option terminated November 30, 1929." (Italics added.)

In *Heine v. Treadwell,* 72 Cal. 217 [13 P. 503], the other California case relied upon by appellants, the court based its decision upon its interpretation of the option agreement, holding that, under the express terms of that agreement, the purchase price had to be tendered at a time specified in the agreement. The action was one of ejectment. The lease gave the defendant the "privilege of purchasing at any time during the term for $3,250, upon giving ten days' previous notice of his election so to purchase ..." (P. 219.) The court ***16** quite properly held that, under the terms of the lease, tender of the purchase price was required before the lease had expired.

A case more closely analogous to the instant case is *Cates v. McNeil,* 169 Cal. 697 [147 P. 944]. There, the plaintiff brought an action in unlawful detainer, claiming that defendants were unlawfully holding over after the expiration of their lease. Defendants cross-complained, seeking specific performance under a provision of the lease giving them an option to purchase the leased premises. The option rights expired on May 27, 1912. Defendants had served upon plaintiff a notice of election to buy on May 25th, but had not then deposited the purchase price. The pertinent provision of the lease provided (p. 700): "And in case the party of the second part shall not exercise its right and option to purchase said land within two years from date hereof, then and in that event such right and option to purchase shall absolutely determine and be null and void except that the party of the second part, after having paid the rent on said property for the term of ten years shall then have the right and option to purchase said property for the price of $600.00 per acre."

The dispute arose at the termination of the 10-year period. Plaintiff argued that there was no valid acceptance by defendants because a tender had not been made within the 10-year period. In disposing of the contention the court stated (p. 706): "We do not deem it necessary here to discuss the terms of the notice served on appellants as to whether it constituted a tender of the purchase price at that time or not. The option clause gave the respondents a right to purchase the leased premises for the price of six hundred dollars an acre. There is nothing in the option clause which requires payment of the price of the land to be made or tendered when the option right is exercised in order to constitute an acceptance. Payment may or may not be made an essential condition to the exercise of such a right just as the parties see fit to provide for in the option agreement. But nothing is said about payment in the option clause here. It is not even mentioned. What the respondents acquired under the option clause was an irrevocable right of option to purchase the property at a specified price if they should at the end of ten years elect to do so and all that was necessary on their part to do as far as the terms of the option are concerned in order to constitute a binding contract for the sale and purchase of the premises was to give notice of their acceptance of the right. This they did. Payment of the purchase price at that ***17** time was not a condition required by the option and it is not for the court to incorporate terms in it which the parties to it did not incorporate or even mention. Of course, payment would be essential before respondents would be entitled to a conveyance of the land but that is a matter pertaining to the performance of the contract of purchase and sale which had been created by the acceptance. In the absence of anything in the contract itself the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property under which the agreement or

covenant of the vendor to convey and the vendee to pay the purchase price are considered mutual and dependent covenants and are to be performed contemporaneously by the respective parties. Each party must perform his part in carrying out the contract and do so within a reasonable time after the contract is created. The payment of the purchase price and the delivery of the deed are to be done concurrently and as the option clause here did not provide otherwise respondents were not bound to make payment of the purchase price until appellants were prepared to make them a deed conveying to them a good title to the premises."

While it is true that in the Cates case the sellers did not deposit a deed, while in the instant case Doelger did deposit a deed prior to the expiration of the 30-month period, that fact cannot serve to distinguish the two cases because Doelger had also filed instructions calling for the payment of insurance, and Miss Porter failed to file a release of the chattel mortgage held by appellants. Thus, the deposit of the deed was subject to conditions not contained in the contract. Under the contract, appellants had no legal right to take out insurance as long as Murfee had the property insured. Appellants took out the insurance without Murfee's knowledge, permission or consent. They had no legal right to impose this charge of $469.40 upon him. So far as the chattel mortgage is concerned, the bank manager testified that he could not advance the money until a release of the chattel mortgage had been given. Thus, appellants' deposit of the deed was subject to invalid limitations and amounted, legally, to no deposit at all.

(2) The rule of the Cates case is sound and in accordance with generally accepted legal principles. Supported by many cases, these general principles are expressed as follows in the following authorities: "The 'exercise' of an option is merely ***18** the election of the optionee to purchase the property." (66 C.J. 497.) "Except where required by statute to be in writing, an option may be exercised or accepted orally unless the contract requires a written acceptance ..." (66 C.J. 499.) "... payment or tender is not essential unless it is a condition precedent." (66 C.J. 500.) "If no time is specified the acceptance must be within what is a reasonable time under the circumstances of the particular case. The principle that time is of the essence of an option generally applies only to acceptance and not to performance." (66 C.J. 503; see, also, 55 Am.Jur. 512.) "It is a general rule that an optionor who has given the right to purchase property within a specified time may not do any act or omit to perform any duty calculated to cause the optionee to delay in exercising the right." (55 Am.Jur. 510.) (For a detailed discussion of these general principles see 3 Thompson on Real Property (Perm. ed.), §§ 1325, 1329, 1330, 1331; vol. 8, §§ 4569, 4573.) Once the option to purchase was exercised, the lease and option agreement no longer existed, and a binding contract of purchase and sale came into existence between the parties. (55 Am.Jur. 494; *Smith v. Post,* 167 Cal. 69 [138 P. 705]; *W. G. Reese Co. v. House,* 162 Cal. 740 [124 P. 442].)

(1b) Appellants argue that the finding that Murfee notified Doelger of his intent to exercise the option within the time required by the agreement is unsupported, apparently on the theory that no election was made exactly on June 20, 1947. Such an argument places formalism ahead of substance. The bank manager, on behalf of Murfee, notified appellants of Murfee's election to purchase on May 20, 1947, and the instructions of the purchaser were filed with the title company under date of June 17, 1947. Both were continuing acceptances, and in effect on June 20, 1947.

The acceptance here was clearly timely and complete. The appellants had deposited their deed on May 19, 1947, subject, however, to invalid instructions. The bank deposited its money and vouchers in escrow on June 19, 1947. This was a clear acceptance. The delay caused by the publication of the chattel mortgage did not qualify the acceptance. Releases filed by Mrs. Murfee on June 17th cleared any claim she might have had on the $30,000. The

tax liens were paid prior to the 20th, and the fact that the title company was not so notified by the county was immaterial. Had appellants' demands not been in excess of the amount called for by the lease, the whole transaction could have been closed on the 20th, ***19** subject only to the time interval required to publish notice in connection with the chattel mortgage. The delay was largely caused by appellants. At any rate, the money was deposited within a reasonable time. This being so, the acceptance was timely.

The judgment appealed from is affirmed.

Ward, J., and Bray, J., concurred.
A petition for a rehearing was denied March 10, 1950, and appellants' petition for a hearing by the Supreme Court was denied March 30, 1950.

Cal.App.1.Dist.
Murfee v. Porter
96 Cal.App.2d 9, 214 P.2d 543

END OF DOCUMENT

PALO ALTO TOWN & COUNTRY VILLAGE, INC., Plaintiff and Appellant,
v.
BBTC COMPANY, Defendant and Respondent
S.F. No. 23065.

Supreme Court of California
May 16, 1974.

SUMMARY

In a landlord's action for declaratory relief, the evidence indicated that the tenant had timely mailed an acceptance of an option, set out in the lease, to extend it, but that the landlord had not received the acceptance and had, after expiration of the initial term, demanded surrender of the premises. The trial court held that the option had been timely and effectively exercised. (Superior Court of Santa Clara County, No. 238874, Vernon C. Hunt, Sr., Judge. FN*)

The Supreme Court affirmed. After reviewing the nature of an option from the differing viewpoints of the optionor and optionee, the court held that Civ. Code, §§ 1582, 1583, relating to mode of communicating acceptance of a proposal and completion of the communication of a consent to a proposal, apply to not only revocable offers, but also to irrevocable options, with the result that absent any provisions to the contrary in the option contract, the option becomes effective when a written acceptance is timely deposited in the mail. And applying these rules and provisions to the lease extension option in litigation, the court held that exercise of the option had become effective when the tenant had deposited his acceptance in the ordinary mail.

FN* Retired judge of the municipal court sitting under assignment by the Chairman of the Judicial Council.

In Bank. (Opinion by Sullivan, J., expressing the unanimous view of the court.) ***495**

HEADNOTES

Classified to California Digest of Official Reports

(1) Contracts § 22--Consent--Mode of Acceptance--Option.
Where provisions of an option contract prescribe the particular manner in which the option is to be exercised, they must be strictly followed, but where the contract merely suggests and does not require a particular manner of communicating exercise of the option, another means of communication is not precluded.

(2) Contracts § 16--Consent--Option as Proposal.
An option falls within the term "proposal," as used in Civ. Code, § 1582, relating to the mode of communicating acceptance of a "proposal."

(3) Contracts § 17--Consent--Continuing Offer or Option.
An irrevocable option is a contract, made for consideration, to keep an offer open for a prescribed period of time.

(4) Landlord and Tenant § 94(1)--Leases--Exercise of Option--Use of Ordinary Mail.
A lessee's use of the ordinary mail to exercise an option set forth in the lease for extension was a reasonable mode of communicating the exercise, where the lease did not prescribe the manner of communicating the exercise, and nothing in the circumstances militated against the conclusion that such mode of communication was authorized by Civ. Code, § 1582, declaring that in the absence of contractual provisions describing particular conditions concerning communication of the acceptance of a proposal, any reasonable and usual mode may be adopted.

(5) Contracts § 22--Mode of Acceptance--Options--"Effective On Posting" Rule.
Civ. Code, §§ 1582, 1583, relating, respectively, to the mode of communicating acceptance of a pro-

posal and the completion of communication of a consent to a proposal, apply to irrevocable options as well as to revocable offers. And absent any provisions in the option contract to the contrary, the exercise of an option becomes effective, by virtue of Civ. Code, § 1583, at the time written notice of acceptance is deposited in the mail.

(6) Contracts § 17--Consent--Continuing Offer or Option--Nature.
An option, as a matter of legal theory, is considered to have a dual nature: on the one hand, it is an irrevocable offer which, on acceptance, ripens into a bilateral contract, whereas on the other hand, it is a unilateral contract which binds the optionor to perform an underlying agreement on the optionee's performance of a condition precedent. Which aspect is emphasized depends on which party's duties are under consideration. From the point of view of the optionor's duty, it is binding on the making of the option contract. The optionee, however, has no duty until, and unless, he accepts the irrevocable offer proposed to him by the optionor.
[See **Cal.Jur.2d,** Contracts, § 15; **Am.Jur.2d,** Contracts, § 32.]
(7) Contracts § 17--Consent--Continuing Offer or Option--Nature.
From the viewpoint of the optionor, an option is a binding contract subject to the performance of a condition precedent by the optionee. From the optionee's viewpoint, an option is an irrevocable offer which he can convert into a binding bilateral contract by acceptance of the offer.

(8) Contracts § 22--Consent--Mode of Acceptance--Option.
From the optionee's viewpoint, the notice of the exercise of an option falls within the language of Civ. Code, § 1583, relating to completion of communication of consent to a proposal. The optionee is a "party accepting a proposal," namely, the irrevocable offer. And the notice of exercise is an "acceptance" of that offer which signifies the optionee's "consent" to be bound according to the terms of the bilateral contract created by the acceptance.

(9) Contracts § 22--Consent--"Effective on Posting" Rule as State Policy.
The "effective upon posting" rule expressed in Civ. Code, § 1583, relating to acceptance of a proposal, is the declared policy of this state.

COUNSEL

Mager, Matthews & Neider, Thomas F. Stack and James F. Matthews for Plaintiff and Appellant.

Nakashima & Boynton and Theodore K. Boynton for Defendant and Respondent. ***497**

SULLIVAN, J.

The sole issue confronting us in this case is whether, absent any provisions in the option contract to the contrary, a written notice by the optionee of his exercise of an option is effective upon its deposit in the mail or only upon its receipt by the optionor. As we explain *infra*, we have concluded that pursuant to sections 1582 and 1583 of the Civil Code, FN1 the exercise of the option is effective upon mailing. We therefore affirm the judgment.

FN1 Hereafter, unless otherwise indicated, all section references are to the Civil Code.

The facts of the case are briefly these. By written lease dated November 20, 1964, plaintiff leased to defendant, for the operation of a restaurant and bar, certain premises in a shopping center in San Jose for a five-year term commencing on January 1, 1965, and ending on December 31, 1969. The lease granted defendant two successive options to extend the term for a period of five years on each option. According to the options contained in paragraph 45 of the lease the "Lessee may, by giving not less than six months prior notice in writing to the Lessor, extend this lease for an additional five years" under specified terms and conditions, and after such extension "may extend this lease for a further five-year period ... by giving Lessor not less

than six months notice in writing prior to the end of the tenth year of the term of this lease."

On June 5, 1969, and more than six months prior to the end of the term of the lease, defendant prepared and signed a letter to plaintiff notifying the latter that it was exercising its option to extend the lease and deposited the same in the mail in a stamped envelope addressed to plaintiff. Defendant continued with its usual operation of the bar and restaurant and made various improvements on the premises in anticipation of the extended term of the lease. On February 13, 1970, a month and a half after the end of the initial term and eight and a half months after defendant's letter exercising the option, plaintiff notified defendant that the lease had expired for want of renewal and demanded surrender of the premises by March 31, 1970. Plaintiff claimed that it had never received defendant's letter. Defendant, on the other hand, claimed that it had properly exercised its option and refused to vacate.

Plaintiff thereupon commenced the present action for declaratory relief seeking a determination of its rights and duties under the lease and a declaration as to whether defendant properly exercised its option and whether the lease terminated on December 31, 1969. Defendant filed an answer ***498** and cross-complaint, essentially alleging that it had by written notice to plaintiff exercised its option to extend the term and that in addition thereto, defendant's use, possession, improvement of and continued operations on the premises were such that plaintiff knew, or should have known, that defendant intended to extend its tenancy. In its cross-complaint, defendant sought damages for plaintiff's allegedly wrongful action in threatening defendant's peaceful possession and plaintiff's alleged interference with defendant's remodeling plans and negotiations for the sale of its business.

The trial court found and concluded that defendant on June 5, 1969, prepared, signed and mailed, properly stamped and adequately addressed, a letter to plaintiff unconditionally exercising its first renewal option in the lease; that defendant exercised the option, properly and validly in all respects; and that defendant at all material times was rightfully in possession of the premises under the lease. Judgment was entered accordingly. [FN2] This appeal followed.

> FN2 In accordance with its findings of fact and conclusions of law, the court also ordered that plaintiff recover from defendant the sum of $4,000 as additional rental. The court, however, made no mention of defendant's cross-complaint for damages. Defendant has not appealed from the judgment and has apparently abandoned its damage claim.

(1) It is well settled that when the provisions of an option contract prescribe the particular manner in which the option is to be exercised, they must be strictly followed. (*Flickinger* v. *Heck* (1921) 187 Cal. 111, 114 [200 P. 1045]; *Callisch* v. *Farnham* (1948) 83 Cal.App.2d 427, 430 [188 P.2d 775]; see generally 1 Witkin, Summary of Cal. Law (8th ed. 1973) p. 127.) However, when the option contract merely suggests, but does not positively require, a particular manner of communicating the exercise of the option, another means of communication is not precluded. (*Estate of Crossman* (1964) 231 Cal.App.2d 370, 372 [41 Cal.Rptr. 800].)

Accordingly, we must first ascertain if the lease requires that the exercise of the option be communicated to the lessor in a particular manner. An examination of that document discloses that paragraph 45 requires that notice of the exercise of the option be given "in writing" but the lease does not prescribe any particular manner of communicating such written notice to the lessor.

Plaintiff contends, however, without citation of any California authority, [FN3] ***499** that the phrase "giving notice" in an option contract must be construed to mean that the notice is not effective until it is actually received by the optionor. Absent appropriate extrinsic evidence, to construe the term "giving notice" as imposing an absolute condition

that the optionor receive the notice completely distorts the normal and accepted meaning of the phrase. FN4

FN3 While some of the cases from other jurisdictions cited by plaintiff appear to support the proposition that the term "giving notice" in an option contract means, as a matter of contractual construction, "receiving notice," most appear to apply a substantive rule of law that unless the contract specifies to the contrary, exercise of an option is effective only upon receipt of notice by the optioner. (See, e.g., *Dynamics Corporation of America v. United States* (1968) 389 F.2d 424, 431 [182 Ct.Cl. 62].)

FN4 See, e.g., Black's Law Dictionary (4th ed. 1951) page 819: "Give Notice. To communicate to another, in any proper or permissible legal manner, information or warning of an existing fact or state of facts or (more usually) of some intended future action."

In *Estate of Crossman, supra*, 231 Cal.App.2d 370, the court was called upon to determine whether an option to purchase real property had been effectively exercised under a provision in the option contract that any notice to be given by either party "'shall be given in writing, either delivered personally or sent by prepaid registered mail.'" (*Id.* at p. 371.) Concluding that this provision in effect equated "given" with "sent," the court said "The agreement required that all notices be 'given' - not 'delivered' or 'received.' The same paragraph provides that notice be 'sent' by registered mail, thus equating 'sent' with 'given', and emphasizing the lack of requirement of actual delivery." (*Id.* at p. 373.)

In the case at bench paragraph 19 of the lease provides that all notices to be given *to* the lessee may be given in writing either personally or by mail. FN5 Although this paragraph is silent as to notices given *by* the lessee and is therefore less inclusive than the provision in *Crossman*, it suggests a sufficient equating of "given" with "sent" to negative plaintiff's assertion that "giving", without more, means "receiving." We conclude, therefore, that paragraph 45 of the lease does not prescribe any absolute condition concerning the manner of communicating the exercise of the option to the optionor.

FN5 "All notices to be given *to* Lessee may be given in writing personally or by depositing the same in the United States mail, postage prepaid, and addressed to Lessee at the said premises, whether or not Lessee has departed from, abandoned or vacated the premises." (Italics added.)

Since the lease does not prescribe the manner of communicating the exercise of the option to the optionor, "any reasonable and usual mode may be adopted." (§ 1582) FN6 (2, 3) Clearly an option falls within the term "proposal" found in this section since "[a]n irrevocable option is a *contract* made for consideration, to keep an offer open for a prescribed ***500** period." (1 Witkin, Summary of Cal. Law (8th ed. 1973) p. 124; see *Warner Bros. Pictures v. Brodel* (1948) 31 Cal.2d 766, 772 [192 P.2d 949]; *Flickinger v. Heck, supra*, 187 Cal. at p. 113; *Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 751 [101 Cal.Rptr. 335]; Rest., Contracts, §§ 24, 47; Rest.2d Contracts (Tent. Drafts Nos. 1-7) §§ 24, 24a.) Thus in *Estate of Crossman, supra*, 231 Cal.App.2d 370 an option contract to purchase real property provided that any notice required to be given by either party, shall be in writing, either delivered personally or by prepaid registered mail. The court, holding section 1582 applicable, declared that the "broad inclusion of notices, regardless of importance, implies mere suggestion of a permissive method of communication," that "registered mail was not a prescribed requirement or an absolute condition,"

FN6 Section 1582 provides: "Mode of Communicating Acceptance of Proposal. If

> a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted." (231 Cal.App.2d at p. 373) and that exercise of the option by ordinary mail was effective as a "reasonable and usual mode" (§ 1582) of communicating acceptance of the proposal.

(4) We therefore reject as devoid of merit, plaintiff's argument that the use of ordinary mail is not a reasonable and usual means of communicating acceptance in the instant case. Indeed, in the absence of any specified means in the lease, plaintiff's thesis against ordinary mail seems to us to be an astonishing one in the light of the common practice of today's world of business. It is even stranger in the light of paragraph 19 of the lease (see fn. 5, *ante*) which selects ordinary mail as a means of giving notice. We are satisfied that there is nothing in the circumstances of the case before us which militates against the conclusion that defendant's use of ordinary mail was a reasonable mode of communicating to plaintiff its exercise of the option to extend the lease.

We turn to the crucial issue in the case. Was defendant's exercise of its option to extend the lease effective upon its deposit in the mail of its written notice of acceptance or only upon the actual receipt of such notice by plaintiff?

The so-called "effective upon posting" rule [FN7] was codified in California in 1872 as section 1583 of the Civil Code: "When Communication Deemed Complete. Consent is deemed to be fully communicated between ***501** the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section." Although the question as to whether the exercise of an option is effective at the time written acceptance is deposited in the mail has never been squarely presented to this court, we have declared and a number of Courts of Appeal have held that option contracts are subject to the provisions of sections 1582 and 1583 and that an option is effectively exercised when written acceptance is deposited in the mail. (*Dawson v. Goff* (1954) 43 Cal.2d 310, 316 [273 P.2d 1]; [FN8] *Estate of Crossman, supra*, 231 Cal.App.2d 370, 373-374; *State of California v. Agostini* (1956) 139 Cal.App.2d 909, 915 [294 P.2d 769]; *Morello v. Growers Grape Prod. Assn.* (1947) 82 Cal.App.2d 365, 370-371 [186 P.2d 463]; *Canty* v. *Brown* (1909) 11 Cal.App. 487, 491 [105 P. 428]; 1 Witkin, Summary of Cal. Law (8th ed. 1973) § 130, p. 127.) (5) We today reaffirm our observations in *Dawson* and hold that sections 1582 and 1583 apply to irrevocable options as well as to revocable offers and that absent any provisions in the option contract to the contrary, by virtue of section 1583 the exercise of an option becomes effective at the time written notice of acceptance is deposited in the mail.

> FN8 In *Dawson* we decided the sole issue of venue on the basis of the option contract itself. But assuming that it was not a binding contract, we went on to comment as to when the contract to which the option related was made. Although not actually necessary for our decision, we declared that sections 1582 and 1583 "have been held applicable to acceptance or exercise of an option by an optionee under an option contract as well as to a revocable offer. [Citations.]"

> FN7 "It is well established that an acceptance of an offer to enter into a bilateral contract is effective and deemed communicated as soon as deposited in the regular course of mail if the offer was made by mail, or if the circumstances are such that an acceptance by mail would be authorized." (*State of California v. Agostini* (1956) 139 Cal.App.2d 909, 915 [294 P.2d 769]; *Ivey v. Kern County Land Co.* (1896) 115 Cal. 196, 200-201 [46 P. 926].) (43

Cal.2d at p. 316.)

Plaintiff, however, points out that the majority rule in other jurisdictions is that notice of exercise of an option is effective only upon receipt. Our attention is directed to *Dynamics Corporation of America v. United States, supra,* 389 F.2d 424, 431, where the court stated: "Turning now to the general rule governing exercise of an option, it is well settled that notice to exercise an option is effective only upon receipt." An additional example is presented in *Cities Service Oil Co. v. National Shawmut Bank* (1961) 342 Mass. 108 [172 N.E.2d 104], where the Supreme Court of Massachusetts declared: "It is at least the majority rule that notice to exercise an option is effective only upon its receipt by the party to be notified unless the parties otherwise agreed." (*Id* . at p. 105, fn. 1, see cases therein cited.) Finally it is noted that Professor Corbin supports such a rule: "If in an option contract the duty of the promisor is conditional on 'notice within 30 days', does this mean notice received or notice properly mailed? It is believed that in the absence of an expression of contrary intention, it should be held that the notice must be received. ... The rule that an acceptance ***502** by post is operative on mailing was itself subjected to severe criticism; and, even though it may now be regarded as settled, it should not be extended to notice of acceptance in already binding option contracts." (1A Corbin on Contracts (1963 ed.) § 264, p. 521, fn. omitted; accord, Rest.2d Contracts (Tent. Drafts Nos. 1-7) § 64(f), p. 134.)

Arguing that section 1583 is inapplicable to option contracts since an option, properly analyzed, is not a "proposal" as used in the section and that we are free of any restraint of stare decisis, plaintiff urges us to apply the above so-called majority rule. We decline to do so. As we have explained, the "effective on posting" rule rests solidly on California statutory and decisional law. An analysis of the legal theory of option contracts to the end of determining whether an optionee is a "party accepting a proposal" and whether the exercise of the option is an "acceptance" from which "[c]onsent is deemed to be fully communicated" (§ 1583; and see §§ 1550, 1565, 1580 and 1581), satisfies us that our decision in this respect is a sound one.

(6) An option, as a matter of legal theory, is considered to have a dual nature: on the one hand it is an irrevocable offer, which upon acceptance ripens into a bilateral contract, and on the other hand, it is a unilateral contract which binds the optionor to perform an underlying agreement upon the optionee's performance of a condition precedent. Professor Corbin explains the option as follows: "[The option] is a binding unilateral contract, since it is a promise exchanged for a sufficient cash consideration. It is also commonly called an offer .... This usage is not at all objectionable, if we realize that an offered promise may also be a binding promise. It certainly creates a power in B to be exercised ... by giving notice of consent .... And on the giving of such notice within the time limit, the legal result is almost identical with that of the acceptance of an ordinary revocable offer .... It is a 'binding' promise, because a consideration was paid for it; it is an 'offer', because it invites a second and different exchange of equivalents. [¶] ... O's [optionor's] promise is from the very beginning a binding contract, his duty to convey being conditional on notice by B within the stated time. The sending of such a notice by B is not merely the acceptance of an offer; it is also the performance of a condition precedent to O's duty of immediate performance." (1A Corbin on Contracts (1963 ed.) § 264, pp. 508-509, fn. omitted.)

This court in its exhaustive analysis of an option in *Warner Bros. Pictures v. Brodel, supra,* 31 Cal.2d 766, 772-773, explicitly recognized the dual aspect of an option, referring to it sometimes as an irrevocable offer ***503** which is completed by the acceptance of the optionee and sometimes as a binding contractual promise to perform the underlying contract subject to the condition precedent of acceptance by the optionee. Which aspect of an option is emphasized depends upon which party's duties are under consideration. From the point of view

of the optionor's duty it is binding upon the making of the option contract. "[T]he optionor has irrevocably promised upon the exercise of the option to perform the contract or make the conveyance upon the terms specified in his binding offer. ... The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of the irrevocable offer of the optionor by the optionee. 'The contract has already been made, as far as the optionor is concerned, but is subject to conditions which are removed by the acceptance.' (*Seeburg v. El Royale Corp.* [1942] 54 Cal.App.2d 1, 4 ....)" (*Warner Bros. Pictures v. Brodel, supra*, 31 Cal.2d 766, 772-773; *Dawson v. Goff, supra*, 43 Cal.2d 310, 316-318; *Caras v. Parker* (1957) 149 Cal.App.2d 621, 626-627 [309 P.2d 104].)

However, the optionee has no duty until, and unless, he accepts the irrevocable offer proposed to him by the optionor. As we observed in *Warner Bros. Pictures v. Brodel, supra*, 31 Cal.2d 766, 772, "In an option contract the optionor stipulates that for a specified or reasonable period he waives the right to revoke the offer. [Citations.] Such a contract is clearly different from the contract to which the irrevocable offer of the optionor relates, for the optionee by parting with special consideration for the binding promise of the optionor refrains from binding himself with regard to the contract or conveyance to which the option relates. ... 'A contract conferring an option to purchase is ... an irrevocable and continuing offer to sell, and conveys no interest in land to the optionee, but vests in him only a right in personam to buy at his election.'" Thus it has been held in California that an option to purchase real property "is by no means a sale of property, but is the sale of a right to purchase" (*Hicks v. Christeson* (1917) 174 Cal. 712, 716 [164 P. 395]) and on acceptance the option becomes a contract of sale binding on both parties. (*Smith* v. *Post* (1914) 167 Cal. 69, 74 [138 P. 705]; *Rheingans* v. *Smith* (1911) 161 Cal. 362, 367 [119 P. 494].)

(7) Therefore from the viewpoint of the optionor, an option is a binding contract subject to the performance of a condition precedent by the optionee. From the viewpoint of the optionee, an option is an irrevocable offer which the optionee can convert into a binding bilateral contract by acceptance of the offer. Where the issue presented in a case focused upon ***504** the optionor's obligation, the former analysis prevailed, so that in *Dawson* it was held that, as to the optionor, the contract was made upon the signing of the option contract and therefore venue in a suit to enforce the option lay where the option contract was made and not where the option was exercised. However, where the issue focused upon the optionee's action the latter analysis prevailed, as in *Crossman* where the court held that acceptance of an option was effective upon posting pursuant to section 1583.

(8) Viewing the exercise of an option as an acceptance of an irrevocable offer, or in other words from the optionee's viewpoint under the preceding analysis, we think it is clear that the notice of the exercise of an option falls within the language of section 1583. The optionee is a "party accepting a proposal," namely the irrevocable offer; the notice of exercise is an "acceptance" of that offer and signifies the optionee's "consent" to be bound according to the terms of the bilateral contract created by the acceptance.

As plaintiff points out, it is true that if the exercise of the option is viewed as the performance of a condition precedent to the optionor's existent contractual duty, or in other words from the optionor's viewpoint under the preceding analysis, the language of section 1583 is not so apt, since a contractual duty is not a "proposal," and performance is not a "consent." Indeed Professor Corbin chooses to emphasize the theoretical possibility of viewing the notice of the exercise of an option in this aspect so as to thwart the extension of the "effective upon posting" rule, which he views with disfavor. FN9

FN9 "It is believed that, in the absence of an expression of contrary intention, it should be held that the notice must be re-

> ceived. As above explained, the notice is in one aspect a notice of acceptance of an offer; but in another aspect it is a condition of the promisor's already existing contractual duty. ... The rule that an acceptance by post is operative on mailing was itself subjected to severe criticism; and, even though it may now be regarded as settled, it should not be extended to notice of acceptance in already binding option contracts." (1A Corbin on Contracts (1963 ed.) § 264, p. 521, fn. omitted.)

(9) In California, however, the "effective upon posting" rule has received legislative sanction and is the declared policy of this state. We must effectuate this policy in all cases reasonably included within the scope and language of the statute promoting this policy. As previously explained, when the notice of exercise of the option is viewed as an acceptance of an irrevocable offer, such notice is clearly covered by section 1583.

To recapitulate, we hold first, that since pursuant to section 1582 the lease prescribed no condition concerning the communication to the optionor of the exercise of the option except that the notice be in writing, notice of ***505** acceptance by ordinary mail was a reasonable mode of communication; and second, that pursuant to section 1583 defendant's exercise of the option became effective when notice of acceptance was deposited in the mail.

The judgment is affirmed.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Burke, J., and Clark, J., concurred. ***506**

Cal.
Palo Alto Town & Country Village, Inc. v. Bbtc Company
11 Cal.3d 494, 521 P.2d 1097, 113 Cal.Rptr. 705

END OF DOCUMENT

WALTER W. PATTY et al., Respondents,
v.
AMY M. BERRYMAN, as Administratrix, etc., Appellant.
Civ. No. 14145.

District Court of Appeal, First District, Division 1, California.
Dec. 19, 1949.

HEADNOTES

(1) Sales § 26--Contract--Interpretation.
A letter from the buyer of a specified number of prefabricated houses, identifying and giving the location of the houses, fixing the purchase price and setting forth in detail the terms of the transaction and method of delivery and payment, signed by the buyer and endorsed as "accepted" by the seller, is not a unilateral offer to purchase dependent on delivery by the seller for completion, but the seller's promise to deliver s necessarilly implied from his acceptance, and such instrument constitutes a binding bilateral contract.

(2) Contracts § 125--Interpretation--Bilateral or Unilateral Contract.
Where there is doubt as to whether an agreement is bilateral or unilateral, it will be interpreted as bilateral, thus protecting both parties, rather than unilateral, which would protect neither.
See 6 **Cal.Jur.** 247; 12 **Am.Jur.** 745.
(3) Sales § 43--Performance and Breach--Time of Breach.
In an action against an administratrix for breach of a contract to buy prefabricated houses, where decedent contracted to perform on the day before plaintiff was to complete the purchase of the houses under another contract, thus enabling plaintiff to perform on his part, but plaintiff could not perform because of decedent's failure to do so, and where neither plaintiff nor his seller wished to terminate the contracts, but each gave informal extensions of time in order to give decedent opportunity to perform up to the date of his death, the contract was in force up to the time of decedent's death and was breached by him as of that date. Had there been no such extensions, decedent would have been in default on the date originally set for performance on his part, and the measure of damages would have been the same.

(4) Sales § 75(1)--Performance and Breach--Time of Payment.
Where a buyer contracted to buy goods that he knew the seller did not own but in turn had contracted to buy, and where the buyer was to pay for the goods one day before the seller had contracted to complete his purchase, the fact that the seller would not have title at the time of the buyer's performance, but was dependent on such performance to the buyer's knowledge to enable him to obtain title, did not excuse performance by the buyer, but the seller was entitled to a reasonable time after such performance to complete his own purchase and deliver to the buyer. (Civ. Code, § 1439.)
See 22 **Cal.Jur.** 941; 46 **Am.Jur.** 383.
(5) Sales § 75(1)--Performance and Breach--Time of Payment.
Where a seller contracts to sell goods which, to the buyer's knowledge, he does not own, but in which he has some interest, the law implies a common sense rule that such seller is allowed a reasonable time after payment by the buyer to purchase the goods required to meet his promise.

(6) Contracts § 245--Breach--Anticipatory Breach.
Where a buyer contracted to buy goods which, to his knowledge, the seller had contracted to obtain from a third party after the buyer's payment therefor, and where such seller and third party both made extensions of time to enable the buyer to perform after his default in not paying fo the goods at the stipulated time, a threat by the third party to sue the buyer unless he was paid for a release did not amount to an anticipatory breach of the contract between the seller and the buyer, who had no contractual relations with such third party, especially in view of the fact that extensions continued to be granted after such threat.
See 6 **Cal.Jur.** 457; 12 **Am.Jur.** 969.

(7) Sales § 382--Damages--For Nonacceptance.
Where a buyer contracts to buy goods from a middleman who has contracted to obtain the goods from a third party after such buyer's payment therefor, the measure of damages upon the buyer's default, and the loss proximately caused thereby (Civ. Code §§ 1784, subd. 2; 3300), is the middleman's profit or difference between his buying and selling prices, and the market value of the goods has no application to such measure (Civ. Code, § 1784, subd. 3).

(8) Sales § 382--Damages--For Nonacceptance.
Where a buyer contracts to buy goods from a middleman who, to such buyer's knowledge, has contracted to obtain the goods from a third party after the buyer's payment therefor, and where payments made by the buyer have, to his knowledge, been applied by the middleman to preserving the rights of the parties under his contract with the third party, upon the buyer's default, such payments are credited to him only to the extent that they are also charged to him as necessary expenses of the middleman under the contract, and the middleman is still entitled to be made whole by receiving his entire prospective profit.

SUMMARY

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Lile T. Jacks, Judge. Affirmed.

Action for damages for breach of contract. Judgment for plaintiff affirmed.

COUNSEL

Rogers & Clark and Bruce F. Allen for Appellant.

Bruce M. Parks and Fitzgerald, Abbott & Beardsley for Respondents.

PETERS, P. J.

The administratrix of the estate of E. R. Berryman appeals from a judgment awarding plaintiff, Walter W. Patty, $10,000 for breach of contract, and denying the estate's right to any judgment against Patty and the other cross-defendant, John S. Huston.

The facts are as follows: On, prior, and after November 1, 1946, Huston was the owner of 22 prefabricated houses. On the morning of that day, Patty entered into a contract with Huston whereby Patty agreed to buy, and Huston impliedly agreed to sell, the 22 prefabricated houses for a total purchase price of $53,750, payable $1,000 on November 1st, $4,000 on November 6th, and the balance by December 6, 1946. Patty and his partner Kelly, as Huston well knew, were sales promoters and intended to resell the houses at a profit. Prior to the Huston-Patty contract, Patty had had some oral negotiations with Berryman, so that, when the Huston-Patty contract was signed, Patty knew that he had a purchaser for the houses in the person of Berryman. In fact, a contract between Patty and Berryman in the form of a letter to Patty signed by Berryman and marked "accepted" by Patty was executed on the afternoon of November 1, 1946. Except as to the purchase price, which was $63,800, and for the final date of performance, which was fixed as December 5, 1946, this agreement was in the same form as the Huston-Patty agreement. On November 1, 1946, Berryman paid by check the sum of $1,000 to Patty, ***162** pursuant to the terms of the contract, and Patty endorsed the check over to Huston, pursuant to the terms of the Huston-Patty agreement. When these agreements were executed, Huston did not know of the identity of the purchaser to whom Patty intended to resell the houses, and Berryman did not know Huston. These two parties became acquainted by November 7, 1946, and each then knew of the other's relationship to the transaction. On November 7th, Huston and Patty signed an addendum to their contract extending the time of final payment from December 6, 1946, to January 6, 1947, and on the same date Patty and Berryman signed an addendum to their contract extending the final date of payment from December 5, 1946, to January 5, 1947. When this addendum was signed by Berryman he paid to Patty by check $4,000, which check Patty immediately endorsed over to Huston. All parties involved knew of these transactions.

Berryman intended to resell the houses, and, with the

assistance of Patty and Kelly, on November 27, 1946, he entered into a contract with the American Bulb Growers and A. G. Adams to sell the houses to them for $85,800, of which $1,000 was paid to Berryman, the balance being payable June 1, 1947. This contract was terminated by mutual consent of the parties on January 28, 1947.

None of the contracts was ever completed. During November and December, 1946, and up until he died in March of 1947, Berryman was heavily involved financially in other transactions and was just unable to raise any money. Patty and Kelly tried to aid Berryman in finding a purchaser for the houses, and were partially responsible for the Berryman-Adams contract.

Under the terms of the Huston-Patty contract, performance was due by Patty on January 6, 1947, while under the terms of the Patty-Berryman contract, the latter was required to pay the full purchase price to Patty on January 5, 1947. Because of Berryman's default, Patty defaulted in his payments to Huston. Thus the contracts normally would have terminated no later than January 6th. The evidence is not entirely clear as to what happened thereafter, but the most reasonable interpretation of what then occurred is that Huston and Patty both realized that if Berryman could sell the houses they would get their money, and they were loath to terminate Berryman's rights without giving him a full and fair opportunity to perform. There is substantial evidence to the ***163** effect that after January 6th, Huston orally gave several extensions on the time limit for performance, which extensions applied to both Patty and Berryman. After the termination of the Berryman-Adams contract, Patty and Kelly tried to find another purchaser for Berryman and did get several offers, but none higher than $40,000. Berryman died on March 19, 1947, and later in that year Huston succeeded in selling the houses to other individuals for some undisclosed amount.

It is clear that, if the deals had gone through, Huston would have received $53,750 for the houses, and Patty would have received $63,800 for them. Thus, Patty would have realized a profit of $10,050. Huston did get $5,000 and he kept the houses, while Patty lost his $10,050 profit. Patty filed a claim against the estate of Berryman for $10,000, and, upon its rejection, brought this action against the estate of Berryman for the $10,000. The estate answered and cross-complained for the $5,000 paid by Berryman to Patty, naming Patty and Huston as cross-defendants, it being the theory of the cross-complaint that Patty was the agent for Huston.

The trial court found that Patty at no time was acting as the agent of Huston; that Patty was relying on Berryman to perform his contract so that Patty could make good on his contract with Huston; that Berryman was aware of the Huston-Patty contract, and knew that Patty did not have sufficient capital to buy the houses himself; that Patty at all times was ready and able to deliver possession and tendered delivery; that Berryman received adequate consideration under the terms of the contract; that Berryman defaulted, and such default prevented Patty from completing his contract with Huston.

The court concluded that the Patty-Berryman agreement constituted a valid bilateral contract, and that Patty had been damaged to the extent of $10,000, his loss of profit. The court refused any relief on the cross- complaint, and refused to allow any credit on the $10,000 awarded Patty because of the $5,000 payment.

(1) The first major contention of appellant is that the agreement is unenforceable because it contains no promise of delivery on the part of Patty. Appellant seriously urges that the letter amounted to an offer of a unilateral contract which could be accepted only by the act of delivery. A reading ***164** of the document demonstrates the error in appellant's position. It reads, in part, as follows:

"San Francisco, California

"November 1, 1946

"Mr. Walter W. Patty

"4103 24th Street

"San Francisco, California

"Re: Purchase of 22 Williamson

Prefabricated Houses.

"Dear Mr. Patty:

"I hereby agree to purchase from you twenty-two (22) Williamson Prefabricated Houses hereinafter described, for a total price of $63,800.00, payable $1,000.00 upon delivery of this letter to you, $4,000.00 on or before 12 o'clock noon, November 6, 1946, and the balance at 4103 24th Street, San Francisco, California, on or before 12 o'clock noon on the 5th day of December, 1946, the balance of the purchase price to bear interest at the rate of five percent (5%) per annum after its due date.

"The houses are now in the possession of Western Auto Supply Company, and are of two types, consisting of twenty (20) Williamson 5-room cottage plan No. 400 houses, and two (2) Williamson 5-room cottage plan No. 500 houses.

"Attached hereto and made a part hereof are plans and material lists for the houses above mentioned.

"It is understood and agreed that there is no window glass or roofing material in said material lists, and no flooring for the two Model 500 houses, and it is further understood and agreed that you are not to furnish these materials.

"I agree to take all houses in their present condition, but you are to reimburse me for the reasonable value of any items that may be missing on delivery to me.

"The title to the houses purchased by me under the terms of this agreement shall pass upon their delivery to me at their present storage location and the payment by me of the full balance of their purchase price. All costs of handling, sorting and loading houses on trucks in connection with their delivery shall be paid by me.

"All houses are to be warehoused at my expense after the 1st of November, 1946, and I hereby agree to pay all public warehouse charges accruing thereafter and to pay you for any of these units stored by you a reasonable storage charge of not in excess of $10 per unit per month. ... ***165**

"I shall be entitled to take delivery of units in the order and number that I request only after having paid the full purchase price as aforesaid.

"You shall incur no liability hereunder to me for inability to deliver or for any delay in the delivery of said houses occasioned by governmental action, fires, floods, strikes, labor difficulties, accidents, acts of God or any other similar or different contingencies beyond your control.

"In the event that I fail to complete the payment of the purchase price of these houses within the time aforesaid, you may retain any moneys heretofore paid on the purchase price of said houses as consideration for the execution of the agreement on your part, and as consideration for withholding the houses from sale during the period from the date hereof until the time that I have agreed to pay the unpaid balance of the purchase price of said houses.

"I understand that the said houses as described in the plans and material lists are sold as is and where is and without warranty, express or implied, except warranty of title.

"I agree to pay at the time of paying the balance of the purchase price, any and all sales or use taxes attaching to the sale of said houses from yourself to myself.

"Any notice that you desire or may be required to give or make upon me shall be in writing either delivered personally or sent to me ...

"If it becomes necessary for you to make any tender to me, the tender may be made in the manner aforesaid and without physically producing or tendering the houses.

"The foregoing, when accepted by you, shall constitute the entire agreement between us.

"If the foregoing is satisfactory to you, please sign and return to me the enclosed duplicate original hereof.

"Very truly yours,

"[Signed] E. R. Berryman

"E. R. Berryman

"Accepted, and the sum of

$1,000.00 received, November 1, 1946.

"[Signed]

Walter W. Patty

"Walter W. Patty"

"Addendum to Contract.

"1-Paragraph 1 to be modified to read 'and the balance at 4103 24th Street, San Francisco, California, on or before ***166** 12 o'clock noon on the 5th day of January 1947, the balance of the purchase price to bear interest at the rate of 5% per annum after its due date,' with the expressed agreement that we will take a minimum of at least three (3) houses to be purchased and paid for within a period of thirty (30) days.

"2-You will hereby waive lien rights of all houses purchased and paid for from you.

"[Signed] E. R. Berryman

"E. R. Berryman

"[Signed] Walter W. Patty

"Walter W. Patty"

It is true that in the above document Berryman made all of the express promises, and that Patty made no express promise. But a promise to sell on the part of Patty is necessarily implied. The letter identifies the property to be purchased, fixes the purchase price and sets forth the terms of the proposed transaction in minute detail. Patty wrote "accepted" on the letter, and signed his name. What else could the term "accepted" mean except that he agreed to the terms set forth, and necessarily agreed to sell on those terms? If authority is necessary to establish such an obvious conclusion, it can be found in the cases of *Gregg v. McDonald,* 73 Cal.App. 748 [239 P. 373], and *Herrlein v. Tocchini,* 128 Cal.App. 612 [18 P.2d 73]. In the first of these cases, at page 754, the court stated: "It is uniformly held that the obligation of a party need not be expressly stated in the contract but may be inferred from the undertakings of the other party. Thus it has been held that where one party agrees to buy from the other and nothing is expressly said as to the obligation of the latter to sell, such obligation to sell may be implied. (*Thomas-Huycke-Martin Co. v. Gray,* 94 Ark. 9 [125 S.W. 659, 140 Am.St.Rep. 93].)"

In the second case above cited, at page 620, the court stated: "It cannot be denied that the escrow agreement was clumsily drawn and that paragraph three thereof lends color to appellants' claim with respect to an option. Then, too, there is no explicit promise on the part of respondent Herrlein to sell, or on the part of the appellant Tocchini to buy. ... However, it seems not to be so lame with respect to the mutual obligations of the parties as appellants profess to believe. The parties are designated as buyer and seller, the price is named and the property identified. In these circumstances it may ***167** be implied that Herrlein agreed to sell and that Tocchini agreed to buy."

(2) If doubt existed as to whether the agreement was bilateral or unilateral, such doubt would have to be resolved by interpreting the agreement to be bilateral, thus protecting both parties, rather than unilateral, which would protect neither. There is a presumption in favor of interpreting ambiguous agreements to be bilateral rather than unilateral. (*Davis v. Jacoby,* 1 Cal.2d 370, 379 [34 P.2d 1026]; *Woodbine v. Van Horn,* 29 Cal.2d 95, 104 [173 P.2d 17]; Restatement of Contracts, § 31; 1 Williston on Contracts, § 60.)

The cases cited by appellant on this issue- *California R. Co. v. Producers R. Corp.,* 25 Cal.App.2d 104 [76 P.2d 553]; and *Foley v. Euless,* 214 Cal. 506 [6 P.2d 956]-are not in point. Neither case involved the question here presented. In both cases, the quantity involved depended upon the whim or caprice of one of the contracting parties. In each case there was an illusory promise-that is, no promise at all. It is elementary, of course, that where performance is optional with one of the parties,

or where the quantity involved rests in the sole discretion of one of the parties, no enforceable obligation exists. In the instant case, unlike the two cited cases, the quantity involved-22 designated houses-was clearly fixed, and the price and terms of sale were set forth in minute detail. None of the promises here involved was illusory. (*Woodbine v. Van Horn*, 29 Cal.2d 95, 105 [173 P.2d 17].)

(3) Both parties discuss at some length the question as to whether or not the record shows Berryman received valid oral extensions of the time of performance under his contract after January 6, 1947. It is the theory of the appellant that the record shows that Berryman received extensions up to the time of his death on March 19, 1947, but that the Huston-Patty contract terminated January 6, 1947. Hence, it is argued that Patty could not perform after January 6th, and could not thereafter place Berryman in default. The evidence in reference to these oral extensions is quite confusing. Huston testified in his deposition that Patty was in default after January 6, 1947, but he also stated that Patty was given oral extensions after that time. Patty's testimony is likewise ambiguous. He first testified that his interest in the houses terminated on January 6th, but he also testified that after that date he offered to deliver the houses to Berryman, and that Huston agreed with Berryman and Patty that, if Berryman ***168** could sell one or more of the houses, he, Huston, would "credit Mr. Berryman with that towards the contract, up until Mr. Berryman's death." Patty also testified that Huston gave oral extensions directly to Berryman after January 6th, and that such extensions applied to him also. While the testimony on this issue is certainly ambiguous, a reading of the record leads to the conclusion that Huston, Patty and Berryman, before and after January 6th, knew that Berryman could not perform unless he sold the houses, and all three cooperated to accomplish this purpose. Neither Huston nor Patty was desirous of terminating the contract on January 6th, and were desirous of giving Berryman every reasonable opportunity to perform. To this end, Huston gave Patty oral extensions, thus enabling Patty to give extensions to Berryman. Undoubtedly, these extensions were not given in any formal way. Huston was anxious to get rid of the houses and frequently talked with both Patty and Berryman, and these extensions were usually granted during these conversations. Thus, both contracts were in force and effect on the death of Berryman and at that time there was a default under the Patty-Berryman contract.

The appellant finds herself on the horns of a dilemma so far as this point is concerned. If there were valid extensions, such extensions applied to both contracts. On the other hand, if there were no valid extensions, the default occurred January 6, 1947, and Patty was then damaged to the extent of $10,050-his anticipated profit. Berryman's then default caused Patty to lose his interest in the houses under the Huston-Patty contract. In either event, Berryman defaulted. Whether that default took place in January or occurred in March is immaterial. In either event, the measure of damages would be the same.

(4) Appellant next contends that delivery of the houses and payment of the purchase price were concurrent conditions and that, since at no time could Patty have delivered the houses had Berryman paid him the purchase price, because Patty would first have to pay Huston, Berryman was never in default. Appellant contends that section 1439 of the Civil Code compels such a holding. That section provides, in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party ..." ***169**

While it is true that, in the ordinary purchase and sale agreement, payment of the purchase price and delivery of the goods are concurrent conditions, that rule is not strictly applied where the buyer knows the seller does not own the goods involved when the contract is executed. The trial court found, and the finding is supported, that Berryman knew of the Huston-Patty contract as early as November 7, 1946. It is also a found fact, supported by the evidence, that Berryman knew that Patty endorsed the checks given to him by Berryman over to Huston as payments on the Huston-Patty contract. Berryman knew that Patty had to get title from Huston, and Patty could have done this in a very few moments. Berryman made no objection at any time that Patty did not

have title to the houses. By his silence he waived any right to object.

(5) Where a seller contracts to sell property he does not own, the law applies a common sense rule that a seller is allowed a reasonable time after payment by the buyer during which he can purchase the goods required to meet his promise. (*Darr v. Clevelin Realty Corp.*, 33 Cal.App.2d 500, 504 [92 P.2d 475]; *Ellwood v. Niedermeyer*, 12 Cal.App.2d 699, 704 [56 P.2d 279]; Restatement of Contracts, § 269.) In such cases the seller probably must have some interest in the goods. He cannot, when the buyer tenders the purchase price, then, for the first time, commence to acquire the property. But here Patty had the houses tied up by his contract with Huston, and simply had to pay Huston to complete his title. (See 25 Cal.Jur. § 25, p. 495.)

The appellant cites *Brant v. Bigler*, 92 Cal.App.2d 730 [208 P.2d 47]. That was an action for declaratory relief brought by the seller on an agreement involving the sale of real property. The facts are similar to those here, in that the seller did not have title to the land sold, but was relying upon the use of the buyer's money in order to be able to purchase the property. Each of the transactions in which the seller was involved was in the form of an escrow. He gave instructions to the Santa Monica escrow company, which was the depository of defendant buyer's funds, to transfer the money to a company in Glendale through which he was purchasing the property. The seller was denied relief, the court stating that the buyer had not consented to the simultaneous escrow device, and therefore the Santa Monica escrow company could not lawfully have made the transfer. The only way that defendant ***170** buyer could have been placed in default was for the seller to have placed the deed in the Santa Monica escrow. The case is clearly distinguishable from the instant one. Obviously, the Santa Monica escrow company could not have complied with the seller's instructions to transfer the money to the Glendale company without breaching its fiduciary duty owed to the purchaser. Moreover, as the court pointed out, the case involved an attempted forfeiture, and so, of course, the court tended to that view which would avoid the forfeiture.

(6) One of the attorneys for appellant testified that Huston telephoned him on December 28, 1946, and demanded to know if Berryman was going to perform his agreement with Patty. The attorney stated that he told Huston that Berryman was in no financial position to perform. Thereupon, Huston threatened suit, and threatened that, unless Berryman paid him $10,000 for a release, he would sue. Appellant seeks to make much of this incident, claiming that this was a repudiation-an anticipatory breach-of the contract by Berryman, and demonstrates that the Patty- Berryman contract was not extended. In view of the evidence heretofore set forth of the conversations between Berryman, Patty and Huston, it is obvious that the parties did not treat this as a breach. If any breach occurred, it was waived. Moreover, the conversation was with Huston, not with Patty. Just how a conversation with Huston, with whom Berryman had no contractual relations, could constitute an anticipatory breach of the contract between Berryman and Patty, does not appear. Section 318 of the Restatement of Contracts, in illustration No. 3, gives the following example: "A and B enter into a bilateral contract to sell and buy goods during the following month. Before the time for performance arrives, A tells C, a third person having no right under the contract, that he intends not to carry out his contract with B. C informs B of this conversation, though not requested by A to do so. A has not committed an anticipatory breach."

(7) The last major point urged by appellant is that the trial court applied the wrong measure of damage, and erroneously refused to allow appellant a $5,000 setoff. On the issue of damages the trial court found that: "It is further a fact that at all times herein mentioned from and after November 7, 1946, decedent knew that default by him under, and failure on his part to pay and perform under, his agreement with plaintiff, Exhibit 'A' to the complaint, would directly cause a default on plaintiff's part under plaintiff's contract as ***171** buyer, with John S. Huston, as seller, since decedent knew, as the fact was, that such default on decedent's part when coupled with the prompt necessity on plaintiff's part of making payment to John S. Huston under plaintiff's contract, as buyer, with Huston, as seller, would not afford plaintiff sufficient time either to procure the necessary funds to

make payment on his contract with Huston or permit plaintiff sufficient time to effect a further sale of said houses, or any thereof, to any third person, since plaintiff believed and knew on or about January 5, 1946, and for some time prior and subsequent thereto that there was no immediately available or ready market for the sale of said ... houses but instead plaintiff knew, as the fact was, that said ... houses could only be sold at or about said times for a price in excess of $40,000 or $50,000 as the chance result of happening to find a person, ... who had a particular need or desire therefor at the time."

This finding clearly applied the correct measure of damages. The general rule is that for breach of contract, the injured party is entitled to damages in such amount as "will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) Berryman obviously knew that Patty expected to make a profit on the deal. The loss of that profit was proximately caused by Berryman's failure to perform. (*Hacker etc. Co. v. Chapman V. Mfg. Co.*, 17 Cal.App.2d 265, 267 [61 P.2d 944].) Section 1784 of the Civil Code is the section providing the measure of damages where the buyer wrongfully neglects to accept and pay for goods. Subdivision 2 provides that: "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract." Subdivision 3 provides that where there "is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price." This section obviously applies where the seller has the goods and retains them after the default. But it has no application to a situation where the seller is a middleman and everyone knows his profit depends upon the difference in his purchase and selling price. Therefore, there are "special circumstances" here present that make market value a false factor. Moreover, the trial court found, and the finding is supported, ***172** that during the times here involved there was no ready or available market for the houses.

Contrary to appellant's argument, the market value of these houses at any time is an immaterial factor. The damages to Patty had no relation to market value and were totally unaffected by such value. Whether the market value of the houses was $40,000 or $100,000 would not affect his damage. In either event, his loss was the difference between his contracted for purchase price-$53,750-and his contracted for sales price of $63,800, or $10,050.

The case of *Rice v. Schmid*, 18 Cal.2d 382 [115 P.2d 498, 138 A.L.R. 589], relied upon by appellant, is not in point. That case held that, under section 1784 of the Civil Code, the proper measure of damages was the difference between the market and contract prices in a case where the plaintiff contracted to buy flour and at the same time contracted to sell flour to the defendant who subsequently failed to perform. That case dealt with a brand name flour, and the contract provided that the seller should procure the "flour of the specified brands, whether from the miller or on the market." (P. 388.) In the instant case, the houses were a definite product not available on the general market. Moreover, unlike the flour case, in the instant one the court found that there was no market available for the houses.

(8) Appellant contends that, in any event, she is entitled to a credit on the $10,000 judgment for the $5,000 already paid Patty, on the theory that a buyer in default should be credited for payments on the purchase price already made to and retained by the seller. (*Gopcevic v. California Packing Corp.*, 64 Cal.App. 132, 141 [220 P. 1078].) That principle has no application here. The $5,000 paid by Berryman to Patty was immediately turned over by Patty to Huston in order that Patty could perform under the Patty-Berryman contract, and Berryman knew that the money was to be so used. The expenditure of the $5,000 was reasonably necessary in order to preserve the rights of all concerned. The proper rule of law is thus expressed by McCormick in his Handbook on the Law of Damages, page 582, as follows: "Reasonably necessary expenditures incurred, and the value of services rendered, by the contracting party not in default, may be recovered as damages for breach of contract, wherever the plaintiff has not also re-

covered the full price or the value of the benefits expected under the contract. ... In addition to expenses, the plaintiff is entitled to the net profit he would have made upon ***173** the entire contract, if he can establish it. The net profit is the contract price less the total amount of expenditures, including those already incurred, which the plaintiff would have made from the beginning to the end of the contract."

Patty is entitled to be made whole. Had Berryman performed, Patty would have had $10,050 (reduced by the claim filed with the estate to $10,000) net. If Berryman is credited with the $5,000, obviously Patty will only have $5,000 of his expected $10,000 profit. Actually, the court allowed a credit to Berryman's estate. Properly computed, the damages are as follows:

Patty's loss of expected profit due to breach	$10,000
Patty's necessary expenditures to enable him to perform on the Berryman contract	5,000
Total damages	$15,000
Credit to Berryman's estate for payments	5,000
Total damage	$10,000

The judgment appealed from is affirmed.

Ward, J., and Bray, J., concurred.
A petition for a rehearing was denied January 18, 1950, and appellant's petition for a hearing by the Supreme Court was denied February 16, 1950. Shenk, J., and Edmonds, J., voted for a hearing. ***174**

Cal.App.1.Dist.
Patty v. Berryman
95 Cal.App.2d 159, 212 P.2d 937

END OF DOCUMENT

116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317, 04 Cal. Daily Op. Serv. 2378, 2004 Daily Journal D.A.R. 3500
(Cite as: 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317)

Court of Appeal, Fourth District, Division 1, California.
The PEOPLE ex rel. Bill LOCKYER, as Attorney General, etc., Plaintiff and Respondent,
v.
R.J. REYNOLDS TOBACCO COMPANY, Defendant and Appellant.
No. D040854.

Feb. 25, 2004.
As Modified on Denial of Rehearing March 19, 2004.
Review Denied June 9, 2004.

Background: State filed complaint against tobacco company for enforcement order of consent decree entered on master settlement agreement (MSA) that prohibited targeting youth in advertising of tobacco products. The Superior Court, San Diego County, No. GIC764118,Ronald S. Prager, J., entered summary judgment permanently enjoining company from continuing to violate MSA and awarded State sanctions of $20 million. Company appealed.

Holdings: The Court of Appeal, McDonald, J., held that:
(1) company's access to media researcher's data showing that level of exposure of company's advertising to youth was about the same as exposure to targeted young adult smokers constituted substantial evidence that company violated MSA;
(2) injunction did not impose obligations on company beyond those to which it agreed in MSA;
(3) media researcher's survey data was admissible;
(4) substantial evidence supported finding that company violated MSA within State of California;
(5) no reversible error resulted from admission of evidence of policies of company's competitors to reduce advertising to youth;
(6) State was entitled to sanctions; and
(7) amount of sanctions was not supported by record.

Affirmed in part and reversed in part.

See also 107 Cal.App.4th 516, 132 Cal.Rptr.2d 151.

West Headnotes

[1] States 360 ⇐104

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases
Requirement in master settlement agreement (MSA) that prohibited tobacco company from targeting youth in advertising of tobacco products included intent as material element; word "target" incorporated concept of direct purpose and excluded indirect results.

[2] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Where trial court's interpretation of provision in agreement does not turn on credibility of extrinsic evidence, Court of Appeal exercises de novo review of that interpretation.

[3] Contracts 95 ⇐152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases
Words in contract are given their ordinary mean-

ings absent evidence parties intended to use those words in different sense.

[4] Contracts 95 ⇨152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases
To determine common meaning of word in contract, court typically looks to dictionaries.

[5] Contracts 95 ⇨152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases
Clear and explicit meaning of contract's words construed in their ordinary and popular sense generally controls judicial interpretation unless parties used words in technical sense or special meaning was given to words by usage.

[6] States 360 ⇨104

360 States
360III Property, Contracts, and Liabilities
360k104 k. Construction and Operation of Contracts. Most Cited Cases
Intent requirement in master settlement agreement (MSA) that prohibited tobacco company from targeting youth in advertising of tobacco products was satisfied not only by direct advertising to youth, but also by advertising, targeted at young adults, that company knew to substantial certainty would be exposed to youth to same extent as young adults.

[7] States 360 ⇨107

360 States
360III Property, Contracts, and Liabilities
360k107 k. Performance or Breach of Contracts. Most Cited Cases
Tobacco company's access to media researcher's data showing that level of exposure of company's advertising to youth was about the same as exposure to targeted young adult smokers constituted substantial circumstantial evidence that company violated master settlement agreement (MSA) that prohibited company from targeting youth in advertising of tobacco products, since company knew to substantial certainty that its advertising was exposed to youth.

[8] Constitutional Law 92 ⇨1645

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)2 Advertising
92k1645 k. Product Advertisements. Most Cited Cases
(Formerly 92k90.3)
First Amendment constrains state efforts to limit advertising of tobacco products, because so long as sale and use of tobacco is lawful for adults, tobacco industry has protected interest in communicating information about its products and adult customers have interest in receiving that information. U.S.C.A. Const.Amend. 1.

[9] Injunction 212 ⇨211

212 Injunction
212VI Writ, Order, or Decree
212k207 Final Judgment or Decree
212k211 k. Operation and Effect in General. Most Cited Cases
Injunction requiring tobacco company to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults did not impose obligations on company beyond obligation not to target youth in its advertising to which company agreed in master settlement agreement (MSA); injunction simply set forth means to measure existence of prohibited youth targeting and suggested way to avoid target-

ing youth.

[10] Contracts 95 ⚿147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases
A contract extends only to those things it appears parties intended to contract.

[11] Contracts 95 ⚿143(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(3) k. Rewriting, Remaking, or Revising Contract. Most Cited Cases
Court's function in interpreting contracts is to determine what, in terms and substance, is contained in contract, not to insert what has been omitted; courts do not have power to create for parties a contract that they did not make and cannot insert language that one party later wishes were there.

[12] Constitutional Law 92 ⚿948

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k948 k. Contractual Waiver. Most Cited Cases
(Formerly 92k43(1))
Tobacco company's First Amendment and due process challenge to injunction requiring company to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults was barred by company's voluntary waiver of constitutional challenges set forth in master settlement agreement (MSA) resolving earlier litigation with State. U.S.C.A. Const.Amends. 1, 14.

[13] Injunction 212 ⚿204

212 Injunction
212VI Writ, Order, or Decree
212k202 Writ or Order
212k204 k. Form and Requisites. Most Cited Cases
Injunction requiring tobacco company to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults was not impermissibly vague; evidence suggested methods by which percentage exposure to youth could be reduced without comparable reduction in exposure to young adults, and implementation of those methods were reasonable measures required by injunction.

[14] Evidence 157 ⚿314(1)

157 Evidence
157IX Hearsay
157k314 Nature and Admissibility
157k314(1) k. In General. Most Cited Cases
Survey conducted to record recollections of survey respondents is "hearsay."

[15] Evidence 157 ⚿361

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k360 Books and Other Printed Publications
157k361 k. In General. Most Cited Cases
Media researcher's survey data showing level of exposure of tobacco company's advertising to youth were admissible, under hearsay exception for publications relied upon as accurate in course of business, in State's action against company to enforce master settlement agreement (MSA) prohibiting company's targeting youth in advertising; data were accepted by magazine industry, and State's statistics expert found data were reliably obtained. West's Ann.Cal.Evid.Code §§ 801(a), 1340.

[16] Evidence 157 ⚿361

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k360 Books and Other Printed Publications
157k361 k. In General. Most Cited Cases
Statements within statutory hearsay exception for publications relied upon as accurate in course of business are sufficiently trustworthy to overcome concerns about reliability of those hearsay statements. West's Ann.Cal.Evid. Code § 1340.

[17] Appeal and Error 30 ⚿946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases
Appropriate test for abuse of discretion is whether trial court exceeded bounds of reason.

[18] Appeal and Error 30 ⚿996

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k996 k. Inferences from Facts Proved. Most Cited Cases
When two or more inferences can reasonably be deduced from the facts, reviewing court has no authority to substitute its decision for that of trial court.

[19] Evidence 157 ⚿555.4(3)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(3) k. Hearsay or Evidence Otherwise Incompetent. Most Cited Cases
Even if media researcher's survey data showing level of exposure of tobacco company's advertising to youth were inadmissible hearsay in State's action against company to enforce master settlement agreement (MSA) prohibiting company's targeting youth in advertising, data constituted proper basis for expert opinion because advertising experts reasonably relied on those data to determine exposure of magazine advertising to youth. West's Ann.Cal.Evid.Code §§ 801(a), 1340.

[20] States 360 ⚿109

360 States
360III Property, Contracts, and Liabilities
360k109 k. Rights and Remedies of State on Contracts in General, and Debts Due State. Most Cited Cases
Substantial evidence supported finding that tobacco company violated master settlement agreement (MSA) prohibiting targeting youth in advertising of tobacco products within State of California; although media researcher's survey showing level of exposure of tobacco company's advertising to youth, admitted as evidence, was nationwide, researcher's sample included two large California cities, and company's advertising plan included advertising schedules for several large California cities.

[21] Appeal and Error 30 ⚿1051.1(2)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1051.1 Same or Similar Evidence Otherwise Admitted
30k1051.1(2) k. Particular Cases. Most Cited Cases
In State's action against tobacco company to enforce master settlement agreement (MSA), incorporated into a consent decree, that prohibited targeting youth in advertising of tobacco products, no

reversible error resulted from admission of evidence of policies of company's competitors to reduce advertising to youth; other properly admitted evidence sufficiently showed that company could reduce advertising exposure to youth while maintaining significant exposure to company's stated target of young adults.

[22] Injunction 212 ⚖223

212 Injunction
212VII Violation and Punishment
212k223 k. Acts or Conduct Constituting Violation. Most Cited Cases

Injunction 212 ⚖232

212 Injunction
212VII Violation and Punishment
212k232 k. Punishment. Most Cited Cases
State was entitled to monetary sanctions in successful action against tobacco company to enforce master settlement agreement (MSA), incorporated into a consent decree, that prohibited targeting youth in advertising of tobacco products, where evidence showed that company did little to reduce advertising exposure to youth and intentionally avoided examining data demonstrating that youth were exposed to company's advertising claimed to be targeted at young adults.

[23] Injunction 212 ⚖232

212 Injunction
212VII Violation and Punishment
212k232 k. Punishment. Most Cited Cases
Sanction of $20 million was not supported by record in State's successful action against tobacco company to enforce master settlement agreement (MSA), incorporated into a consent decree, that prohibited targeting youth in advertising of tobacco products, where amount was based on company's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California.
See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1373 et seq.; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:143 et seq. (CACIVAPP Ch. 8-c); Cal. Jur. 3d, Damages, § 130 et seq.

[24] Damages 115 ⚖87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
Punitive damages are aimed at deterrence and retribution.

[25] Constitutional Law 92 ⚖4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)
While states possess discretion over imposition of punitive damages, there are procedural and substantive constitutional limitations on these awards; Due Process Clause prohibits imposition of grossly excessive or arbitrary punishments on tortfeasor. U.S.C.A. Const.Amend. 14.

[26] Damages 115 ⚖94.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
(Formerly 115k94)
To extent award of punitive damages is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. U.S.C.A. Const.Amend. 14.

[27] Damages 115 ⚿179

115 Damages
115IX Evidence
115k164 Admissibility
115k179 k. Intent, Malice, or Motive of Defendant. Most Cited Cases
Lawful out-of-state conduct may be probative in determining punitive damages award when it demonstrates deliberateness and culpability of defendant's action in the state where it is tortious, but that conduct must have a nexus to specific harm suffered by plaintiff.

[28] Damages 115 ⚿87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
State cannot punish, with punitive damage award, a defendant for conduct that may have been lawful where it occurred.

[29] Damages 115 ⚿87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
Generally, a state does not have a legitimate concern in imposing punitive damages to punish defendant for unlawful acts committed outside of state's jurisdiction.

[30] Constitutional Law 92 ⚿4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)
A punitive damages award that encompasses defendant's extraterritorial conduct may be unconstitutional even if size of award itself is not outside bounds of due process. U.S.C.A. Const.Amend. 14.

[31] Damages 115 ⚿94.3

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.3 k. Wealth of Defendant. Most Cited Cases
(Formerly 115k94)

Damages 115 ⚿94.8

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.8 k. Constitutional Limitations on Amount in General. Most Cited Cases
(Formerly 115k94)
Defendant's wealth cannot justify an otherwise unconstitutional punitive damages award. U.S.C.A. Const.Amend. 14.
****321 *1257** Paul, Weiss, Rifkind, Wharton & Garrison, Jeh Charles Johnson, Marc Falcone, Paul H. Cohen, Amelia A. Cottrell, Howard, Rice, Nemerovski, Canady, Falk, & Rabkin, and H. Joseph Escher III for Defendant and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Dennis Eckhart, Senior Assistant Attorney General, Laura Kaplan, Alan Lieberman and Karen Leaf, Deputy Attorneys General for Plaintiff and Respondent.

G. Steven Rowe, Attorney General, Melissa Reynolds O'Dea, Assistant Attorney General (Maine), Christine O. Gregoire, Attorney General, and David M. Horn, Assistant Attorney General (Washington),

for 38 states, the District of Columbia and Puerto Rico as Amici Curiae on behalf of Plaintiff and Respondent.

McDONALD, J.

Defendant R.J. Reynolds Tobacco Company (Reynolds) appeals a judgment in favor of plaintiff the People of the State of California on the People's complaint for an enforcement order of a consent decree (Consent Decree) entered on a master settlement agreement (MSA). Reynolds contends the court erred by (1) concluding Reynolds violated an MSA provision incorporated into the Consent Decree prohibiting Reynolds from targeting youth in its print advertising of tobacco products, (2) issuing an impermissibly vague injunction, and (3) imposing $20 million in sanctions on Reynolds. We reverse the imposition of sanctions and otherwise affirm the judgment.

****322** I

INTRODUCTION

We state the facts and reasonable inferences drawn from the evidence most favorably to the People as the party prevailing at trial. ***1258**(*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, 138 Cal.Rptr. 705, 564 P.2d 857, disapproved on another point in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 581, 34 Cal.Rptr.2d 607, 882 P.2d 298; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362; *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912, 117 Cal.Rptr.2d 631; *Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, 1243, fn. 2, 62 Cal.Rptr.2d 298.)

"Tobacco manufacturer Reynolds promoted its tobacco products in California." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520, 132 Cal.Rptr.2d 151, fn. omitted (*Lockyer*).) In doing so, Reynolds and its media planner developed plans for advertising its products in print media, including magazines. Reynolds's media plans identified the magazines in which to place advertisements, formed its magazine approval policy and created media advertising schedules [FN1] by reference to survey data measuring magazine readership collected and analyzed by national research services, MediaMark Research Inc. (MRI) and, to a lesser extent, Simmons Market Research Bureau (Simmons). MRI's data do not show how many people have seen an advertisement in a magazine but instead simply quantify the people who read or looked at an issue of the magazine. Young adult smokers age 21 to 34 were generally the stated target of Reynolds's magazine tobacco advertising.

> FN1. A media advertising schedule is a list of magazines and the number of issues in which an advertisement is to appear in a magazine during a defined period of time.

"In November 1998 Reynolds and the People signed the MSA that settled the People's litigation against various tobacco product manufacturers, including Reynolds." (*Lockyer, supra,* 107 Cal.App.4th at p. 520, 132 Cal.Rptr.2d 151, fn. omitted.) "Further, the parties stipulated to entry of a consent decree and final judgment. As part of the consent decree, the Superior Court of San Diego County approved the MSA (*People v. Philip Morris, Inc.* (1998, No. JCCP4041, 2000 WL 34016276)) [and] retained exclusive jurisdiction for purposes of implementing and enforcing the MSA." (*Lockyer,* at p. 520, 132 Cal.Rptr.2d 151.)

"The MSA placed ... detailed express restrictions on Reynolds's advertising and marketing practices." (*Lockyer, supra,* 107 Cal.App.4th at p. 520, 132 Cal.Rptr.2d 151.) MSA, subsection III(a), entitled " *Prohibition on Youth Targeting,* " provided: "No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State [including California] in the advertising, promotion or marketing of Tobacco

Products...." [FN2] Consent Decree, section V(A) permanently enjoined Reynolds from "[t]aking any action, ***1259** directly or indirectly, to target Youth within the State of California in the advertising, promotion or marketing of Tobacco Products...."

> FN2. MSA, subsection II(bbb) defined "Youth" as "any person or persons under 18 years of age." Our opinion uses the word "youth" to mean persons age 12 through 17.

The People's litigation settled under the MSA included allegations that Reynolds had targeted its advertising to youth. However, after entering into the MSA, Reynolds initially made no changes to its media advertising schedules, did not include in its media plans the goal of reducing exposure of its advertising to youth and did not determine the extent its advertising was exposed to youth. Although Reynolds eventually made changes to its media advertising schedules, those changes had minimal impact in reducing ****323** exposure of its advertising to youth. After the MSA was signed, Reynolds was more likely to advertise in magazines known to have a higher level of exposure to youth than before the MSA was signed. After the MSA was signed, Reynolds's print media advertising policy did not significantly avoid exposure of its advertising to youth.

Although the MSA was signed in 1998, during 1999 through 2001 Reynolds's tobacco print advertising was exposed to youth at levels virtually identical to the levels of its targeted group of young adult smokers. Those comparable exposures suggested Reynolds's print advertising was aimed at two audiences. If Reynolds had been aiming exclusively at young adult smokers, the exposure of its advertising to that group would have been higher than to youth. Because the MRI and Simmons data were available to Reynolds, Reynolds could have reasonably anticipated the comparable exposures of its print advertising to young adult smokers and youth. Alternative advertising strategies were available to Reynolds. Reynolds could have modified its existing advertising policies and practices and created alternative media advertising schedules to reduce the exposure of magazines containing Reynolds's advertising to youth while retaining a reasonably good exposure to young adult smokers. The advertiser's selection of the magazines and the number of advertising insertions into those magazines determine the number of people exposed to the advertising within and outside the stated target group. An advertiser can target specific smoker demographic groups by selecting the magazines into which its advertisements are placed. The key to reducing advertising exposure to youth without a commensurate reduction in exposure to adult smokers is to select magazines with high adult-smoker-to-youth audience ratios and magazines with audiences containing a low composition of youth. Further, advertising in numerous magazines results in a cumulative effect of advertising exposure to youth. Reynolds could have reduced the number of magazines in which it advertised to avoid those with a high youth audience while continuing its advertising exposure to young adult smokers. Although Reynolds was aware it could adopt media advertising schedules less likely to expose its advertising to a high number of youth while maintaining a strong exposure of its advertising to young adult smokers, it chose not to do so.

***1260** A dispute arose between the parties about whether Reynolds was complying with subsection III(a) of the MSA and section V(A) of the Consent Decree. The People demanded that Reynolds modify its advertising practices. Communications between the parties did not resolve the matter, and in March 2001 the People filed this lawsuit alleging Reynolds violated the MSA and Consent Decree by targeting youth through placement of its tobacco advertisements in national consumer magazines in the years 1999, 2000 and 2001. [FN3] The People's lawsuit sought enforcement of the MSA and Consent Decree and sanctions for Reynolds's alleged violation of the ****324** Consent Decree provisions prohibiting the targeting of tobacco advertising to youth.

FN3. On the same day the People filed this lawsuit, Reynolds announced a policy limiting its advertising to magazines with an exposure to youth of less than 25 percent as measured by the MRI or Simmons data. Reynolds's press release of that day stated "[o]ur advertising policy fulfills the intent and spirit of the MSA by dramatically reducing advertising exposure among minors, while allowing limited communication with adult smokers"; and "we believe our policy is a responsible way to minimize the number of cigarette ads minors may see in magazines." However, despite Reynolds's newly announced policy, the exposure of magazines containing Reynolds's advertising to youth insignificantly declined.

Before and during trial, Reynolds moved to exclude evidence of MRI's survey data, including its teenage audience data. Reynolds also moved to preclude the People's experts from offering opinion testimony based on those data. At trial, the parties litigated the accuracy and admissibility of MRI's data. The trial court overruled Reynolds's foundational objections to evidence of those data, concluding the People established an adequate foundation for admissibility of that evidence.

The trial court found that after "the MSA was signed, [Reynolds] ... exposed Youth to its tobacco advertising at levels very similar to those of targeted groups of adult smokers." The court also found that between 1997 and 2001, "the delivery of print media advertising by [Reynolds] to its stated target audience of young adult smokers and to Youth age 12 to 17 is essentially the same." Based on those findings, the court concluded Reynolds violated the MSA and Consent Decree's prohibition against targeting youth. The court entered judgment permanently enjoining Reynolds from continuing to violate MSA, subsection III(a) and Consent Decree, section V(A) "by exposing Youth to its tobacco advertising at levels similar to the levels of exposure of adult smokers." The judgment also ordered Reynolds to (1) adopt reasonable measures designed to reduce exposure of its advertising to youth to a level significantly lower than the exposure level of its advertising to its stated target of young adult smokers, and (2) use reliable means such as the MRI and Simmons data to measure and demonstrate whether Reynolds was achieving success toward that goal. Further, based on the Consent Decree's provisions authorizing sanctions, the court awarded the People $20 million sanctions against Reynolds.

***1261** Reynolds appeals the judgment, contending the trial court reversibly erred by concluding Reynolds violated MSA, subsection III(a) and Consent Decree, section V(A) by targeting tobacco advertising to youth within California. Reynolds also contends the court reversibly erred by imposing a $20 million sanction without the requisite specific findings or any basis in the record.

II

DISCUSSION

A

MSA's Provision Prohibiting the Targeting of Advertising to Youth

Reynolds contends that the trial court improperly concluded the People met their burden to prove Reynolds violated MSA, subsection III(a) and Consent Decree, section V(A) by targeting its tobacco advertising to youth within California. Reynolds argues the court prejudicially erred by: (1) in effect rewriting subsection III(a) to eliminate the requirement that Reynolds have the purpose or intent to expose its advertising to youth; (2) violating Reynolds's due process rights by restricting Reynolds's First Amendment right to advertise to adult smokers; (3) issuing an impermissibly vague in-

junction; (4) admitting hearsay evidence of survey data of magazine readership for its truth and permitting the People's experts to offer opinions based on those data; (5) entering judgment against Reynolds although the evidence did not show any violation of MSA, subsection III(a) occurred within California; and (6) making findings and reaching conclusions about Reynolds's competitors Philip Morris and Brown & Williamson (B & W) based on inadmissible hearsay evidence.

****325** 1

Interpretation of MSA's Provision Prohibiting Reynolds from Targeting Youth

The parties dispute the meaning of MSA, subsection III(a) that provides Reynolds may not "take any action, directly or indirectly, to target Youth" in its advertising, promotion or marketing of tobacco products. The trial court interpreted that provision of the MSA to preclude Reynolds from "taking any action that exposes Youth to tobacco advertisement to virtually the same degree as if Youth had been directly targeted." In arriving at that interpretation, the court stated it did not matter whether Reynolds "had any purpose or primary purpose to increase the incidence of Youth smoking in designing and ***1262** implementing its advertising campaign." The court characterized subsection III(a) as prohibiting targeting youth "regardless of purpose or intent." The court also stated subsection III(a)'s term "indirectly" referred to "any tobacco advertising actions that result in Youth exposure to virtually the same degree as if Youth had been directly targeted." Applying its interpretation of subsection III(a) to the evidence adduced at trial, the court concluded Reynolds violated the MSA "by indirectly targeting Youth in its tobacco advertising."

[1][2] Reynolds contends the trial court erroneously transformed Reynolds's obligation under MSA, subsection III(a) by rewriting that contractual provision (1) to delete as a material element of a violation of the provision any requirement that Reynolds have the purpose or intent to expose its advertising to youths, and (2) to impose on Reynolds not simply a prohibition on targeting youth but rather an enormous and ill-defined affirmative obligation to avoid or reduce the levels of exposure of its tobacco advertising to youth. Because the court's interpretation of subsection III(a) does not turn on the credibility of extrinsic evidence, we exercise de novo review of that interpretation. (*Lockyer, supra,* 107 Cal.App.4th at p. 520, 132 Cal.Rptr.2d 151; *Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 843, 102 Cal.Rptr.2d 468; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1336, 93 Cal.Rptr.2d 635; *Centex Golden Construction Co. v. Dale Tile Co.*(2000) 78 Cal.App.4th 992, 996, 93 Cal.Rptr.2d 259; *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504, 61 Cal.Rptr.2d 668; *Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1549, 54 Cal.Rptr.2d 488; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 22, 31 Cal.Rptr.2d 378.)

We depart from the trial court's interpretation of MSA, subsection III(a), and conclude that intent is a material element that must be proven to establish a violation of that contractual provision. Our interpretation of subsection III(a) to include an element of intent is consistent with the compromise struck by the parties in the MSA [FN4] and avoids any alleged unconstitutionality****326** in the trial court's interpretation. However, under our interpretation of subsection III(a), Reynolds has not demonstrated that any ***1263** error in the trial court's interpretation was prejudicial in this case. (Code Civ. Proc., § 475; [FN5] *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.)

FN4. In construing MSA, subsection III(a), we give no weight to the MSA's recitals relied on by the People. (*Lockyer, supra,* 107 Cal.App.4th at p. 524, 132 Cal.Rptr.2d

151.) In *Lockyer* we declined to "apply the People's proffered analysis based on the theory that the overall general intent of the MSA was to reduce youth smoking and promote public health." (*Ibid.*) In doing so, we noted: "Though the parties' pleadings acknowledged that the MSA's stated goals included reduction of youth smoking and promotion of public health, the MSA was fundamentally a means of settling litigation by striking a balance between competing interests." (*Ibid.*) The parties expressly agreed that although Reynolds's print advertising targeting youth would be prohibited, some print advertising to Reynolds's stated target of adult smokers would nonetheless be allowed even if the advertising also reached youth.

FN5. All statutory references are to the Code of Civil Procedure unless otherwise specified.

[3][4][5] The trial court's analysis was incorrect to the extent it interpreted MSA subsection III(a)'s prohibition against targeting youth as not including the element of intent. Words in a contract are given their ordinary meanings absent evidence the parties intended to use those words in a different sense. (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9, 115 Cal.Rptr. 736.) To determine a word's "common meaning, a court typically looks to dictionaries." (*Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 444, 128 Cal.Rptr.2d 454; *Tellis v. Contractors' State License Bd.* (2000) 79 Cal.App.4th 153, 163, 93 Cal.Rptr.2d 734; *Blasiar, Inc. v. Fireman's Fund Insurance Co.* (1999) 76 Cal.App.4th 748, 754, 90 Cal.Rptr.2d 374.) " 'The "clear and explicit" meaning of [a contract's words construed] in their "ordinary and popular sense" ... [generally] controls "judicial interpretation" ' " unless the parties used the words in a technical sense or special meaning was given to the words by usage. (*Blasiar*, at p. 754, 90 Cal.Rptr.2d 374, citing *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, 274 Cal.Rptr. 820, 799 P.2d 1253.)

The common and ordinary meaning of the word "target" as defined in various dictionaries incorporates the concept of a direct purposeful intent to reach a particular goal. (Random House Dict. (2d ed.1993) p.1944; Webster's 3d New Internat. Dict. (1993) p. 2341.) FN6 Indeed, some dictionary definitions expressly include the phrase "to direct toward a target." (See, e.g., Webster's 3d New Internat. Dict., *supra,* at p. 2341; Random House Dict., *supra,* p.1944.) Considering the common meaning of the word "target," the trial court erred to the extent it interpreted MSA, subsection III(a) as prohibiting "indirect" targeting. The trial court also erred to the extent it concluded the People were not required to prove Reynolds had the intent to target youth. As Reynolds observes, one "cannot 'target' something without intending to do so." The People's opening brief acknowledges that a scienter element is inherent in the word "target" and, in opposing Reynolds's motion for judgment under section 631.8, the People told the trial court they were not proceeding on the theory that targeting was devoid of any element of intent. ***1264** The People acknowledged intent was not irrelevant to the question of targeting, but argued intent was "not limited to primary ****327** purpose or exclusive purpose or anything of that character."

FN6. Media research consultant Gray testified that, as used in the media research industry, targeting has an intentional component (intent and selection) and an empirical component (results and achievement of the intent). However, for purposes of proving a violation of MSA, subsection III(a), our interpretation of the word "targeting" does not depend on evidence of the trade meaning of that word. (§ 1856, subd. (c); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 853, 89 Cal.Rptr.2d 540; *Southern Pacific Transportation Co. v. Santa Fe Pacific*

Pipelines, Inc. (1999) 74 Cal.App.4th 1232, 1240, 88 Cal.Rptr.2d 777; *Hayter Trucking, Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15-16, 22 Cal.Rptr.2d 229.)

The dispositive issue with respect to interpretation of MSA, subsection III(a) is not whether targeting can be *indirect,* because the common meaning of the word "target" excludes indirect results. (*Tellis v. Contractors' State License Bd., supra,* 79 Cal.App.4th at p. 163, 93 Cal.Rptr.2d 734; *Blasiar, Inc. v. Fireman's Fund Ins. Co., supra,* 76 Cal.App.4th at p. 754, 90 Cal.Rptr.2d 374.) Instead, considering the element of scienter inherent in the word "target," the dispositive issue is whether the People proved by substantial evidence that Reynolds violated subsection III(a) by intentionally targeting youth in its advertising. (Cf. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 172, 83 Cal.Rptr.2d 548, 973 P.2d 527 (*Cel-Tech*).)

[6] In *Cel-Tech, supra,* 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527, the Supreme Court observed: "We have said that' "intent," in the law of torts, denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct.' " (*Id.* at p. 172, 83 Cal.Rptr.2d 548, 973 P.2d 527; cf. *Estate of Kramme* (1978) 20 Cal.3d 567, 572-573, 143 Cal.Rptr. 542, 573 P.2d 1369 (*Kramme*) ["[f]or a result to be caused 'intentionally,' the actor must either desire the result or know, to a substantial certainty, that the result will occur"]; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 922, 114 Cal.Rptr. 622, 523 P.2d 662 & fn. 10 (*Schroeder*).) Although *Cel-Tech* discussed the concept of intent in the context of tort law, we conclude that the concept is equally applicable to the required intent implicit in MSA, subsection III(a)'s prohibition against targeting youth. If Reynolds intended its print advertising to target young adults but knew to a substantial certainty it would be exposed to youth to the same extent as young adults, then as a matter of law, Reynolds is deemed to have intended to expose, and thus targeted, youth as well as young adults.

[7] The trial court concluded that although Reynolds had access to data showing that the level of exposure of its advertising to youth was about the same as exposure to the targeted young adult smokers, Reynolds "studiously avoided" measuring its advertising exposure to youth or comparing exposure to youth with exposure to young adults, probably because Reynolds "knew the likely result of such analysis." The court also found that Reynolds "willingly engaged in an aggressive print advertising campaign to maximize exposure to targeted groups such as Young adult smokers, simply choosing to ignore the foreseeable consequence of significant Youth exposure." The court further stated, "it is reasonable to conclude that [Reynolds], even without examining all the data it had at its disposal, realized or should have realized that it was reaching Youth at levels at least as great as adults in its print advertising...." Further, as Reynolds acknowledged in seeking judgment under section 631.8, "intent can always be proved through circumstantial ***1265** evidence" if such evidence is "reliable." [FN7] MRI's magazine exposure results and derivative data constituted circumstantial evidence of Reynolds's intent to target youth. The trial court acted within its discretion in overruling Reynolds's objections that the circumstantial evidence was not reliable. We conclude the record ****328** contained substantial evidence that Reynolds violated MSA, subsection III(a) by targeting youth because Reynolds knew to a substantial certainty that its advertising was exposed to youth to the same extent it was exposed to young adults. (*Cel-Tech, supra,* 20 Cal.4th at p. 172, 83 Cal.Rptr.2d 548, 973 P.2d 527; *Kramme, supra,* 20 Cal.3d at pp. 572-573, 143 Cal.Rptr. 542, 573 P.2d 1369; *Schroeder, supra,* 11 Cal.3d at p. 922 & fn. 10, 114 Cal.Rptr. 622, 523 P.2d 662.)

FN7. In its reply brief, Reynolds acknowledges that "where direct evidence is not

available to establish" an intent element, "courts accept circumstantial evidence as a potent means of proof."

2

Constitutionality of MSA Interpretation and Injunctive Portions of Judgment

[8][9][10][11] The MSA imposed a variety of express prohibitions and restrictions on Reynolds's marketing and advertising practices while otherwise preserving Reynolds's commercial speech rights to advertise in the print media to adult smokers. (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 564, 571, 121 S.Ct. 2404, 150 L.Ed.2d 532 (*Lorillard*);[FN8] cf. *Lockyer, supra,* 107 Cal.App.4th at pp. 531-532, 132 Cal.Rptr.2d 151.) Reynolds asserts it has constitutional free speech and due process rights to target its advertising to young adult smokers even if the advertising resulted in "incidental" exposure to youth, and the trial court violated its rights by issuing an injunction that requires Reynolds to reduce its advertisements to its stated target of young adult smokers. Reynolds asserts that by requiring Reynolds to avoid exposing its tobacco advertising to youth at levels similar to its advertising's exposure to its stated target of young adults, the court's interpretation of MSA, subsection III(a), and the injunctive portions of the court's judgment, imposed obligations on Reynolds beyond those to which it expressly agreed in the MSA. (*Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 58-59, 92 Cal.Rptr.2d 597 (*Vons*).)[FN9] Reynolds contends the issue is whether subsection III(a) imposed an affirmative obligation on Reynolds to limit ***1266** incidental advertising exposure to youth that is targeted solely at adults. Reynolds characterizes as undisputed its constitutional right to communicate information through advertising to adults despite incidental exposure of the advertising to youth. However, this case does not involve incidental exposure of Reynolds's advertising to youth. Instead, the case involves Reynolds's intentional exposure of its advertising to youth because Reynolds knew to a substantial certainty its advertising was exposed to youth to virtually the same extent it was exposed to young adults.

FN8. The First Amendment to the United States Constitution "constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information." (*Lorillard, supra,* 533 U.S. at p. 571, 121 S.Ct. 2404.)

FN9. "A contract extends only to those things ... it appears the parties intended to contract. Our function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there." (*Vons, supra,* 78 Cal.App.4th at pp. 58-59, 92 Cal.Rptr.2d 597.)

[12] Although Reynolds acknowledges that in the MSA it waived any claims that the MSA was unconstitutional, it contends it did so only to the extent that the MSA contained restrictions, limitations or obligations expressly agreed to in the MSA or the Consent Decree.[FN10] Reynolds characterizes ****329** the trial court's construction of MSA, subsection III(a) and the language of the permanent injunction as not simply prohibiting targeting youth but instead imposing an enormous and ill-defined affirmative obligation on Reynolds to avoid or reduce the levels of exposure of its advertising to youth, an obligation to which it did not agree. Reynolds asserts the record contains no basis for a finding that it clearly and compellingly intended to relinquish its constitutional rights, and concludes

the MSA should be construed to preserve its constitutional rights and against a waiver of those rights. (*City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1397-1398, 1405, 256 Cal.Rptr. 742.) However, our independent interpretation of MSA, subsection III(a)'s prohibition against targeting youth differs from the interpretation of the trial court. We agree with Reynolds that proof of a violation of subsection III(a) or the Consent Degree requires a showing Reynolds intentionally targeted youth in its print advertising. Our interpretation of subsection III(a) is consistent with the restrictions, limitations and obligations Reynolds expressly assumed under the MSA and Consent Decree. Moreover, the language in the trial court's interpretation of MSA, subsection III(a) and in the permanent injunction, precluding Reynolds from exposing its tobacco advertising to youth at levels similar to its exposure to adult smokers, did not expand the prohibition to which Reynolds agreed in that subsection. ***1267** Instead, the trial court simply set forth a means to measure the existence of prohibited youth targeting on this factual record and on a subsequent alleged violation of the prohibition. The record contains substantial evidence that an advertising vehicle's exposure is the standard for evaluating the ability to reach a target audience. The evidence also suggests the way to avoid targeting a particular group is to minimize exposure of the advertising to that group.[FN11] As observed by the People, subsection III(a)'s prohibition on youth targeting "*is* a limitation on Youth exposure." The record contains evidence that Reynolds could implement alternative advertising schedules using different magazines to avoid targeting youth while maintaining effective targeting of young adult smokers. Reynolds's constitutional challenge to the injunction's language is barred by Reynolds's voluntary waiver set forth in MSA section XV. (*D.H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 184-188, 92 S.Ct. 775, 31 L.Ed.2d 124; *Lockyer, supra,* 107 Cal.App.4th at p. 533, 132 Cal.Rptr.2d 151; ****330** *cf. Newton v. Rumery* (1987) 480 U.S. 386, 397-398, 107 S.Ct. 1187, 94 L.Ed.2d 405.)

FN10. MSA section XV provided in relevant part: "Each Participating Manufacturer further acknowledges that it understands that certain provisions of this Agreement may require it to act or refrain from acting in a manner that could otherwise give rise to state or federal constitutional challenges and that, by voluntarily consenting to this Agreement, it (and the Tobacco Related Organizations (or any trade associations formed or controlled by any Participating Manufacturer)) waives for purposes of performance of this Agreement any and all claims that the provisions of this Agreement violate the state or federal constitutions. Provided, however, that nothing in the foregoing shall constitute a waiver as to the entry of any court order (or any interpretation thereof) that would operate to limit the exercise of any constitutional right except to the extent of the restrictions, limitations or obligations expressly agreed to in this Agreement or the Consent Decree."

FN11. We note that in an August 2001 press release, Reynolds stated: Reynolds believed its "advertising policy is a responsible way to minimize the number of cigarette ads that minors may see in magazines"; Reynolds was "committed to complying with both the letter and spirit of the MSA" and "confident [its] cigarette advertising and marketing fully comply"; and "[t]he MSA was designed to further limit minors' exposure to cigarette advertising-which has happened-while still allowing limited opportunities to compete for adult smokers' business."

[13] In any event, in exercising de novo review of the language of the permanent injunction entered by the trial court, we are not persuaded by Reynolds's contention that on its face the injunction is impermissibly vague, incomplete, indeterminate, impre-

cise or overbroad. (*San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 969, 74 Cal.Rptr.2d 364; *cf. Schmidt v. Lessard* (1974) 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661 ["basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed"]; *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach* (1993) 14 Cal.App.4th 312, 329, 17 Cal.Rptr.2d 861; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 476-477, 239 Cal.Rptr. 549; *City of Indio v. Arroyo* (1983) 143 Cal.App.3d 151, 157, 191 Cal.Rptr. 565; *Foti v. City of Menlo Park* (9th Cir.1998) 146 F.3d 629, 638.) Reynolds faults the trial court for not providing definition or guidance about the meaning of various operative provisions in the injunction, and contends it must guess at the meaning of the injunction's provisions prohibiting Reynolds from exposing its advertising to youth *at levels similar to* the exposure to adult smokers and requiring Reynolds to employ *reasonable measures* in its media planning to demonstrate that the level of exposure of its advertising to youth is *significantly less* than the level of exposure of its advertising to targeted groups of adult smokers. (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651, 83 Cal.Rptr. 35.) However, the language of the ***1268** injunction gives Reynolds adequate notice of what it "may and may not do." (*Brunton v. Superior Court* (1942) 20 Cal.2d 202, 205, 124 P.2d 831; *Schmidt,* at p. 476, 94 S.Ct. 713.)

The evidence from which we conclude Reynolds was substantially certain its tobacco advertising was exposed to youth as a targeted audience includes the MRI data showing exposure or reach to the admitted target audience of young adults was essentially the same as to youth. In 1999 exposure to youth was 97.1 percent and exposure to adults was 97.9 percent; in 2000 exposure to youth was 95.2 percent and to adults 96.3 percent. Evidence at trial suggested the methods by which the percentage exposure to youth could be reduced without a comparable reduction in exposure to young adults. Implementation of these methods would be the reasonable measures required by the injunction and the resulting reduction in advertising exposure to youth compared to exposure to young adults would be the significant reduction in exposure to youth required by the injunction.

The permanent injunction contained mandatory provisions ordering Reynolds to "adopt, adhere to, and incorporate as part of its media strategy reasonable measures designed to reduce Youth exposure to its tobacco advertising to a level significantly lower than the level of exposure of targeted groups of adult smokers" and "employ reliable means such as MRI and Simmons data to measure its success in achieving this goal to demonstrate that the exposure of Youth to Reynolds's tobacco advertising is significantly less than the exposure of targeted groups of adult smokers." The mandatory provisions of the injunction do not shift to Reynolds the burden of proof on the issue of prohibited youth targeting. Instead, those mandatory provisions provide Reynolds with means to demonstrate compliance with MSA, subsection III(a)'s prohibition against targeting youth. The burden to prove a violation of that subsection remains with the People, who must show that Reynolds knew with ****331** substantial certainty that its print advertising exposure to youth would be the same as its exposure to young adults.

Because of our interpretation of MSA, subsection III(a) and the permanent injunction, Reynolds has not established reversible prejudice resulting from any constitutional error by the trial court involving the language of those contractual and remedial provisions. Because the injunction's language is not unconstitutionally vague, we conclude the court acted within its discretion by issuing the injunction. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479, 243 Cal.Rptr. 902, 749 P.2d 339; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331, 216 Cal.Rptr. 718, 703 P.2d 58; *Shapiro v. San Diego City Council, supra,* 96 Cal.App.4th at p. 912, 117 Cal.Rptr.2d 631.)

***1269** 3

Admissibility of Evidence of Survey Data Measuring Magazine Readership

Based on MRI's data, the trial court found: In the year 1999, magazines containing Reynolds's advertising were exposed to 97.1 percent of youth and 97.9 percent of adults; and in the year 2000, magazines containing Reynolds's advertising were exposed to 95.2 percent of youth and 96.3 percent of adults. From those findings, the court concluded the levels of exposure of Reynolds's advertising to youth and adults were "essentially the same."

Reynolds characterizes MRI's data as forming the entire basis for the People's case that Reynolds violated MSA, subsection III(a) by targeting youth and the trial court's conclusion about the comparable levels of exposure of Reynolds's advertising to youth and adults. Reynolds asserts the trial court's decision "rises and falls" on the "accuracy and reliability" of MRI's data. Reynolds contends MRI's data, especially its youth data, was inadmissible hearsay, unreliable and produced overstated and erratic results. It contends the court abused its discretion by admitting those data for their truth (Evid.Code, § 1340) and as the basis of the testimony of the People's experts (*id.*, § 801, subd. (b)) without the requisite foundational showing by the People.

[14] MRI's data were based on a survey. A survey conducted to record the recollections of survey respondents is hearsay. (*Luque v. McLean* (1972) 8 Cal.3d 136, 147-148, 104 Cal.Rptr. 443, 501 P.2d 1163; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1526, 3 Cal.Rptr.2d 833 (*Korsak*).) However, Evidence Code section 1340 sets forth a hearsay exception: "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule *if the compilation is generally used and relied upon as accurate in the course of a business* as defined in Section 1270." (Italics added.) Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] ... [¶] (b) *Based on matter* (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, *whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates,* unless an expert is precluded by law from using such matter as a basis for his opinion." (Italics added.) We conclude that on this record the trial court properly admitted the challenged MRI data into evidence. ***1270**(*People v. Rowland* (1992) 4 Cal.4th 238, 266, 14 Cal.Rptr.2d 377, 841 P.2d 897; ****332***Shamblin v. Brattain, supra,* 44 Cal.3d at pp. 478-479, 243 Cal.Rptr. 902, 749 P.2d 339; *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1073, 116 Cal.Rptr.2d 240 (*Clauser/Wells*); *Korsak,* at pp. 1524-1526, 3 Cal.Rptr.2d 833.)

(a)

Factual Background Bearing on Admissibility of Evidence of MRI's Data

At trial, the parties presented conflicting expert evidence on the admissibility of the challenged MRI data. With respect to the trial court's foundational ruling to admit MRI's data into evidence, we consider the evidence and reasonable inferences most favorably to the People.

MRI collects and analyzes data from surveys about magazine readership. MRI's surveys are based on the question to survey respondents whether they have read or looked into an identified magazine within a specified recent time frame, generally seven days for weekly and 30 days for monthly magazines. Readership includes anyone who responded to the survey as having read or looked into the magazine. Because MRI's surveys measure only

the opportunities to see the advertisements, its data provide estimates of the number of persons to whom the advertising in the magazine is potentially exposed.[FN12] Thus, the basic underlying unit of data obtained by MRI surveys is the number of people who read or looked into an issue of a magazine and therefore had the opportunity to, but did not necessarily, see an advertisement placed in the magazine.

> FN12. In magazine advertising, "audience" means "the number of persons who are exposed to or potentially exposed to a magazine or to a schedule of magazine insertions."

MRI's surveys seek to measure two universes. MRI conducts in-person interviews of adults age 18 and above (adult study) in which questions are asked about more than 216 magazines. MRI also conducts a mail survey of persons age 12 to 19 (teen study) in which questions are asked about approximately 60 magazines. The teen study is intended to create an integrated data base. MRI combines the data from its adult study and teen study into a single study known as Twelveplus (everyone age 12 and above), used to measure both the adult and teen audience of a magazine. MRI's Twelveplus study includes every magazine measured in its teen study and gives totals for survey respondents age 12 through 17 plus the number of issues (zero to four) read or looked into for each magazine. Based on the Twelveplus data, a media advertising schedule's exposure to youth can be determined.

***1271** MRI's data are considered the acknowledged industry standard for measuring and comparing readership of adults and teens in the same way that Nielsen is the standard for television ratings data and Arbitron the standard for radio listening data. Media planners use MRI's data as their "core essential tool" to measure magazine audiences and to plan and implement media advertising schedules. Most advertising agencies use MRI's data for their magazine audience measurements. Further, because MRI produces the dominant study in the teen measurement field, most advertisers interested in measuring teen audiences for magazines use MRI data as the basis for determining their ability to measure exposure of a magazine to teens.

The average magazine issue audience, referred to in the industry as "vehicle exposure," is the basis of the measurements provided by MRI (and Simmons) and the standard to evaluate the magazine's exposure**333 to a target audience. As the predominant form of data available to the media planning and advertising industries, vehicle exposure is the primary criterion for evaluating magazine audiences. Vehicle exposure suggests how many people in general or in a target group have the opportunity to see a magazine advertisement. Also derived from MRI's vehicle exposure audience data are other measures, including composition, coverage, indices, gross impressions and target impressions. Those derivative numbers, as well as MRI's basic data, are used by media planners to measure and determine whether a media advertising schedule succeeds in reaching a target group.

Reynolds and its media planner use MRI's data to evaluate composition, coverage and indices. Magazine audience is generally measured by composition and coverage. Composition is the percent of a target group or other demographic group within the total audience of a magazine. Coverage is the percentage of a target group potentially exposed to an advertisement in a magazine. MRI's format identifies the composition of youth magazine audience and coverage of the magazine's exposure to youth. Index refers to the skew of a magazine to a demographic group. An index may compare the youth composition of a magazine's audience to the percent of youths in the total United States population.

Impressions are the number of advertising viewing opportunities generated by a media advertising schedule. Gross impressions (also called gross rating points) generally refer to the total audience. Gross impressions are cumulative numbers that are the sum of all the audiences of the various magazines across an entire media advertising

schedule and suggest the total number of potential exposures to a media advertising schedule. The total audience of a single issue of a magazine multiplied by the number of insertions of advertising in ***1272** the magazine equals the gross impressions of the magazine. With respect to a target group, the measurements are expressed as target impressions or target rating points. Target rating points express gross impressions as a percentage of the target group with one rating point measuring impressions and equaling one percent of the target group. The total number of impressions divided by the particular population universe equals gross rating points or target rating points.[FN13] Media planners use target rating points from MRI's readership data to compare one media schedule to another or exposure to one demographic group to exposure to another.

> FN13. For example, if a demographic subgroup has 20 million people and 20 million impressions are delivered, that is equivalent to 100 gross rating points and to reaching everybody in that universe once each. That result could also be achieved by reaching half the people in the group twice or 40 percent 2.5 times each.

Advertisers and media planners use the terms "reach" and "frequency" to measure the exposure of advertising to a defined group and to compare exposure of advertising among various groups. Reach means the percentage of a group potentially exposed to an advertising schedule during a specified time period. Frequency means the average number of times persons in the group are exposed to an advertising schedule during the specified time period. Target rating points are the product of the reach and frequency numbers.

Reach and frequency numbers can be derived from the MRI data. Reach is the percentage of a targeted audience to whom a magazine is exposed and quantifies the target audience covered. It also identifies to whom an advertisement is potentially ****334** exposed based on survey respondents who have read or looked into a magazine containing the advertisement within a designated time period. Because reach is the nonduplicated coverage of a target group, reach models are used to estimate the unduplicated audience of a media advertising schedule. Frequency is the average number of times that a media advertising schedule is exposed to a target group within a designated time period.

In short, reach refers to the percentage of the population to whom the magazine is exposed and frequency means on average how many times the magazine is exposed to them. Further, target rating points are equal to reach multiplied by frequency. MRI's reach and frequency numbers are estimated cumulative measures over a year. A reach of 95 percent means that 95 percent of the target group possibly saw the advertisement during the year. With respect to four-month data, monthly reach and frequency numbers can be based directly on MRI's tabulated data without any projections because they are real empirical data. However, annual reach and frequency numbers require use of extension formulas, including the beta binomial formula, to ***1273** extend the reach over a one-year time frame. MRI uses the beta binomial formula only to distribute the gross impressions between reach and frequency. MRI's methodology for projecting cumulative reach is to take the survey data for one to four issues of magazines and then apply the beta binomial formula to arrive at the projection at the end of 52 weeks. MRI developed software for the purpose of obtaining estimates that would raise fewer concerns involving the overlap of which survey respondents read a magazine issue.

MRI's reach and frequency numbers are based on two different data bases: adult smoker measurements using MRI's adult study and youth measurements derived from MRI's composite Twelveplus data. MRI has sought to ensure that the data produced are as compatible as if they came from a single study. Although MRI's surveys for adults and youths differ from one another, processes exist to equate the two. In measuring magazine readership, MRI's teen study also weights and conforms the

survey responses. The purpose of weighting is to ensure that those who respond to the survey are representative of the entire population. MRI's weighting process addresses the issue whether the 77 percent of teens who do not respond to the teen survey are like the 23 percent who do, and compensates for the differences in response rates of different demographic groups. Further, MRI uses a conforming procedure to lower the readership levels in its teen study because MRI's teen data have more overstatement compared to MRI's adult data. Thus, a reason for MRI's conforming adjustment is to reduce teen audience levels to the level of the teens who would have responded had they been administered MRI's adult survey.

Integrated Market Systems (IMS) provides software for various media analyses and has modified MRI's formula in a proprietary way. IMS has a program that compiles MRI data, inputs criteria (the target base) and produces reports based on the criteria. IMS's Modal model inputs a media advertising schedule and estimates how many people saw the magazines in that schedule. To calculate each media advertising schedule's exposure to its stated target, Reynolds used MRI's data on magazine readership as a source of information. Reynolds then used a computer software program (IMS Modal) to calculate a selected magazine's reach (the percentage of the target audience to whom the magazine is exposed) and frequency (the average number of exposures of the magazine).

****335** MRI's data show considerable consistency over time as to which magazines are high or low for exposure to youth. Further, those data are also reliable with respect to the estimates of youth audience (the percent of the audience who are teens). MRI's data can be used to show who is being ***1274** exposed to magazines containing Reynolds's advertisements. Although from 1999 through 2001 young adult smokers age 21 to 34 generally constituted the stated target of Reynolds's advertising, during those years magazines containing Reynolds's advertising were exposed to youth in about the same percentages and about as often as exposed to young adult smokers. Those virtually identical numbers of advertising exposure to adult smokers and youth were unusual. Further, reaches of 80 percent or above suggested the result was not accidental.

In 1999 the reach of magazines containing Reynolds's advertising was 97.1 percent of youth with a frequency of 68.2 times and 97.9 percent of young adult smokers with a frequency of 62.7 times. In 1999 the reach of magazines containing Reynolds's Camel brand's advertising was 88.5 percent of youth with a frequency of 22.7 times and 88 percent of young adult smokers with a frequency of 16.8 times.

In 2000 the reach of magazines containing Reynolds's advertising was 95.2 percent of youth with a frequency of 54.7 times and 96.3 percent of young adult smokers with a frequency of 54.2 times. In 2000-89 percent of Reynolds's Camel advertisements were placed in magazines with youth audiences above the 10.4 percentage of youth in the United States population and 50 percent of the Camel ads appeared in magazines whose youth audience was above 18.5 percent. In 2001 although Reynolds reduced its overall level of magazine advertising, the target rating points were 1571 for adult smokers age 21 to 34 and 1392 for youth. In 2001 magazines containing Reynolds's advertising were exposed to 85.5 percent of youth an average of 16.3 times.

Reynolds also made an analysis of the distribution of gross impressions, an accepted method of measuring an advertising campaign's success in focusing on its target audience, by comparing its brands' advertising campaigns' exposure to the stated target with their exposure to other groups within the universe of adult smokers age 21 and over. The analysis uses an index with average delivery set at 100. Thus, an index of 200 means the group analyzed receives double the average number of exposures. The distribution index for Reynolds's Camel brand's advertising campaign in 2000 showed exposure to smokers age 21 to 24 was 183, reflecting that group

received 83 percent more exposures than the average for all smokers age 21 and over. Those analyses of gross impression distributions showed high exposure to youth and smokers age 18 to 20. In many cases, exposure of advertising to those groups was higher than to Reynolds's stated target audience. If Reynolds had included those two younger age groups in the impressions distributions analyses it used in evaluating its own targeting, Camel's 2000 campaign's high exposure to very young adults would have been a "red flag" to Reynolds that its advertising was exposed to a high number of youth.

***1275** MRI's data can be used for the purpose of magazine selection if the goal is to select magazines with low youth audience and eliminate magazines with high youth audience. Reynolds could identify magazines that would best deliver its advertising to the target group and refine its delivery to ensure its advertising was not exposed to identified groups. By analyzing magazines in terms of composition, ****336** coverage and indices, Reynolds could select a different set of magazines to decrease exposure of its advertising to youth. The reach is a function of which magazines are selected. To reduce exposure to youth while maintaining significant exposure to adults, Reynolds could choose magazines with lower teen composition, lower teen coverage and lower teen audience.[FN14] Were Reynolds making an effort not to target youth, it would concentrate on magazines with a lower youth-to-young-adult ratio. To reduce exposure to youth, Reynolds could also reduce the number of magazines in which it advertised. Instead, in 2000 Reynolds's advertising was distributed fairly randomly in all magazines on its list instead of concentrated in magazines with low youth composition.

> FN14. At trial, Reynolds's counsel acknowledged that the most important factor in devising a media plan is the list of magazines in which it placed advertisements.

The People's media planning expert (Silverman) concluded that Reynolds's media advertising schedule suggested Reynolds was intentionally targeting, or consciously intending not to take positive action to avoid exposure of its advertising to, youth; and Reynolds's failure to do so suggested it knew with substantial certainty that its tobacco advertising was being exposed to youth.

(b)

Analysis of Admissibility of Evidence of MRI's Data

[15] In admitting the People's proffered evidence of MRI's data over Reynolds's objections, the trial court found the testimony demonstrated those data were reliable, generally used and relied on as accurate. However, Reynolds asserts the court erred in admitting the evidence and contends MRI's weighted, conformed and adjusted survey results did not meet the requirements of Evidence Code section 1340's hearsay exception. Reynolds also contends MRI's teen data did not constitute a proper basis for expert opinion. (Evid.Code, § 801, subd. (b).) Reynolds contends no court could properly accept or reject the expert opinion testimony about the validity of the MRI data because there was assertedly no basis in the record to understand the procedures used to arrive at MRI's data. In effect, Reynolds seeks reweighing ***1276** on appeal of the conflicting evidence presented to the trial court. (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290, 130 Cal.Rptr.2d 436; *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832, 227 Cal.Rptr. 1.) On this record the trial court acted within its broad discretion in admitting into evidence MRI's survey data and expert testimony based on those data. (*Korsak, supra,* 2 Cal.App.4th at p. 1523, 3 Cal.Rptr.2d 833.)

MRI's surveys are conducted to obtain sample estimates for the number of people exposed to an average issue of a magazine. MRI's data involve results and statistical projections in terms of sample to

population and from one or two weeks to an entire year. However, all surveys are subject to random variability. Except for a complete census of the entire population to which each person responds, no survey is perfect regardless of its size and no survey's results can be deemed accurate with certainty. The data in a survey such as an audience measurement study cannot be guaranteed as 100 percent reliable (expecting the same results if repeated samples are generated using the same methodology) or 100 percent valid (reflecting exactly what is happening in the universe). Instead, degrees of reliability and validity ****337** are recognized. Statistical reliability evaluates the absence of random error, which means the results of subsequent tests are close to the outcome in the initial test. A sample estimate is considered reliable to the extent it does not exhibit substantial random variability. Statistical validity is a measure of whether the test is suitable for its intended purpose, which evaluates whether test results are consistent with reality. Media research consultant Gray testified that in the case of national magazines, MRI's data have been accepted by the industry as providing sufficient reliability and validity to serve as the standard and the criteria for media evaluation.

Further, the People's statistics expert (Javitz) conducted a standard statistical analysis of MRI's readership data, and found MRI's survey was reliable and valid for purposes of measuring estimated adult and youth audiences for media schedules. Javitz found MRI's youth data had very good reliability, with very small margins of error with respect to the projected reach and the calculated frequencies for adult smokers age 21 to 34 and teens. Javitz thus concluded that MRI's studies were very good in terms of their margins of error and MRI's readership data were the most likely estimate of the magazine's exposure. Javitz also characterized the amount of random variability in the estimates of average impressions per teen, reach and frequency as sufficiently small to make the data useful. Moreover, Javitz found that the potential of bias in MRI's data caused by sample selection, weighting, ***1277** nonresponse bias, differences in the form of the questionnaire or problems with conforming was "minimal" if existent at all, and concluded those data were valid as truthfully expressing the real world. This evidence is contrary to Reynolds's contention that "no one in the industry really believes" MRI's data are "accurate."

Evidence supported the conclusion that MRI's weighted, conformed and adjusted survey results met the requirements of Evidence Code section 1340's hearsay exception and constituted a proper basis for expert opinion for purposes of Evidence Code section 801, subdivision (b). Gray testified that conforming in general is a common occurrence accepted within the media research industry and MRI's conforming procedure is accepted in that field. Similarly, Javitz found MRI's conforming process was reasonable, consistent with appropriate statistical methods and procedures, and included the action a statistician would take to adjust for differences in survey methods and procedures. Further, Javitz analyzed MRI's weighting process, and found zero potential bias. Moreover, Javitz found that MRI's surveys were conducted in accordance with appropriate and generally accepted methods and procedures followed by social scientists and statisticians, specifically with respect to MRI's sampling procedure and, in particular, MRI's selection of its teen sample. Additionally, the People's survey design expert (Kamins) testified: MRI's teen survey's sample size of more than 3,000 was sufficiently large to support "pretty steady inferences"; MRI's teen study's universe definition and sample size were trustworthy; the design and administration of the survey instrument in MRI's teen study were trustworthy; MRI's teen study's response rate was more than adequate; MRI's teen study was trustworthy; hence, validity and reliability were present; if validity is present, reliability is present by definition; if the observed measure equals truth, random variation is eliminated; and if random variation is eliminated, reliability is present by definition. Finally, with respect to Reynolds's attack on the procedures used to arrive at MRI's data, the re-

cord contained the testimony of MRI's vice president of software development **338 (Safran) that IMS's Modal model is generally used for planning purposes and accepted as a reasonable representation of reach and frequency; and compared to other actual tabulated data, the model produces numbers that are reasonable given that it is a model and is adequate for use for industry practices.

Reynolds also attacks the court's findings that magazines in which Reynolds advertised were exposed to 97.1 percent of youth and 97.9 percent of adults in 1999; magazines in which Reynolds advertised were exposed to 95.2 percent of youth and 96.3 percent of adults in 2000; and those levels of exposure to youth and adults were essentially the same. Reynolds contends that on their face, such high percentages do not pass the common sense test. However, Javitz testified it was plausible that for a year rather than a *1278 six-month period, Reynolds's advertising could have obtained an exposure in the mid-90's for its 2000 media plan.

Evidence also suggested the utility of MRI's data is not limited to its precise numbers. Instead, MRI's data can be used to show who is exposed to magazines containing Reynolds's advertisements because those data portray the comparison of exposure to various groups. The People's media planning expert (Silverman) testified it was appropriate to compare annual reach and frequency numbers of Reynolds's media plans for youth with the stated adult target because those numbers are an indicator of those to whom the advertisement is really being exposed and how often exposed over the course of a year. Further, target rating points are also valuable for media planners as a comparative measure of one schedule to another or one year to another. Thus, although characterizing as "very fuzzy" the line between using MRI's data for relative comparison and accepting the data at face value, Gray testified that looking at teen-measured magazines' exposure to adult smokers and youth was a way of indicating whether there was targeting to any particular group and the degree to which that occurred. FN15 Moreover, noting that impressions and target rating points are derived directly from MRI's data and are the input to the computer models while the output is the reach and frequency for the time period a model is asked to calculate, Gray concluded that to put things on a relative per capita basis, it is more meaningful to look at target rating points for purposes of comparing delivery of youth-measured magazines. Similarly, Reynolds's statistics expert (Olkin) acknowledged that MRI's data were not implausible and that any unreliability resulting from application of computerized extension formulas had nothing to do with gross impressions. Further, the relationship between high exposure to adults and youth is the same whether viewed on an annual, quarterly or monthly basis. Thus, for comparison purposes, annual numbers are appropriate. Additionally, the numbers can be used to compare one media advertising schedule to another or one vehicle to another. As observed by Reynolds's senior vice president of marketing (Creighton), relative comparisons over time show whether a media plan is successful.

> FN15. Gray noted that in practice, media planners and buyers are concerned not with probabilities or the standard error but instead with the numbers at face value.

[16][17][18][19] Statements within the hearsay exception of Evidence Code section 1340 are sufficiently trustworthy to overcome concerns about the reliability of those hearsay statements. (*In re Michael G.* (1993) 19 Cal.App.4th 1674, 1677-1678, 24 Cal.Rptr.2d 260; **339*Miller v. Modern Business Center* (1983) 147 Cal.App.3d 632, 635, 195 Cal.Rptr. 279 ["[t]rustworthiness is reasonably assured by the fact that the business community generally uses and relies upon the compilation and by the fact that its author knows the work will have no commercial value unless it is accurate"].) In admitting MRI's data into *1279 evidence, the trial court found MRI is the most widely used and accepted service for measuring magazine exposure in the United States; MRI's adult and teen surveys are

conducted in accordance with appropriate and generally accepted methods and procedures followed by social scientists and statisticians; MRI's adult and youth data are valid and reliable; and MRI's adult and youth data are generally used and relied on as accurate in the course of business. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain, supra,* 44 Cal.3d at pp. 478-479, 243 Cal.Rptr. 902, 749 P.2d 339; *Korsak, supra,* 2 Cal.App.4th at p. 1523, 3 Cal.Rptr.2d 833.) On this record, substantial evidence and reasonable inferences supported the trial court's foundational ruling to admit MRI's data into evidence. Further, even if MRI's youth data were inadmissible hearsay, the court could have correctly concluded the data constituted a proper basis for expert opinion because advertising experts reasonably rely on those data to determine exposure of magazine advertising to youth. (Evid.Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal.4th 605, 618, 59 Cal.Rptr.2d 356, 927 P.2d 713; *Korsak,* at pp. 1524-1525, 3 Cal.Rptr.2d 833 [experts have "considerable leeway as to the material on which they may rely"].) The court did not abuse its discretion by admitting MRI's data into evidence or permitting the People's experts to give testimony based on those data.

Although Reynolds contends the evidence of MRI's data was inadmissible as unreliable and expert testimony based on those data was also inadmissible, Reynolds essentially concedes that if those matters were properly admitted, there is substantial evidence to support the ultimate judgment favoring the People. Considering our interpretation of MSA, subsection III(a)'s prohibition on youth targeting and our determination upholding the trial court's foundational evidentiary rulings, on this record we conclude substantial evidence and reasonable inferences established that Reynolds violated MSA, subsection III(a) by targeting its tobacco advertising to youth. (*Cel-Tech, supra,* 20 Cal.4th at p. 172, 83 Cal.Rptr.2d 548, 973 P.2d 527; *Kramme, supra,* 20 Cal.3d at pp. 572-573, 143 Cal.Rptr. 542, 573 P.2d 1369; *Schroeder, supra,* 11 Cal.3d at p. 922 & fn. 10, 114 Cal.Rptr. 622, 523 P.2d 662.)

4

Evidence of Violation Within California

[20] To establish violation of the prohibition against targeting youth set forth in MSA, subsection III(a) and Consent Decree, section V(A), the People were required to prove Reynolds targeted youth within the State of California. In its statement of decision, the trial court found, based on MRI's data, that in 1999, "97.1 percent of Youth across the country, including California, were exposed to [Reynolds's] ads 68.2 times."

***1280** In its statement of decision, the trial court also concluded that nothing in the evidentiary record could reasonably support a determination that MRI's nationwide data did not apply to California. In reaching that conclusion, the court noted ****340** that Reynolds did not object at trial to introduction of the nationwide MRI data on the ground the data did not correctly reflect exposure to youth in California. The court also noted Reynolds did not present substantial evidence that MRI's results for California would differ from nationwide results.

Reynolds attacks the court's conclusion as improperly ignoring that it was the People's burden to prove Reynolds violated the youth targeting prohibition in California. Further, characterizing the People's case as built on nationwide MRI data measuring magazine readership, Reynolds contends the People did not attempt to limit the data to California or derive any statewide exposure measurements from MRI's nationwide data. Reynolds asserts that MRI's data did not show Reynolds engaged in any action in California that violated the prohibition on youth targeting set forth in the MSA

or Consent Decree, and contends the court could not correctly assume the magazine exposure measured nationwide by MRI was proportionately the same within California. However, on this record Reynolds cannot establish it was prejudiced by any error in the court's reasoning or analysis on this issue because it is not reasonably likely an outcome more favorable to Reynolds would have resulted absent the error. (§ 475; Evid.Code, § 353, subd. (b); *People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

In response to Reynolds's counsel's question, "don't you think that more than 5 percent of teens in California don't read magazines that contain Reynolds's cigarette ads?" the People's survey design expert (Kamins) testified that the MRI data have a range of error and their statistical variation might increase the number to 7 percent. Further, MRI's sample was disproportionately over-allocated within MRI's 10 major media markets, which were "self-representing" and included Los Angeles and San Francisco. The final 1999 media recommendation for Reynolds's Camel brand sought to maintain its market share of sales to the target audience in key Camel brand markets; and that recommendation contained advertising schedules for alternative weeklies in the "core market" of Los Angeles and the "non-core markets" of Oakland, San Diego, San Francisco, San Jose and Sacramento. The final 1999 recommended media plan for Reynolds's Winston brand contained media advertising schedules for alternative publications in Los Angeles, San Diego, San Francisco and San Jose/Santa Cruz. With respect to market selection rationale, the final 2000 media recommendation for Reynolds's Camel brand identified markets-including Los Angeles/ Long Beach, Oakland, San Diego, San Francisco, San Jose and Sacramento-as possessing a high percentage of 18-plus population, high Camel market share, and ***1281** alternative weeklies; and that recommendation contained advertising schedules for alternative weeklies in Los Angeles, Oakland, Sacramento, San Diego, San Francisco, and San Jose. The final 2001 print plan for Reynolds's Winston brand contained a recommended publication list that included alternative weekly publications in Los Angeles, Sacramento, San Diego, and San Francisco. We conclude that, regardless of any error in its reasoning or analysis, the trial court's implied finding that Reynolds's advertising targeted youth within California was supported by substantial evidence and reasonable inferences drawn from that evidence.

5

Evidence Involving Reynolds's Competitors

[21] Philip Morris and B & W are competitors of Reynolds. Over Reynolds's ****341** hearsay objection, the trial court permitted the People to introduce evidence of those competitors' policies regarding advertising to youth. The court's statement of decision contained various references to that evidence.

First, the trial court found as fact: (1) In January 2000, B & W announced a policy that it would not place tobacco advertising in any publication with a youth composition of more than 15 percent; (2) in May 2000, Philip Morris announced a policy that it would not place tobacco advertisements in any publication with a youth composition of more than 15 percent or that is exposed to more than two million youth; and (3) in 2000, "there was a decline in the amount of print advertising, money spent by Philip Morris and B & W and in the amount of Youth exposure to their print advertising...."

The trial court stated that the "actual practice of other tobacco companies, such as Philip Morris, demonstrates that it is possible to reduce Youth exposure in print media advertising to levels below those for targeted adult smokers while maintaining significant exposure to adult smokers."

Finally, in its legal conclusions and findings bearing on the construction of the prohibitions in the

MSA and Consent Decree on youth targeting, the trial court stated the evidence established Philip Morris and B & W reduced their advertising exposure to youth after signing the MSA by not advertising in publications having more than 15 percent youth composition, with Philip Morris also deciding not to advertise in publications with exposure to youth of more than two million. The court then characterized the conduct of Philip Morris and B & W as providing "strong circumstantial evidence that they believed that dramatic steps to reduce Youth exposure to tobacco advertising had to be taken to comply with the requirements of the MSA."

***1282** Attacking the trial court's findings and conclusions about Philip Morris and B & W as dependent on inadmissible hearsay evidence, Reynolds contends no witness from those companies testified at trial or deposition, no document created by or from the files of those companies was admitted into evidence, and no testimony or document describing the print placement policies of those companies was admitted for its truth. Reynolds also notes the court admitted two Reynolds-created documents describing the print policies of Philip Morris and B & W to show Reynolds's state of mind but expressly not to prove the truth of those companies' internal policies.[FN16] Reynolds contends the court abused its discretion by violating its own rulings and relying on those policies for ****342** their truth. (*People v. Rowland, supra,* 4 Cal.4th at p. 266, 14 Cal.Rptr.2d 377, 841 P.2d 897; *Shamblin v. Brattain, supra,* 44 Cal.3d at pp. 478-479, 243 Cal.Rptr. 902, 749 P.2d 339; *Clauser/Wells, supra,* 95 Cal.App.4th at p. 1073, 116 Cal.Rptr.2d 240; *Korsak, supra,* 2 Cal.App.4th at pp. 1524-1526, 3 Cal.Rptr.2d 833.)

> FN16. A June 2000 Reynolds memorandum inviting attendance at a meeting at which the subject would be Reynolds's "recently-revised magazine approval policy" and at which there would also be discussion of "recent announcements by Philip Morris relative to print advertising and what those announcements mean in terms of publications affected" was admitted to show only Reynolds's state of mind. Accompanying the memorandum were Reynolds's descriptions of Philip Morris's policy announcements that Philip Morris advertisements would no longer appear on magazine back covers and would not appear in any publication with a composition greater than 15 percent of readers under age 18 or with more than two million readers under age 18; a list of magazines in which Philip Morris's cigarettes would no longer be advertised; and a list of magazines remaining within Philip Morris's guidelines.
>
> Also admitted to show only Reynolds's state of mind was a January 2000 Reynolds message regarding "coverage of B & W's internal policy of not advertising in" publications with more than "15% readership under the age of 18" and noting that Reynolds had received numbers about "readership breakdowns" of each of the publications.

Reynolds contends that in construing MSA, subsection III(a), the trial court improperly relied on the actions of Philip Morris and B & W in changing their policies. Reynolds asserts the court improperly concluded that Philip Morris and B & W believed the changes were required by MSA, subsection III(a). However, our interpretation of subsection III(a) differs from the trial court's interpretation and does not depend on conclusions about Reynolds's competitors' reasons for their policy changes. Therefore, Reynolds does not demonstrate reversible error by the trial court with respect to those competitors' beliefs about the meaning of MSA, subsection III(a).

Reynolds also contends that in concluding the actions of Reynolds's competitors demonstrated the possibility of reducing levels of print media advertising exposure to youth while maintaining signific-

ant exposure to the stated target of young adult smokers, the trial court improperly accepted the truth of the hearsay evidence of the substance and results of those competitors' new policies and practices regarding advertising exposure to youth. However, because there is sufficient other evidence showing other media ***1283** advertising schedules could reduce advertising exposure to youth while maintaining significant exposure to Reynolds's stated target, Reynolds does not demonstrate that the outcome at trial would have been more favorable to Reynolds absent the competitor-related evidence that alternative media advertising schedules were available.

Reynolds's media director/senior manager for media planning (Ittermann) testified that in the period of June 2000 to March 2001 she was aware that Philip Morris had adopted a policy of not advertising in a magazine with more than 15 percent youth composition or with an exposure to more than two million youth. Ittermann had also looked at the application of that Philip Morris policy on the magazines in which Reynolds advertised. Further, as acknowledged by Reynolds, the trial court properly admitted Reynolds-created documents regarding its competitors' policies to the extent probative of Reynolds's state of mind. On this record, those documents were at most cumulative to other evidence that Reynolds targeted its tobacco advertising to youth.

B

Sanction Award

At trial, the parties agreed the Consent Decree entitled the People to seek monetary sanctions for violation of the Consent Decree.[FN17] The trial court's judgment ordered Reynolds to pay the People $20 million in monetary sanctions based on its ****343** finding that Reynolds violated section V(A) of the Consent Decree. Reynolds asserts the trial court abused its discretion and attacks the $20 million sanction award as unsupported by the evidentiary record and without findings supporting the amount imposed. (*Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 558, 102 Cal.Rptr.2d 350; *Winikow v. Superior Court* (2000) 82 Cal.App.4th 719, 726, 98 Cal.Rptr.2d 413; *Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 996, 35 Cal.Rptr.2d 93; *Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 124, 260 Cal.Rptr. 369.) Reynolds also contends the amount of sanctions awarded for its conduct in California violated due process ***1284** because it was based on Reynolds's spending on nationwide print advertising without evidence of Reynolds's spending on advertising in California. (Cf. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 1521-1522, 155 L.Ed.2d 585 (*State Farm*); *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 571-572, 116 S.Ct. 1589, 134 L.Ed.2d 809 (*BMW*); *White v. Ford Motor Co.* (9th Cir.2002) 312 F.3d 998, 1015-1016, 1018, 1020 (*White*).) The People assert both the imposition and amount of sanctions were reasonable, and contend the award was justified by Reynolds's "knowing, flagrant, and persistent violation of the preexisting injunction, its steadfast refusal to cure its violation voluntarily, and the magnitude of the harm it inflicted." However, although the trial court gave adequate reasons for imposing sanctions, the court improperly based the amount of the sanction award on (1) Reynolds's national advertising spending rather than on Reynolds's advertising spending in California and (2) Reynolds's wealth. We conclude the portion of the judgment awarding sanctions must be reversed.

> FN17. Section VI(A) of the Consent Decree provides in relevant part: "For any claimed violation of this Consent Decree and Final Judgment, in determining whether to seek an order for monetary, civil contempt or criminal sanctions for any claimed violation, the Attorney General shall give good-faith consideration to whether: (1) the Participating Manufac-

turer that is claimed to have committed the violation has taken appropriate and reasonable steps to cause the claimed violation to be cured, unless that party has been guilty of a pattern of violations of like nature; and (2) a legitimate, good-faith dispute exists as to the meaning of the terms in question of this Consent Decree and Final Judgment. The Court in any case in its discretion may determine not to enter an order for monetary, civil contempt or criminal sanctions."

1

Entitlement to Sanctions

The trial court stated the sanctions against Reynolds were "[b]ased on the evidence presented in this case" and recited in its statement of decision the evidence that entitled the People to sanctions. We summarize the evidence detailed by the court and the court's findings based on that evidence.

(a)

Evidence on Sanctions

After signing the MSA in 1998 and until June 2000, Reynolds made no changes in its print media policies, did not include the goal of reducing tobacco advertising exposure to youth in its marketing plans, avoided conducting media research to determine the extent to which its print advertising was exposed to youth, and otherwise took no action to evaluate whether it was meeting its professed goal of reducing youth smoking. Instead, Reynolds followed its previous pattern of avoiding advertising in magazines with more than a 50 percent composition of youth.[FN18]

FN18. The court noted that in December 1999 after state attorneys general had expressed concern to Reynolds about youth targeting in magazine advertisement placement, Reynolds's general counsel wrote to the National Association of Attorneys General Tobacco Committee: "We are unwilling to preclude ourselves from advertising in publications which have more than a certain number of 'readers' who are under the age of 18 when that number is less than 50 percent of 'readers.' This would preclude us from one or more of the most popular publications, even if this 'readership' overwhelmingly was adult-a result which would damage us competitively and unacceptably oust us from one of the remaining media through which we can communicate with adults who smoke."

***1285** Although Reynolds subsequently made changes in its media advertising ****344** schedule, those changes had minimal impact in reducing exposure of its advertising to youth. After Reynolds in June 2000 announced a 33 1/3 percent youth composition policy, the only tangible consequence of that change was the removal of one magazine (Vibe) from Reynolds's media advertising schedule. In March 2001 on the date the People filed this lawsuit against Reynolds, Reynolds announced a policy of not advertising in any magazine having a youth composition over 25 percent according to MRI's or Simmons's data. As a result of that change in policy, Reynolds eliminated one publication in which it was advertising (Spin) and removed from its media advertising schedule three publications in which it was not advertising.

Meanwhile, in 1999 through 2001 in devising media plans for its nationwide magazine advertising, Reynolds used MRI's data to measure the quantitative effectiveness and demographic composition of the audience to which its print media campaign was exposed, including reach, frequency and target rating points. Reynolds also used MRI's data to measure the effectiveness of its print advertising in tar-

geting various segments of the adult market.

The stated target of most of Reynolds's print media advertising was young adult smokers age 21 to 34. Reynolds's Camel brand also targeted adults age 21 to 24. MRI's 1997-2001 data indicated exposure of Reynolds's print media advertising to its stated target of young adult smokers and to youth age 12 to 17 was essentially the same. Further, according to MRI's data based on 38 teen-measured magazines, Camel advertising exposure to youth increased after the MSA was signed. Moreover, Reynolds advertised in many magazines exposed to large youth composition, including Sports Illustrated with exposure to about 5 million youth. In addition to advertising in magazines exposed to a higher percentage of youth than young adult smokers, Reynolds also advertised in many magazines exposed to youth at disproportionately higher levels than adult smokers.[FN19]

> FN19. The court noted that 89 percent of Camel advertisements in year 2000 were in magazines with youth composition exceeding the percentage of youth (10.4 percent) in the United States population.

After signing the MSA, Reynolds exposed its tobacco advertising to youth at levels similar to those of targeted groups of adult smokers. Although Reynolds had access to MRI's and Simmons's data that would have revealed the reach and frequency of Reynolds's advertising to youth to be about the same as for the stated target groups of adult smokers, Reynolds did not ***1286** examine those data. Further, it was possible to develop and implement media advertising schedules and measure their success with the purpose of reducing exposure of cigarette advertising to youth while retaining significant exposure to adult smokers. Minimizing exposure to certain groups was also possible because the character of magazine advertising allowed advertisers to identify demographic groups based on age, income and lifestyle. Reynolds could have developed media advertising schedules to achieve effective exposure through print advertising to adult smokers while also significantly reducing exposure to youth.[FN20] However, despite its stated post-MSA policy of avoiding targeting youth in its advertising, Reynolds did not attempt to measure the success of that ****345** goal although it could have done so through use of available data it used to measure its other media-related goals.

> FN20. The court noted the People's media planning expert (McCullough) developed media advertising schedules that achieved effective exposure through print advertising to 87 to 92 percent of adult smokers while demonstrating significant reduction to youth exposure.

(b)

Trial Court's Findings on Entitlement to Sanctions

[22] Federal case law involving punitive damages is instructive with respect to the People's entitlement to sanctions. In *State Farm, supra,* 123 S.Ct. at page 1521, the Supreme Court stated the " 'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' " Further, the Supreme Court has "instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical [in contrast] to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. [Citation.] The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*Ibid.*) We summarize the trial court's findings bearing on the People's entitlement to sanctions.

In 1999 and 2000, Reynolds did nothing to reduce its tobacco product advertising exposure to youth. In 2001 Reynolds did "very little." Further, Reynolds took action only after being given notice of the People's intent to file this lawsuit, and waited until the day this action was filed to take insufficient remedial action. Moreover, despite access to data by which exposure to youth could have been compared to exposure to adult smokers, ***1287** Reynolds "intentionally avoided" examining those data that would have confirmed whether Reynolds was succeeding in its stated intention to avoid exposure of its tobacco advertising to youth. Reynolds's failure to measure whether it was meeting its stated goal of minimizing exposure to youth "casts doubt" on Reynolds's intent to abide by either the MSA's terms or Reynolds's expressed intention to avoid targeting youth. In "a corporate world where most goals are set and then measured, it strains credibility that [Reynolds] seriously set avoidance of Youth exposure as a goal, and yet, unlike any other goals it set for its performance, refused to measure the attainment of this goal." Examination of available data would have shown that Reynolds's advertising exposed 97.1 percent of youth 68.2 times on average in 1999; 95.2 percent of youth 54.7 times on average in 2000; and 85.5 percent of youth 16.3 times on average in 2001. Those figures were substantially similar to the figures for targeted adult smokers during those periods.

Further, at various times between 1999 and 2001, Reynolds's policy allowed it to advertise in magazines with youth composition of up to 50, 33 1/3 or 25 percent. Although Reynolds's president (Beasley) "professed" not to know that only about 10 percent of the United States population was made up of teenagers, the evidence made it "reasonable to infer" that Reynolds's "knowledgeable and talented marketing people ... knew this fact." Moreover, during those years, Reynolds's policy also allowed it to advertise in magazines in which youth represented two and one-half to five times the proportion of youth in the population. Additionally, between 1998 and 2001, Reynolds devoted a substantial portion of its advertising to magazines with a disproportionately high youth composition, including rock entertainment music****346** magazines (Spin, Vibe and Rolling Stone) and motor magazines (Hot Rod and Car and Driver). Under those circumstances, it was "reasonable to conclude" that Reynolds, even without examining all the data at its disposal, knew with substantial certainty that it was exposing its print advertising to youth at levels at least as great as its exposure to adults.

Additionally, Reynolds was losing market share and believed it had to be more aggressive than other tobacco companies in its advertising to prevent loss of additional market share "even though the likely effect of these efforts" would cause significant exposure of its tobacco advertising to youth. Thus, to achieve its marketing goals in the most direct manner, Reynolds "willingly engaged in an aggressive print advertising campaign to maximize exposure to targeted groups such as Young adult smokers" while "simply choosing to ignore" the substantial certainty of significant exposure to youth. Although in 2001 a Reynolds executive announced that Reynolds understood the MSA sought to effect a dramatic reduction of tobacco advertising exposure to youth ***1288** while allowing limited communications with adult smokers, Reynolds nevertheless "conducted itself in a manner inconsistent with its understanding of the [MSA's] mandate" by pursuing an extensive advertising campaign aimed at young adult smokers without taking any action to effect a reduction of exposure to youth.

Moreover, testimony by media experts suggested that if a specific age group like young adults was targeted, other age groups closest to the targeted age group would also be reached in higher proportion than groups more distant in age from the targeted group. Further, a substantial portion of Reynolds's advertisements appeared in publications in which youth composition was disproportionately higher than young adult composition. The "totality of this evidence leads to the logical conclusion that

it was or should have been apparent" to the people managing Reynolds's "multimillion dollar sophisticated print advertising campaign" that its tobacco advertising was exposed to youth at levels substantially similar to targeted adult smokers.

"Taking all of the evidence presented into account, it appears likely [Reynolds] studiously avoided analyzing" the reach and frequency of its advertising to youth age 12 to 17 or comparing those figures to the reach and frequency of its target group of young adult smokers because Reynolds "knew the likely result of such analysis." That evidence also provides strong circumstantial support for the conclusion of the MRI data that Reynolds succeeded in exposing its advertising to youth at essentially the same levels as the exposure to its targeted young adult smokers and thus violated the MSA's prohibition on targeting youth.

In sum, in its statement of decision the trial court made detailed references to the evidence and numerous findings adequate to support its determination that sanctions were warranted for Reynolds's conduct in not taking appropriate and reasonable steps to cure the claimed violation of MSA, subsection III(a) and Consent Decree, section VI(A). (*State Farm, supra,* 123 S.Ct. at p. 1521.) FN21

> FN21. Reynolds's contention that sanctions were unwarranted because the parties assertedly had a "legitimate, good-faith disagreement about the proper interpretation" of MSA, subsection III(a) is not on this record persuasive. (Consent Decree, § VI(A).) Reynolds asserts the basis for the sanction award was the trial court's "aggressive interpretation" of subsection III(a), an interpretation characterized by Reynolds as "at best ambiguous." However, consistent with Reynolds's proffered construction of subsection III(a)'s prohibition on youth targeting, we have interpreted the subsection as requiring proof of intent to demonstrate a violation of that prohibition. Based on our review of this record in accordance with our interpretation of subsection III(a), Reynolds violated that subsection by targeting youth because it knew with substantial certainty its tobacco advertising was exposed to youth to the same extent it was exposed to young adults. The sanctions are based on that violation.
>
> Reynolds's contention that the sanction award improperly punished Reynolds's First Amendment communication with adult smokers is also unpersuasive. Reynolds was sanctioned not for its constitutionally protected communication with adult smokers but instead for its violation of MSA, subsection III(a) by targeting youth in its tobacco advertising.

****347 *1289** 2

Amount of Sanction Award

[23] Although on this record the trial court could properly conclude the People were entitled to an award of sanctions, the court did not provide an adequate rationale for the amount of sanctions imposed.

The People based their request for $20 million in sanctions on Reynolds's nationwide advertising spending, not on its California advertising spending. Specifically, in arguing to the court, the People asserted: "The People believe that monetary sanctions of $20 million is reasonable in this case. That represents about 10 percent of the money that Reynolds spent on magazine advertising during the relevant three-year period, and is less than one percent of Reynolds's cash on hand at the end of 2001. This is reasonable." However, the holdings in various federal cases involving punitive damages lead to a conclusion that the award of sanctions for Reynolds's conduct in California could not properly be based on Reynolds's nationwide financial figures without violating Reynolds's due process rights. (

State Farm, supra, 123 S.Ct. at pp. 1551-1522; *BMW, supra,* 517 U.S. at pp. 571-572, 116 S.Ct. 1589; *White, supra,* 312 F.3d at pp. 1015-1016, 1018, 1020.)

[24][25][26] Punitive damages are "aimed at deterrence and retribution." (*State Farm, supra,* 123 S.Ct. at p. 1519.) "While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. [Citations.] The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (*Id.* at pp. 1519-1520.) "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." (*Id.* at p. 1520.)

[27][28][29][30] "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." (*State Farm, supra,* 123 S.Ct. at p. 1522.) However, a "State cannot punish a defendant for conduct that may have been lawful where it ***1290** occurred." (*Ibid.*) [FN22] Moreover, as a general rule, a ****348** State does not have "a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." (*Ibid.*) Similarly, in *White, supra,* 312 F.3d at page 1018, the court stated that " 'a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' ... conduct in other States,' whether the extraterritorial conduct is lawful or not." (Fn.omitted.) Thus, a "punitive damages award that encompasses a defendant's extraterritorial conduct may be unconstitutional even if the size of the award itself ... is not outside the bounds of due process." (*Id.* at p. 1016, fn. omitted.) [FN23] In our view, the principles applicable to punitive damage awards are applicable to the sanctions imposed in this case.

FN22. In *State Farm, supra,* 123 S.Ct. at page 1521, the Supreme Court noted: "While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.... [¶] This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct [ed] toward the Campbells."

FN23. In *White, supra,* 312 F.3d 998, the "evidence focused on the number of vehicles Ford sold nationally, and the number of parking brake failures reported nationally." (*Id.* at p. 1015.) "In essence, the jury was asked to measure damages by Ford's harm to the whole country." (*Ibid.*) Thus, the court reversed a punitive damages award on the ground the "award unconstitutionally allowed a Nevada jury to punish Ford for out-of-state conduct...." (*Id.* at p. 1020.)

[31] Here, the People's request for $20 million in sanctions was based on Reynolds's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California. Similarly, the trial court's statement of decision focused on Reynolds's nationwide financial numbers. (*White, supra,* 312 F.3d at p. 1015.) Specifically, the court found: (1) Between 1999 and 2001, Reynolds spent more than $200 million on print advertising; (2) in 1999 Reynolds earned $195 million; in 2000, $352 or $353 million; and in 2001, $444 million; and (3) at the end of 2001, Reynolds's holding company held cash and short-term investments of more than $2.2 billion.

However, the People have not demonstrated that they have any interest in punishing Reynolds for its conduct outside California's jurisdiction. (*State Farm, supra,* 123 S.Ct. at p. 1522; *White,* at pp. 1015-1016, 1018, 1020.) On this record we cannot say that in awarding sanctions based upon Reynolds's nationwide numbers, the trial court was vindicating only California's "interest in protecting its citizens." (*White,* at p. 1015.) Further, Reynolds's "extraordinary wealth" does not support the amount of the sanction award. A defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." (*State Farm,* at p. 1525.) Accordingly, on this record the award of sanctions in the amount of $20 million must be reversed.

***1291** III

DISPOSITION

The portion of the judgment awarding the People sanctions against Reynolds is affirmed as to entitlement but reversed as to amount and remanded for further proceedings. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

WE CONCUR: McCONNELL, P.J., and HALLER, J.

Cal.App. 4 Dist.,2004.
People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.
116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317, 04 Cal. Daily Op. Serv. 2378, 2004 Daily Journal D.A.R. 3500

END OF DOCUMENT

EDWARD H. PERRY ET AL., APPELLANTS,
v.
THOMAS M. QUACKENBUSH, RESPONDENT.
No. 14497.

Supreme Court of California
December 31, 1894.

BUILDING CONTRACT--NONPERFORMANCE--CANCELLATION OF NOTE AND MORTGAGE.

The owner of a lot who has entered into a contract with a builder to construct a house upon the lot may, upon failure of the builder to construct the building in a good and workmanlike manner, and to furnish the quantity and quality of materials provided for in the contract, and to construct the building substantially according to the contract, maintain an action to have a note and mortgage upon the lot which were executed and delivered in consideration of the contract price for the building, delivered up and canceled.

ID.--FINDINGS--SUPPORT OF JUDGMENT.

Where the court found that the building had not been constructed according to the contract, and that it had not been accepted by the plaintiffs as performed, and further found that there was a difference of three hundred and fifty dollars in the value of the building as actually constructed, and as it should have been constructed under the agreement pursuant to the specifications, a judgment that three hundred and fifty dollars be deducted from the amount secured by the note and mortgage, and adjudging that the residue of the note and mortgage was valid, is not supported by the findings of fact, and the plaintiff is entitled to a judgment upon the findings canceling the note and mortgage.

ID.--FINDINGS--PROBATIVE FACTS--ULTIMATE FACTS.

It is the province of the trial court to find ultimate and not probative facts, and findings of probative facts will not, in general, control, limit, or modify the finding of the ultimate facts, or tend to establish that the ultimate fact was found against the evidence.

ID.--INTENTIONAL DEPARTURE FROM CONTRACT--ATTEMPTED FRAUD--SUBSTANTIAL PERFORMANCE.

Where the findings show an intentional departure of the builder from the contract, and indicate an attempted fraud on his part, there can be no substantial performance of the contract; nor does the finding that the difference between the value of the house as actually constructed and as it should have been constructed was only three hundred and fifty dollars tend to show that the contract had been substantially performed.

ID.--RIGHT OF OWNER TO STAND UPON CONTRACT.

The owner has a right to have built the structure contracted for, and to have his plans substantially embodied in the work, regardless of whether his caprices expressed in the contract would have added to the value of the structure or lessened its value.

ID.--SUBSTANTIAL PERFORMANCE--QUESTION OF FACT--FINDING.

In order that the contractor may recover the contract price less damages caused by the failure to perform the contract there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith, and whether these facts exist is a matter to be determined by the jury or the court sitting as a jury, and substantial performance must be found as a fact.

ID.--APPEAL--ORDER AFTER JUDGMENT STRIKING OUT COST BILL--JURISDICTION--DISMISSAL.

An appeal from an order made after judgment striking out a cost bill does not lie where the amount of the costs claimed is less than three hundred dollars;

and such an appeal must be dismissed for want of jurisdiction.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco and from an order made after judgment striking out a cost bill.

The facts are stated in the opinion.

***300** *Sullivan & Sullivan,* for Appellants.

An ageement to erect a house in a specified manner is an entire and indivisible contract, and is not complied with, except by the construction of a building in every essential particular in accordance with the plans and specifications. (*Neville v. Frost,* 2 E. D. Smith, 63; *Smith v. Brady,* 17 N. Y. 180; 72 Am. Dec. 442;*Tucker v. Williams,* 2 Hilt. 563; *Pullman v. Corning,* 9 N. Y. 93; *Hill v. School Dist.,* 17 Me. 322. See, also, *Feagan v. Meredith,* 4 Mo. 514; *Miller v. Phillips,* 31 Pa. St. 218; *Fauble v. Davis,* 48 Iowa, 462; *Denton v. Atchison,* 34 Kan. 438; *Feinberg v. Weiher,* 19 N. Y. Supp. 215; *Taylor v. Beck,* 13 Ill. 376; *Marsh v. Richards,* 29 Mo. 99; *Smith v. Coe,* 2 Hilt. 365;*Ellis v. Hamlen,* 3 Taunt. 52; Addison on Contracts, 392.) The use or occupation of the house by appellants is not a waiver of their right to demand a compliance by respondent, in every essential particular, with the plans and specifications. (*Smith v. Coe,* 2 Hilt. 369; *Smith v. Brady,* 17 N. Y. 173; 72 Am. Dec. 442.) The respondent's agreement to construct and build a house in a good and workmanlike manner, according to the plans and specifications agreed upon by the parties, was the consideration for the note and mortgage given by appellants to respondent. (Civ. Code, sec. 1605; *Wilcox v. Lattin,* 93 Cal. 594.) The failure of the respondent to construct and build the house in a good and workmanlike manner, according to the plans and specifications agreed upon by the parties,***301** was such a failure of consideration as to entitle the appellants to a rescission of their agreement. (*Wilcox v. Lattin,* 93 Cal. 594;Civ. Code, sec. 1689; *Hallidie v. Sutter St. R. R. Co.,* 63 Cal. 577; *Brown v. Foster,* 113 Mass. 136; 18 Am. Rep. 463; *Loaiza v. Superior Court,* 85 Cal. 11; 20 Am. St. Rep. 197.) The appellants, having rescinded their contract and having offered to restore every thing of value received by them under the contract, are entitled to the aid of a court of competent jurisdiction in securing to them the results and fruits of the rescission. (*Loaiza v. Superior Court,* 85 Cal. 31; 20 Am. St. Rep. 197; Civ. Code, sec. 1689; *Campodonico v. Grossini,* 66 Cal. 358; *Domingo v. Getman,* 9 Cal. 98.)

Pringle, Hayne & Boyd, for Respondent.

The party who has the possession and enjoyment of the labor and materials of another must make compensation for what he has received, after full allowance has been made to him for any damage he may have sustained for the nonperformance of the contract in its entirety. (*Ligget v. Smith,* 3 Watts, 331; 27 Am. Dec. 358; *Haywood v. Leonard,* 7 Pick. 181 ; 19 Am. Dec. 268; *Britton v. Turner,* 6 N. H. 481; 26 Am. Dec. 713; *Crouch v. Gutmann,* 134 N. Y. 50; 30 Am. St. Rep. 608; *Nolan v. Whitney,* 88 N. Y. 648; *Phillip v. Gallant,* 62 N. Y. 256; *Volk v. McKenzie,* 16 N. Y. Supp. 741; *Flaherty v. Miner,* 123 N. Y. 385; *Woodward v. Fuller,* 80 N. Y. 313; *Gustaveson v. McGay,* 12 Daly, 426;*Anderson v. Meislahn,* 12 Daly, 158;*Morton v. Harrison,* 52 N. Y. Super. Ct. 320; *Yeats v. Ballentine,* 56 Mo. 533; *Rude v. Mitchell,* 97 Mo. 371; *Fleischmann v. Miller,* 38 Mo. App. 181;*Ætna Iron Works v. Kossuth Co.,* 79 Iowa, 43; *Harlan v. Stufflebeem,* 87 Cal. 508; *Griffith v. Happersberger,* 86 Cal. 613; *Katz v. Bedford,* 77 Cal. 321, 322; *Voorman v. Voight,* 46 Cal. 397;*Sticker v. Overpeck,* 127 Pa. St. 446; *White v. McLaren,* 151 Mass. 556; *Gleason v. Smith,* 9 Cush. 484; 57 Am. Dec. 62; *Moulton v. McOwen,* 103 Mass. 598; *Meincke v. Falk,* 61 Wis. 623; ***302**50 Am. Rep. 157; *Gilman v. Hall,* 11 Vt. 511; 34 Am. Dec. 700; *Horn v. Batchelder,* 41 N. H. 89; *Phelps v. Beebe,* 71 Mich. 554; *Leeds v. Little,* 42 Minn. 414; *Kane v. Stone Co.,* 39 Ohio St. 10, 11.) The continuous use and occupation of the building by appellants would entitle the contractor to recover the actual value of the building, even if there had been no substantial performance. (

Pinches v. Swedish etc. Church, 55 Conn. 187; *Hayward v. Leonard,* 7 Pick. 181; 19 Am. Dec. 268; *Hayden v. Madison,* 7 Greenl. 78; *Harris Co. v. Campbell,* 68 Tex. 22; 2 Am. St. Rep. 467; *Wildey v. Fractional School Dist.,* 25 Mich. 426; *Kelly & Bragg v. Bradford,* 33 Vt. 39; *Horn v. Batchelder,* 41 N. H. 90; *Neuman v. McGregor,* 5 Ohio, 349; 24 Am. Dec. 293.) The comparatively slight damage caused by the defects and variations from the specifications cannot possibly be said to be such a failure of consideration as entitles appellants to a rescission and cancellation of the note and mortgage. (Civ. Code, sec. 1691, subds. 2, 3407; *State v. McCauley,* 15 Cal. 458; *Fratt v. Fiske,* 17 Cal. 384; *Buckner v. Pacific etc. Ry. Co.,* 53 Ark. 16; 21 Am. & Eng. Ency. of Law, 84; 2 Parsons on Contracts, 679; 2 Kent's Commentaries, sec. 480; *Burge v. Cedar Rapids etc. R. R. Co.,* 32 Iowa, 101; *Whincup v. Hughes,* L. R. 6 C. P. 78; Bishop on Contracts, sec. 828; *Desha v. Robinson,* 17 Ark. 238; *Norton v. Jackson,* 5 Cal. 265; *Reese v. Gordon,* 19 Cal. 147; *Hodgdon v. Golder,* 75 Me. 293; *Wentworth v. Dows,* 117 Mass. 14; 2 Kent's Commentaries, *472-74; Edwards on Notes and Bills, 333.)

TEMPLE, C.

This is an appeal from the judgment and upon the judgment-roll.

The complaint shows that plaintiffs own a described tract of land; that on the 21st of January, 1887, they entered into a contract with the defendant, whereby defendant agreed, in consideration of the sum of three thousand dollars, to construct and build a house on said lot. As part of said contract plaintiffs executed and delivered to defendant their promissory note for the sum ***303** of three thousand dollars, and a mortgage to secure the same on the described real estate. The note and mortgage are recited at length in the complaint.

Thereupon the defendant commenced the construction of the house, but in building the same did not furnish the quantity and quality of materials provided for in the contract.

That he did not construct said building in a good and workmanlike manner, and did not construct the building according to the contract, and has not performed his agreement.

Plaintiffs specify as defects: He agreed in the construction of the foundations to use good, hard brick and lay seven courses, and to construct twelve piers of brick laid in six courses. In violation of the agreement he used old, second-hand brick of poor quality, that had been used in other buildings, and laid the same in courses in five and six instead of seven, and constructed only six piers of brick of the same kind laid in three courses.

2. He agreed to use in the construction of the frame of said building the best kind of lumber; contrary to his agreement he used only second-class lumber and second-hand and refuse lumber that had been used in other buildings.

3. He agreed to use in the construction of the roof the best quality of shingles; contrary to his agreement he used second-hand lumber and second-class shingles.

4. He agreed to paint the building with two coats of metallic paint, but used no metallic paint at all, but cheap and inferior paint.

5. In divers other respects he disregarded and failed to carry out the agreement. That there is one thousand dollars difference in the value of the house as constructed and as called for under the agreement.

The answer denies all the allegations of the complaint in respect to the failure to perform the contract, and avers that the building was accepted by plaintiffs after a careful examination.

***304** The action was brought to have the note and mortgage canceled. Upon the issues made by the pleading the court found: That the construction of the building was completed before the commencement of this action; that in constructing said build-

ing defendant did not furnish the quantity and quality of materials provided for in said contract; that defendant did not construct said building in a good and workmanlike manner; that defendant did not perform said contract nor construct said building according to said agreement. There are, then, findings specifying defects as in the complaint, and finding all in favor of plaintiffs as alleged, except that as to the roof it finds that the shingles were of the quality agreed upon; and as to the painting, that defendant did not agree to use metallic paint, but in painting the building he used cheap and inferior material, contrary to his agreement.

After these specific findings is the following finding: "That in divers other respects defendant disregarded his said specifications and failed to carry out his agreement."

It was then found that "there is three hundred and fifty dollars difference in value of said building as actually constructed and as it should have been constructed under said agreement pursuant to said specifications."

It was found that the note and mortgage if left outstanding may cause serious injury to plaintiffs. That the building was never accepted or received by the plaintiffs in full or part satisfaction of the contract, but plaintiffs took possession of the building under protest, and with notice to the defendant that they were dissatisfied with it, and would not accept it, and offered "to deliver up to defendant said building if defendant would cancel said note and mortgage."

As conclusion of law from these facts the court found that plaintiffs were entitled to judgment; that three hundred and fifty dollars be deducted from the amount secured by the note and mortgage, and that, as to the residue, the note and mortgage were adjudged valid. ***305** A judgment was entered in accordance with the conclusion of law.

From this judgment plaintiffs have appealed, claiming that it is not supported by the findings of fact.

This contention must be sustained. The issues were whether the building had been constructed according to contract, and, if it had not been so constructed, whether it had been accepted by the plaintiffs as performed. On both these issues the court found for the plaintiffs.

Respondent contends that what he calls the old rule upon the subject of performance has been relaxed, and now a more liberal rule, which only requires a substantial performance instead of a literal compliance with all the provisions of the contract, prevails. But, conceding this, the rule still is that the contract must be substantially performed.

The court here did not find that what was done, though not a literal compliance, amounted to a substantial performance, or that the failure was only in trivial matters. Upon every material issue the facts are found for the plaintiffs, and unless their complaint was demurrable, which is not claimed, they are entitled to the judgment demanded.

Respondent's counsel claims that the ultimate fact found of nonperformance is a conclusion from the probative facts found, and that the finding of probative facts being more specific must control. This point cannot be maintained, for several reasons:

1. Findings of probative facts will not, in general, control, limit, or modify the finding of the ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact it would determine that the evidence was insufficient to justify the decision. This, it has been repeatedly held, cannot be done in this mode.

In *Smith v. Acker*, 52 Cal. 217, the court said: "It has been held that where facts are found from which ***306** the existence of the ultimate fact must be conclusively inferred the finding is sufficient as a finding of the ultimate fact. But, when the ultimate fact *is found,* no finding of probative facts, which may tend to establish that the ultimate fact

was found against the evidence, can overcome the principal finding." And it is said: "This point could only have been made on motion for a new trial, or on appeal on a statement or bill of exceptions specifically pointing out the deficiencies in the evidence." In other words the opposing party must be allowed to show what the evidence was, and is not concluded by the finding of probative facts.

This decision was expressly affirmed by this court in *Gill v. Driver,* 90 Cal. 72. See, also, *Pico v. Cuyas,* 47 Cal. 174; *Barrante v. Garratt,* 50 Cal. 112; *Jones v. Clark,* 42 Cal. 180; *Mathews v. Kinsell,* 41 Cal. 512; *Downing v. Graves,* 55 Cal. 544.

2. The probative facts found are not inconsistent with the ultimate fact found; on the contrary, they tend to support it.

It is found, for instance, that defendant did not furnish the quantity or quality of materials called for, and did not construct the building in a good and workmanlike manner. That the foundation was not as large as contracted for, and instead of good hard brick he used old, second-hand brick of poor quality. The piers were only one-fourth part as large as called for, and of inferior old brick, and only half as many of them.

There was no first-class lumber in the framework, and some of it was old refuse lumber from other buildings. The paint used was inferior to that called for in the agreement. And then, to prevent the conclusion that the ultimate fact of nonperformance was a deduction from the specific facts stated, it is added that in divers other respects the contract had not been performed.

3. If there were no other findings save the specific findings I think it a case where the ultimate fact that the contract has not been substantially performed would ***307** be necessarily inferred. The findings may be, in fact, unjust to defendant, but we cannot go behind them; if true, they show an intentional departure from the contract--in fact, an attempted fraud.

Under such circumstances the court would not have been justified in finding that there had been a substantial performance.

Nor does the finding that the difference between the value of the house as actually constructed and as it should have been was only three hundred and fifty dollars tend to show that the contract had been substantially performed. That might have been true, though the structure were totally unlike the house contracted for. The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the court can have an occasion to estimate the deficiencies.

The authorities are very clear upon this point. There are a variety of cases to which the so-called modern equitable rule had been applied.

One is where the contractor fails to complete the structure. In such case it is said, if the contractor has done or furnished any thing of which the owner avails himself, such owner may be made to pay the value of it after deducting all damages resulting from the failure of the contractor. In such case it has been sometimes said that it does not matter why the contractor failed to perform.

Another case is where there is a defect which can be remedied. Here the contractor may recover the contract price, less damages caused by the failure, including cost of supplying the deficiency.

Another case is where the contractor has endeavored in good faith to perform his contract, and has substantially***308** performed, but there are some unimportant defects arising through accident or inadvertence.

Here the defects not being such as defeat or materially change the design embodied in the contract, the

contractor may recover, less damages occasioned by the failure.

In such case there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith, and whether these facts exist is a matter to be determined by the jury or the court sitting as a jury. Substantial performance must be found.

The rule is laid down in *Kelly v. Bradford,* 33 Vt. 35. The court says: "The party must have intended in good faith to comply with the terms of the contract. The spirit of the contract must be faithfully observed though the very letter of it fail. Hence a voluntary abandonment of the agreement or a willful departure from its stipulations are not allowed. Still, if the contract is substantially kept, a failure in minor particulars--though plainly ascertainable and patent to observation if consistent with good faith, if not wanton or willful--will not prevent a recovery upon the *quantum meruit.*"

In *Hayward v. Leonard,* 7 Pick. 181, 19 Am. Dec. 268, it is said: "When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant,* where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract and a substantive execution of it."

In *Elliott v. Caldwell,* 43 Minn. 357, it is said: "The omissions and deviations were not slight and easily remedied, but substantial and remediless, except by tearing down and rebuilding the structure. Neither were they the result of mistake or oversight, but intentional and even fraudulent. And we may remark here, in passing, that the very nature of the deviations as in using inferior and defective material all through the ***309** building is intrinsic evidence strongly supporting the finding that defendant acted fraudulently. No case, we think, can be found where the doctrine of substantial performance was applied to such a state of facts. To justify a recovery upon the contract as substantially performed, the omissions or deviations must be the result of a mistake or inadvertence, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact for the jury or trial court."

In *Crouch v. Gutmann,* 134 N. Y. 45, 30 Am. St. Rep. 608, the rule is stated in these words: "Since the rule of exact or literal performance has been relaxed and recovery may be founded upon substantial performance, that term, in its practical application to building contracts, has perhaps necessarily become somewhat indefinite otherwise than that the builder must have in good faith intended to comply with the contract, and shall substantially have done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract and its purpose cannot, without difficulty, be accomplished by remedying them."

There is no necessity for multiplying citations upon this point. So far as I have extended my investigations there is no conflict in the cases.

Since the rule as to what shall constitute performance has become so indefinite, it is an important consideration, in determining whether there has been a substantial performance, that the deviations are so slight that they might have been made by one who was honestly endeavoring to comply with his contract.

Good faith, however, on the part of the contractor is ***310** not enough. The owner has a right to a structure in all essential particulars such as he has contracted for, and to authorize a court or jury to find that there has been a substantial performance it must be found that he has such a structure. The court cannot say that any thing is immaterial which the parties have made material by their contract.

One has the right to determine for himself what he deems a good foundation or what materials he desires to be used, and if he contracts for them neither the contractor nor the court has the right to compel him to accept something else which may be shown by the witnesses to be just as good or even better. No precise rule can or ought to be laid down upon this subject, but whenever such a case arises courts and juries should see to it that the design of the owner shall not be defeated in any important respect.

I think the judgment should be modified by giving plaintiffs a decree in accordance with the prayer of the complaint.

There is another appeal contained in the same transcript, an appeal from an order made after judgment striking out plaintiffs' cost bill. The amount of the costs claimed was less than three hundred dollars; this court, therefore, has no jurisdiction to hear the appeal. (*Fairbanks v. Lampkin*, 99 Cal. 429.)

BELCHER, C., and SEARLS, C., concurred.
For the reasons given in the foregoing opinion the judgment is modified, by giving plaintiffs a decree in accordance with the prayer of the complaint, and that the appeal from the order made after judgment striking out plaintiffs' cost bill be dismissed.
GAROUTTE, J., HARRISON, J., VAN FLEET, J.
Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

Cal. 1894.
Perry v. Quackenbush
105 Cal. 299, 38 P. 740

END OF DOCUMENT

RAY THOMAS, INC. (a Corporation), Respondent,
v.
MARY E. COWAN, Appellant.
Civ. No. 3785.

District Court of Appeal, Third District, California.
May 24, 1929.

HEADNOTES

(1) CONTRACTS--PERFORMANCE--PREVENTION BY ADVERSE PARTY.
--A party to a contract cannot take advantage of his own act or omission to escape liability therefrom, and performance of a contract is excused when prevented by the acts of the opposite party, or is rendered impossible by him.
See 6 **Cal. Jur.** 436; 6 **R. C. L.** 1012.

(2) VENDOR AND VENDEE--OPTION--ACCEPTANCE PREVENTED BY VENDOR--TIME-- SPECIFIC PERFORMANCE.
--Where the vendor by her own act prevented service upon her of a written notice of acceptance of an option to purchase within the time limited, and on receipt of notice of acceptance by the assignee of the option on the day after the time expired approved the assignment and signed an *addenda* thereto, specifying the manner of payment of installments, the vendor could not, in an action by the assignee for specific performance, defeat plaintiff's recovery on the ground that the option to purchase was not exercised within time.

(3) SPECIFIC PERFORMANCE--REPUDIATION OF CONTRACT--TENDER OF PERFORMANCE.
--Where a vendor repudiates the terms of a contract and indicates that he will be no longer bound thereby, further tender of performance by the vendee before suit for specific performance is unnecessary.
See 23 **Cal. Jur.** 460; 25 **R. C. L.** 321.

(4) ID.--VENDOR AND VENDEE--PLEADING.
--Where the vendor has absolutely repudiated his agreement to sell, it is sufficient for the vendee to set forth in his complaint for specific performance that he is ready, willing and able to perform his part of the contract.
See 23 **Cal. Jur.** 499; 25 **R. C. L.** 332.

(5) VENDOR AND VENDEE--REPUDIATION--PAYMENT--TENDER--OFFER--WAIVER.
--Where the vendor notified the escrow-holder and the purchaser of the repudiation of the contract for the sale on the ground that her signature had been obtained by fraud, her right to object to the sufficiency of the purchaser's tender and offer of payment of the first installment was waived, under section 2076 of the Code of Civil Procedure and section 1501 of the Civil Code, in the purchaser's suit for specific performance.

(6) ID.--OPTION--ASSIGNMENTS--RATIFICATION.
--A vendor giving an option to the purchaser sufficiently ratified the assignment thereof, as notice of acceptance of the option, by handing a deed executed in favor of the assignee of the option to the escrow-holder.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. L. T. Price, Judge. Affirmed.

The facts are stated in the opinion of the court.

COUNSEL

Stewart & Stewart for Appellant.

Joseph Musgrove and F. O. McGirr for Respondent.

PLUMMER, J.

Plaintiff had judgment in an action for specific performance of a contract for the sale of real estate. From this judgment the defendant appeals.

The complaint in this action sets forth that the defendant is the owner in fee of the lands and premises described in this action, and was such on the sixth day of July, 1926; that on said date the defendant gave to one George W. Fassel an option to purchase the real estate described in the complaint; that thereafter, and on or about the nineteenth day of July, 1926, Fassel assigned his interest in said option to one Lem A. Brunson, who, on or about the same date assigned his interest in said option to the plaintiff in this action; that on or about the same date the defendant accepted the assignment of the option herein referred to; that on or about the twentieth day of July, 1926, the defendant gave certain instructions to the Title Guarantee and Trust Company, in relation to consummating the sale of the real estate involved in this action. The complaint further alleges that the plaintiff has complied with all the terms and conditions of the option agreements herein referred to. The answer of the defendant denies the allegations of the complaint, and for further defense sets up that she was induced to sign the instruments referred to herein by reason of fraudulent misrepresentations. As the question of fraud is not presented to us upon this appeal, no further reference will be made thereto.

The court found that the plaintiff was entitled to, and entered a decree for the specific performance of the instruments designated as Exhibits "A" and "B." ***142**

Exhibit "A" is the option agreement entered into between the respondent Mary E. Cowan and George W. Fassel, the persons heretofore referred to, and is substantially as follows: That on the sixth day of July, 1926, the defendant gave to said Fassel the exclusive right and option, at any time before 12 o'clock P. M. on the eighteenth day of July, to purchase the real property involved in this action for the sum of $36,000, subject to conditions (which are not involved in this action and need not be set forth). The option ran in favor of the optionee, his heirs, executors, administrators and assigns. By its terms it provided that the option could be exercised only by written instrument signed by the optionee, his heirs, executors, administrators or assigns, and delivered to the optionor personally or deposited in the mail by registered letter, postage prepaid, addressed to the optionor at her address in the city of Los Angeles. The purchase price was fixed at $36,000, $12,000 payable upon demand in escrow, the remaining $24,000 payable on or before five years after date of escrow, with interest at seven per cent per annum, payable semi-annually. The eighteenth day of July, 1926, falling on Sunday, the life of the option, by reason of the provisions of the Civil Code, ran until 12 o'clock P. M., July 19th. On the nineteenth day of July, George W. Fassel assigned and transferred all his interest in the option referred to and right to purchase the real estate involved in this action to Lem A. Brunson. This assignment is in the words and figures following, to wit:

"Exhibit 'B'

"July 19, 1926.

"Mr. Lem A. Brunson,

"945 Wall Street,

"Los Angeles, Calif.

"My dear Mr. Brunson:

"In accordance with our conversation of this date, please be advised that I hereby agree to and do hereby transfer, assign, set over and convey to you those certain exclusive options executed and delivered to me by Miss Mary E. Cowan, covering certain real property owned by said Mary E. Cowan, situated at 824 West 10th Street, Los Angeles, California, upon the following terms and conditions, to-wit: First: That you agree to pay said Miss

Mary E. Cowan,*143 upon acceptance and exercise of said option, the sum of $36,000, $5,000 of which is to be paid into escrow within three (3) days after notification by the Title Company or Mary E. Cowan, of the opening of escrow by said Mary E. Cowan and $7,000 and a note and mortgage on standard form in the sum of $24,000 dated and bearing interest of 7% from the date of close of escrow within three (3) days after notification to you by the Title Company of its readiness to record the Deed of Conveyance. Second: And upon your payment to me of the further sum of $2,000 upon the close of said escrow. It is understood and agreed that your acceptance of this proposition is to supercede a former option dated July 15, 1926, by me to you upon said property.

"Very truly yours,

"GEO. W. FASSEL.

"Approved and Accepted.

"LEM A. BRUNSON."

Thereupon, said Lem A. Brunson signed the following instrument, directed to the respondent, to wit:

"July 19, 1926.

"Miss Mary E. Cowan,

"824 West 10th Street,

"Los Angeles, Calif.

"Dear Madam:

"This is to advise you that Mr. George W. Fassel has this date sold, assigned and transferred to me those certain options given by you to him, covering the purchase of your property situated at 824 West 10th Street, Los Angeles, California, at a price of $36,000 net to you, payable upon the following terms and conditions, to-wit: $5,000 to be paid to you upon opening of escrow for the sale of said property, which you agreed to do within three (3) days from the date hereof, and a further sum of $7,000 and a note and mortgage in the sum of $24,000 on the standard form, dated as of the close of escrow and bearing 7% (LAB) interest from said date, payable semiannually, which sum is to be paid on or before five (5) years. This is to further notify you that I do hereby accept and exercise said offer and do hereby tender to you on account of the purchase price of said property as hereinbefore set forth, the sum of $500.00

"Very truly yours,

"LEM A. BRUNSON.*144

"Above assignment, terms conditions and the receipt of $500.00 on the purchase price is accepted and approved this 19th day of July, 1926. Terms of mortgage to be $8000.00 in 2 yrs. $8000.00 in 4 yrs. & $8000.00 in 5 yrs. at 7% on all deferred payments.

"MARY E. COWAN.

"Witness to signature of Mary E. Cowan.

"GEO. W. FASSEL."

The record shows an assignment by Brunson to the plaintiff in this action. While the approval of the assignment by Fassel to Brunson appears to have been approved by the respondent on the 19th day of July, 1926, it was actually approved by her on the 20th of July, 1926.

By an instrument bearing date of July 20, 1926, the appellant gave certain instructions to the Title Guarantee and Trust Company escrow-holder relative to the acts to be performed in the consummation of the sale of the property referred to by the respondent in this action, and also set forth the terms of sale. These instructions were to the effect that a deed executed by her to the plaintiff for the property involved was authorized to be delivered to the plaintiff within twenty days on payment to the Title Company of the sum of $11,500, on account of the purchase price of the property mentioned, and a

mortgage for $24,000 securing three notes of $8,000 each in two, four and five years, with interest at seven per cent per annum, payable semi-annually. The instructions also provided that $5,000 of the defendant's demand should be placed in escrow on or before Friday, July 23, 1926. The record shows that on the twenty-first day of July, 1926, the plaintiff, or, rather, that one Musgrove, an attorney for plaintiff, deposited with the Title Guarantee and Trust Company the sum of $4,500 for the benefit of the plaintiff. The transcript contains the following in relation to the $4,500: "It was also stipulated that $4500.00 was paid into escrow and is still in said escrow."

On the twenty-third day of July, 1926, the appellant wrote a letter to the Title Guarantee and Trust Company and the parties involved herein, notifying them that she repudiated her agreements of sale on the ground that her signature thereto had been obtained by fraud. No objection was made to the form of the tender, nor was any objection made as to the amount thereof. ***145**

Upon this appeal it is contended that the finding of the court that the plaintiff had complied with all the terms and conditions to be performed by it specified in the writings to which we have referred, are not supported by the testimony in this, that the evidence shows the option to purchase was not accepted and ratified on the nineteenth day of July, 1926, but that the ratification thereof took place on the twentieth day of July, 1926, and was therefore one day too late. And, further, that the payment of $4,500 in escrow was not in accordance with the terms of the instrument in that the escrow instructions delivered to the Title Guarantee and Trust Company called for the payment of the sum of $5,000, and also that it was uncertain as to whether the $4,500 heretofore mentioned was deposited in such a manner that the appellant could lay claim thereto in the event the plaintiff failed to comply with the terms and conditions of the instruments herein referred to. It may be observed that none of the instructions to which we have referred, made time the essence thereof, save and except that the options, until accepted, gave the optionee only so long a time within which to exercise his option to purchase. **[1]** As to the first objection that the option to purchase was not exercised within the time limit, it is sufficient to say that the record shows beyond controversy that the act of the appellant prevented the service upon her of written notice of acceptance of the option within the time limit, and brings this case clearly within the rule set forth in 13 C. J., page 647, section 721, which is: "A party to a contract cannot take advantage of his own act or omission, to escape liability thereon. ... Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him." **[2]** Furthermore, the record shows that on the twentieth day of July, 1926, the respondent received notice of the acceptance of the option and assignment, and thereupon approved the assignment, and signified the same by signing an *addenda* to the assignment specifying that the $24,000 mentioned in the acceptance of the option and assignment thereof should be paid in two, four and five years.

The second objection urged by the appellant is as to the amount of the tender. As shown by the writing dated July 19, 1926, which bears the approval of the respondent, it is ***146** specified that $5,000 was to be paid to the respondent upon the opening of the escrow of the sale of property involved in this action, and then that the further sum of $7,000 was to be paid, and then notes and mortgages were to be given for $24,000. It thus clearly appears that the cash to be paid was only the sum of $12,000. At the time of the approval of this writing the respondent was tendered and accepted a check for the sum of $500. This left only the sum $11,500 to be paid. The instructions contained in the paper signed by the appellant and handed to the Title Guarantee and Trust Company did direct that $5,000 should be paid on or before July 23, 1926. In this particular it differs from the two instruments which we have mentioned herein, or, rather, the fact that $500 had already been paid on the $5,000 apparently was lost

sight of. As we have stated, on the twenty-third day of July, 1926, the appellant repudiated her agreements, which repudiation was received by the parties interested on the twenty-fourth day of July, 1926. **[3]** The law is well settled that where a vendor repudiates the terms of a contract and indicates that he will be no longer bound thereby, a further tender of performance before beginning suit by the vendee is unnecessary. In support of this we may refer to the long list of cases cited in a note appended to the case of *Bateman v. Hopkins*, as reported in Ann. Cas. 1913C, pages 642-648, being a case also reported in 157 N. C. 470 [73 S. E. 133]. To the same effect is the rule cited in 23 Cal. Jur., page 499; see, also, *Buckmaster v. Bertram*, 186 Cal. 673 [200 Pac. 610]. **[4]** Where the vendor has absolutely repudiated his agreement to sell, it is sufficient, on the part of the vendee, to set forth in his complaint that he is ready, willing and able to perform his part of the contract. Such appears to be the case at bar. The complaint contains the necessary allegations which was followed by the necessary proof introduced upon the trial. **[5]** As to the sufficiency of the tender and offer of the payment of the first installment, we think the objections of the appellant are answered by section 2076 of the Code of Civil Procedure and section 1501 of the Civil Code. These sections provide that the form of tender must be objected to at the time, and, likewise, as to the amount; otherwise, such objections are waived. Without reciting the sections referred to, we think they absolutely answer the objections of the appellant in the negative. **[6]** While the ***147** record shows no acceptance of the assignment by Brunson to the plaintiff, it does show the assignment, and then shows that the respondent acted thereon and in pursuance thereof in handing the deed executed in favor of the plaintiff, to the Title Guarantee and Trust Company, for the property involved, at the time of the delivery of instruments which sufficiently show ratification. The record shows that appellant makes no objection in this particular.

We conclude that the trial court was correct in holding that Exhibits "A" and "B" constituted a contract of sale and properly directed specific performance.

The judgment is affirmed.

Finch, P. J., and Thompson (R. L.), J., concurred.

Cal.App.3.Dist.
Ray Thomas, Inc., v. Cowan
99 Cal.App. 140, 277 P. 1086

END OF DOCUMENT

273 Cal.App.2d 656, 78 Cal.Rptr. 536
(Cite as: 273 Cal.App.2d 656)

RIVERSIDE FENCE CO., INC., Plaintiff and Respondent,
v.
JAMES NOVAK et al., Defendants and Appellants.
Civ. No. 9071.

Court of Appeal, Fourth District, Division 2, California.
June 3, 1969.

HEADNOTES

(1) Vendor and Purchaser § 32--Options--Nature.
An option supported by a consideration is an irrevocable offer, open for a prescribed period.
See **Cal.Jur.2d,** Vendor and Purchaser, § 159 et seq; **Am.Jur.,** Vendor and Purchaser (1st ed § 27 et seq).

(2) Vendor and Purchaser (1st ed § 27 et seq). § 46--Options-- Consideration.
If there is actual consideration instead of a promise of consideration, an option contract is unilateral.

(3) Vendor and Purchaser--Options--Acceptance.
An acceptance must be in accordance with the terms of an option agreement and must be free of conditions which the optioner is not bound to perform.

(4) Vendor and Purchaser § 48--Options--Acceptance--Payment.
Unless an option so provides, its acceptance need not be accompanied by a tender of performance.

(5) Vendor and Purchaser--Options--Exercise--Nature.
The exercise of an option is merely the communicated election of the optionee to accept the option; unless otherwise required by statute, acceptance may be written or oral; and an oral acceptance of a written option to convey real property is valid.

(6) Vendor and Purchaser § 47--Options--Exercise--Communication and Notice.
Any method of communicating an election to exercise an option to purchase real property was proper, where the option agreement did not prescribe any particular manner in which the option was to be exercised.

(7a, 7b) Specific Performance § 81--Acts Prerequisite to Suit-- Sufficiency of Performance by Plaintiff.
In an action for specific performance of an option to sell real property, the court was justified in finding that defendants were precluded from asserting that there had not been a timely or proper exercise of the option, where there was substantial evidence that plaintiff's agent made known to defendants the fact that plaintiff was accepting the option and tendering performance by establishing an escrow for such purpose, where one defendant testified that he was apprised that plaintiff was seeking to exercise the option, where, despite requests for a statement of defendants' objections to the escrow instructions designed to constitute plaintiff's exercise of the option and offers to make corrections therein, defendants refused to give any explanation for refusal to sign escrow instructions, and where it was abundantly clear that plaintiff was attempting in good faith to tender performance and that defendants' evasive conduct was calculated to prevent the timely exercise of the option.

(8) Vendor and Purchaser § 47--Options--Exercise--Notice.
Although the usual contemplated method of accepting an option is by notice, a valid acceptance may be made by a tender of actual performance.

(9) Vendor and Purchaser--Options--Exercise--Tender.
The principle that if a person offering to perform is acting in good faith, and makes the mistake of demanding something to which he is not entitled, he ought to be given the same opportunity to recede from such demand that he is allowed for tendering

the correct amount where he has tendered too little, or the right thing where he has tendered the wrong thing, applies to a good-faith tender of performance in the exercise of an option.

(10) Vendor and Purchaser § 49--Options--Exercise--Time of Exercise.
An optioner who has given an irrevocable option to purchase property may not do any act or omit to perform any duty calculated to cause the optionee to delay exercising the option within the specified period; the optionor's good faith is a relevant consideration; and his evasion or prevention of exercise of the option may excuse tender of performance and other conditions precedent to acceptance.
When optionee's delay in exercising option excused, note, 157 A.L.R. 1311. See also **Cal.Jur.2d,** Vendor and Purchaser, § 176; **Am.Jur.,** Vendor and Purchaser (1st ed § 40).
(11) Landlord and Tenant § 99--Options to Purchase--Duration and Termination.
The phrase of a lease containing an option to purchase the leased premises that the "option to purchase is to be exercised by Lessee within thirty (30) days of the termination of this Lease or any option of renewal of said lease," indicated an intention to continue the option to purchase in any renewal of the lease with the right to exercise it within 30 days of the date of the expiration of the new term; and the provisions in the lease granting the option to renew "upon the same terms and conditions as herein set forth," necessarily included the option agreement.
Holding over under lease, or renewal or extension thereof, as extending time for exercise of option to purchase contained therein, note, 15 A.L.R.3d 470. See also **Cal.Jur.2d,** Landlord and Tenant, § 77; **Am.Jur.,** Landlord and Tenant (1st ed § 308).
(12) Vendor and Purchaser § 51--Options--Actions--Specific Performance.
An optionee was entitled to seek specific performance of an irrevocable option agreement where the option was exercised by a timely, good-faith tender of performance, and the optionors, by their conduct, had waived any objections thereto.

(13) Vendor and Purchaser--Options--Exercise--Correction of Tender.
Defects in a tender of performance of an option to purchase real property were cured by timely commencement of an action for specific performance thereof, and the offer in the amended complaint therein to perform in accordance with the terms of the option agreement, where the tender of performance had varied in some respects from the option agreement impairing to some extent the value of the optionor's security.

(14) Specific Performance § 50--Mutuality--Options and Unilateral Contracts.
Where a party commences an action to compel specific performance of an agreement to sell real property, any requirement of mutuality is satisfied on the theory that by bringing the action plaintiff has submitted himself to the jurisdiction of equity and thereby enables the court to assure performance by him.

SUMMARY

APPEAL from a judgment of the Superior Court of Riverside County. E. Scott Dales, Judge. Affirmed.

Action for specific performance of an option to sell real property. Judgment for plaintiff affirmed.

COUNSEL

Ray R. Goldie, Dennis L. Collier and Clark A. Hansen, Jr., for Defendants and Appellants.

Alan Nixen and Arthur R. Seidler for Plaintiff and Respondent.

TAMURA, J.

Defendants appeal from a judgment decreeing specific performance of an option to sell certain real property.

The following facts are virtually undisputed:

On November 20, 1962, defendants leased subject

property to plaintiff for a term expiring October 31, 1963, with an option to renew for two successive one-year terms. Plaintiff exercised the renewal option for the two years extending the lease to October 31, 1965. The lease granted plaintiff an option to purchase the property for $29,000 on the following terms: $5,000 cash down, the assumption of an existing trust deed in favor of Hemet Federal Savings & Loan Association, and the ***659** balance to be secured by a second trust deed in favor of defendants payable "at the rate of Seventy-five Dollars ($75.00) per month and interest at the rate of six percent (6%) per annum," with the entire balance to be paid within five years of the date of exercise of the option or eight years of the date of execution of the lease, whichever is longer. The option provided that plaintiff was entitled to a credit towards the purchase price in the sum of $700 for each year the lease had been in existence, the credit to be applied to the down payment.

On September 13, 1965, plaintiff opened an escrow with the Security First National Bank (Bank) for the purchase of the subject property for $29,000. The escrow instructions provided for the payment in full of the loan secured by the existing trust deed in favor of Hemet Federal Savings & Loan (the unpaid balance then being $11,908.76), the recordation of a new trust deed in favor of the bank for $15,000 and a second trust deed for $11,900 in favor of defendants, principal and interest payable at the rate of $75 per month with the unpaid balance to be paid in full on October 1, 1970. The instructions also contained the following recital:

"This escrow is the consummation of that certain Lease with Option to Purchase dated Nov. 20, 1962 by and between James Novak and Ruth Novak, his wife, as Lessors, and Riverside Fence Co., Inc., a California corporation, as Lessee, with the loan of record thereunder in favor of Hemet Federal Savings and Loan Association to be paid in full through this escrow as the responsibility of the purchasers herein, and at their request, WITH Sellers herein allowing proper credit for said pay-off."

Plaintiff signed the instructions and the Bank mailed defendants a copy together with a deed, accompanied by a letter of transmittal requesting defendants to execute and return the documents. Defendants received the documents on September 30, 1965, but failed to sign or return them. On October 18, 1965, Mrs. Moore, the Bank's escrow officer, telephoned defendant Novak and asked if he were going to sign the instructions, stating that "time was of the essence." Mr. Novak stated he was going out of town and would call her on October 25. In a letter confirming the telephone conversation and Mr. Novak's promise to call her on the 25th, Mrs. Moore stated in part:" "On October 18th we talked to you regarding subject escrow with Riverside Fence Company, Inc., and the lease with option to buy which they hold with you." On ***660** October 25, Mr. Novak called Mrs. Moore and stated that he would not be signing the escrow instructions. During the conversation Mrs. Moore repeatedly inquired why he was not going to sign, "... what was the trouble with the escrow," and whether anything could be done. Mr. Novak refused to reveal why he would not approve the instructions.

On October 29, 1965, plaintiff instituted the present action alleging that it had performed all of the terms and conditions of the option agreement, that it was ready, able and willing to pay defendant all monies mentioned in the option, that it had opened an escrow for that purpose, and prayed for a decree that defendants perform the "option agreement and escrow instructions. ... " Following a demurrer to the complaint but prior to a hearing thereon, plaintiff filed an amended complaint on January 7, 1966, eliminating any reference to the escrow and praying for specific performance of the option in accordance with the agreement.

The court found that plaintiff gave timely and sufficient notice of exercise of the option, that although the escrow instructions did not comply with the terms of the option, defendants "waived their right to object to this variance when they failed to complain, after ample opportunity to do so, and any de-

fects were subsequently cured by timely filing of the Complaint and the Amended Complaint." The court decreed specific performance in accordance with the option agreement.

Defendants contend that the submission of escrow instructions at variance with the option agreement was not an unqualified acceptance of the option and that, hence, plaintiff failed to exercise the option in accordance with its terms within the specified period.

(1) An option supported by consideration is an irrevocable offer, open for a prescribed period. (2) If there is actual consideration instead of a promise of consideration, the option contract is unilateral. (1A Corbin, Contracts, §§ 260, 263.) (3) The acceptance must be in accordance with the terms of the option agreement and must be free of conditions which the optionor is not bound to perform. (*Robbins v. Pacific Eastern Corp.*, 8 Cal.2d 241, 276 [65 P.2d 42] ; *Schomaker v. Osborne,* 250 Cal.App.2d 887, 890 [58 Cal.Rptr. 827]; *Schmidt v. Beckelman,* 187 Cal.App.2d 462, 469 [9 Cal.Rptr. 736]; Witkin, Summary of Cal. Law (1960) 60; 1A Corbin, Contracts, § 264.) "Nothing less will suffice unless the optionor waives one or more of the terms of the option." (1 ***661** Williston, Contracts, 206.) (4) Unless the option so provides, the acceptance need not be accompanied by a tender of performance. (*Cates v. McNeil,* 169 Cal. 697, 704-707 [147 P. 944]; *Lawrence v. Settle,* 182 Cal.App.2d 386, 389 [6 Cal.Rptr. 49]; *Murfee v. Porter,* 96 Cal.App.2d 9, 16-17 [214 P.2d 543].) (5) "The exercise of an option is merely the communicated election of the optionee to accept the option." (*Lawrence v. Settle, supra,* p. 388.) Unless otherwise required by statute, acceptance may be written or oral; an oral acceptance of a written option to convey real property is valid. (Civ. Code, § 1582; *Vezaldenos v. Keller,* 254 Cal.App.2d 816, 826-827 [62 Cal.Rptr. 808]; 1A Corbin, Contracts, 520.)

(6) In the present case, the agreement did not prescribe any particular manner in which the option was to be exercised. Consequently, any method of communicating an election was proper. (*Lawrence v. Settle, supra,* 182 Cal.App.2d 386, 388-389.) (7a) The trial court found that there had been a timely communication of acceptance. In a memorandum opinion which we may properly consider in construing the findings, the trial judge determined that notice of acceptance was given by delivery of a copy of the escrow instructions, communications between Mrs. Moore, on behalf of plaintiff, and Mr. Novak, and the institution of the law suit on October 29. There is substantial evidence that Mrs. Moore, as agent for plaintiff, made known to defendants the fact that plaintiff was accepting the option and tendering performance. (See *Murfee v. Porter, supra,* 96 Cal.App.2d 9, 18.) Mr. Novak testified that the escrow instructions and his conversations with Mrs. Moore apprised him of the fact that plaintiff was seeking to exercise the option.

Moreover, the record reveals that plaintiff, the escrow agent, and defendants were apparently acting under the misapprehension that the option could be exercised only by tender of performance prior to the expiration of the option period. [FN1] (8) Although the usual contemplated method of accepting an option is by notice, a valid acceptance may be made by a tender of actual performance. (1A Corbin, Contracts, 518; see Civ. Code, § 1584; *Logoluso v. Logoluso,* 233 Cal.App.2d 523, 529 [43 Cal.Rptr. 678]; *Becker v. Kelsey,* 9 N.J. Misc. 1265 [157 A. 177, 188-189]; 1 Williston, Contracts, 260.

> FN1 Defendants continue to urge on this appeal that the option could only be exercised by tender of performance and that mere notice of election to exercise the option would not be sufficient.

"The person to whom a tender is made must, at the time, ***662** specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." (Code Civ.

Proc., § 2076.) "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated." (Civ. Code, § 1501.) (9) "If the person offering to perform is acting in good faith, and makes the mistake of demanding something to which he is not entitled, he ought to be given the same opportunity to recede from such demand that he is allowed for tendering the correct amount where he has tendered too little, or the right thing where he has tendered the wrong thing. ..." (*Kofoed v. Gordon,* 122 Cal. 314, 321 [54 P. 1115]; Code Civ. Proc., § 2076; *Hind v. Oriental Products Co.,* 195 Cal. 655, 665 [235 P. 438]; see *Thomassen v. Carr,* 250 Cal.App.2d 341, 350 [58 Cal.Rptr. 297].) The foregoing principle has been held to be applicable to a good faith tender of performance in the exercise of an option. (*Hohener v. Gauss,* 221 Cal.App.2d 797, 800 [34 Cal.Rptr. 656]; see *Layton v. West,* 271 Cal.App.2d 508, 511- 512 [76 Cal.Rptr. 507] [hearing den.]; *Alfinito v. Sater,* 246 Cal.App.2d 362, 383-384 [54 Cal.Rptr. 636].) In *Layton v. West, supra,* the court stated at p. 511: "Any tender of performance, including the exercise of an option, is ineffective if it imposes conditions upon its acceptance which the offeror is not entitled to demand. (Civ. Code, § 1494; *Schiffner v. Pappas* (1963) 223 Cal.App.2d 526. ...) However, the imposition of such conditions is waived by the offeree if he does not specifically point out the alleged defects in the tender. (Civ. Code, § 1501; Code Civ. Proc., § 2076; *Hohener v. Gauss* (1963) 221 Cal.App.2d 797. ...) The rationale of the requirement of specific objection is that the offeror should be permitted to remedy any defects in his tender; the offeree is therefore not allowed to remain silent at the time of the tender and later surprise the offeror with hidden objections. (*Thomassen v. Carr* (1967) 250 Cal.App.2d 341, 350 . ...)"

(10) In addition, an optionor who has given an irrevocable option to purchase property may not do any act or omit to perform any duty calculated to cause the optionee to delay exercising the option within the specified period. (See ***663***Murfee v. Porter, supra,* 96 Cal.App.2d 9, 18.) The optionor's good faith is a relevant consideration; his evasion or prevention of exercise of the option may excuse tender of performance and other conditions precedent to acceptance. (*Citron v. Franklin,* 23 Cal.2d 47, 57 [142 P.2d 16]; *Ray Thomas, Inc. v. Cowan,* 99 Cal.App. 140, 145 [277 P. 1086]; *Connolly v. Lake County Canning Co.,* 95 Cal.App. 768, 769 [273 P. 611]; 1 Williston, Contracts, 206; 17 Am.Jur.2d 398, 399; see Cases, Annotation, 157 A.L.R. 1311.

(7b) In the case under review, despite Mrs. Moore's repeated requests for a statement of his objections, and her offer to make corrections, defendant Novak refused to give any explanation for his refusal to sign the escrow instructions. It is abundantly clear that plaintiff was attempting in good faith to tender performance and that defendants' evasive conduct was calculated to prevent a timely exercise of the option. In these circumstances the court was justified in finding that defendants were precluded from asserting that there had not been a timely or proper exercise of the option.

(11) Defendant's contention, without supporting authority, that the time within which the option could have been exercised expired prior to October 31, 1965, is devoid of merit. The lease provided, "Said option to purchase is to be exercised by Lessee within thirty (30) days of the termination of this Lease or any option of renewal of said lease." The phrase "or any option of renewal of said lease" indicates an intention to continue the option to purchase in any renewals of the lease with the right to exercise it within 30 days of the date of the expiration of the renewed term. The provision in the lease granting an option to renew "upon the same terms and conditions as herein set forth," necessarily included the option agreement. A reasonable construction of the words "within thirty days of the termination of this Lease" is that the phrase was intended to mean the 30-day period immediately preceding expiration of the term. It is reasonable to as-

sume that the lessors desired to retain the right to collect the rents reserved for the entire term of the lease. The lease as renewed expired on October 31, 1965. The tender of performance and the communications between Mrs. Moore and Mr. Novak all occurred prior to that date.

(12) The option having been exercised by a timely, good faith tender of performance and defendants, by their conduct, having waived any objections thereto, plaintiff was entitled to seek specific performance of the option agreement. (***664***Copple v. Aigeltinger,* 167 Cal. 706, 710 [140 P. 1073]; *Jonas v. Leland,* 77 Cal.App.2d 770, 777 [176 P.2d 764].) (13) Although, as the court found, the tender of performance varied in some respects from the option agreement, the principal variance being that the proposed escrow instructions contemplated a refinancing of the existing loan by recording a new trust deed for $15,000 rather than an assumption of the existing trust deed in favor of Hemet Federal Savings and Loan, thus impairing to some extent the value of the second trust deed, the defects were cured by the timely commencement of the action and the offer in the amended complaint to perform in accordance with the terms of the option agreement. FN2 (*Kelley v. Russell,* 50 Cal.App.2d 520, 529 [123 P.2d 606].) (14) Where a party commences an action to compel specific enforcement of an agreement to sell real property, any requirement of mutuality is satisfied on the theory that by bringing the action the plaintiff has submitted himself to the jurisdiction of equity and thereby enables the court to assure performance by him. (*Ellis v. Mihelis,* 60 Cal.2d 206, 216 [32 Cal.Rptr. 415, 384 P.2d 7]; *Copple v. Aigeltinger, supra,* 167 Cal. 706, 710; *Jonas v. Leland, supra,* 77 Cal.App.2d 770, 777; 1A Corbin, Contracts, 565.) In the instant case the trial court decreed specific performance in accordance with the terms of the option agreement.

> FN2 In addition to the variance mentioned, defendants urge that the escrow instructions provided for payment on the second trust deed at the rate of $75 per month, principal and interest included, whereas the option agreement provided for payment at the rate of "$75 per month and interest," and that although the agreement provides for division of escrow costs, the instructions made no provision for division of costs.

Judgment affirmed.

Kerrigan, Acting P. J., and Gabbert, J. pro tem., FN* concurred. ***665**

> FN* Assigned by the Chairman of the Judicial Council.

Cal.App.4.Dist.
Riverside Fence Co. v. Novak
273 Cal.App.2d 656, 78 Cal.Rptr. 536

END OF DOCUMENT

123 Cal.App.3d 701, 176 Cal.Rptr. 835
(Cite as: 123 Cal.App.3d 701)

NORMAN ROLLINS, Plaintiff and Appellant,
v.
NORENE STOKES, et al., Defendants and Respondents.
Civ. No. 4699.

Court of Appeal, Fifth District, California.
Sep 18, 1981.

SUMMARY

In an action by a real estate broker against a lessor and lessee for declaratory relief regarding the right to purchase the leased property, the trial court granted defendants' motion for summary judgment and entered judgment accordingly. Under the terms of the lease, the lessee had been granted an "option," in fact a preemptive right, to purchase the leased property within 15 days after the lessor's notification of any offer for the purchase of the property. During the lease term, the lessor granted the broker an option to purchase the property, exercisable after expiration of the lease term. The lessor notified the lessee of the option contract with the broker, and, within 15 days after such notice, the lessee expressed his desire to buy the property and tendered to the lessor the initial payment under an option to purchase the property to be executed by the lessor and the lessee upon the exact terms as set forth in the option to purchase granted to the broker. (Superior Court of Tulare County, No. 86183, Edward Kim, Judge.)

The Court of Appeal affirmed. The court held that, in light of both the theories of options and preemptive rights and the conduct of the parties, the lessee's preemptive right to purchase was triggered during the lease term. The court further held that the lessee complied with the lease provisions regarding exercise of his preemptive right to purchase, and, with respect to the requirements imposed by the lessor's notice to the lessee of the broker's option, the lessor waived any defective tender on the part of the lessee. (Opinion by Pettitt, J., FN* with Franson, Acting P. J., and Hanson (P. D.), J., concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 145--Review--Questions of Law and Fact--Function of Appellate Court--Interpreting Written Instruments--Absence of Conflicting Extrinsic Evidence.
In reviewing a trial court's interpretation of a written instrument where no conflicting extrinsic evidence is received, an appellate court is not bound by the trial court's ruling, but must give the writing its own independent interpretation.

(2) Real Estate Sales § 10--Options--Distinguished From Preemptive Rights.
An option is not a sale of property, but rather a sale of a right to purchase, and becomes a contract of sale only on acceptance of the option by the optionee. An option gives the holder of the option a power to compel a sale regardless of whether the owner then wants to sell. By contrast, a preemptive right gives the holder the first right to buy when and if the owner later wants to sell, and if the holder does not buy, the owner of the property may sell to anyone.

(3) Landlord and Tenant § 29--Leases--Options to Purchase--Lessee's Preemptive Right to Purchase--When Right Is Activated.
The right of a lessee to purchase the leased property was activated during the term of the lease, where the lessee had been granted by the terms of the lease an "option," in fact a preemptive right, to purchase the leased property, where, during the lease term, the owner of the property granted to a real estate broker an option to purchase exercisable after the expiration of the lease term, and where the own-

er notified the lessee of such option. It was evident from the conduct of the owner and the lessee that they treated the option contract executed between the owner and the broker as equivalent to an offer for the purchase of the subject property so as to trigger the lessee's preemptive right to purchase. Furthermore, under option contract theory, the option contract between the owner and the broker constituted a contract to sell, and once the broker exercised his option, the right to acquire the property related back to the time of the granting of the option.

[See **Cal.Jur.3d**, Landlord and Tenant, § 176 et seq.; **Am.Jur.2d**, Landlord and Tenant, § 368.]

(4a, 4b, 4c) Landlord and Tenant § 30--Leases--Options to Purchase-- Exercise of Option--Preemptive Right to Purchase--Lessee's Exercise After Notice of Option Granted to Another.

Pursuant to a lease provision granting the lessee an "option," in fact a preemptive right, to purchase the leased property within 15 days after the lessor's notification of an offer for the purchase of the property, the lessee exercised such "option" so as to defeat the right to purchase of a broker, who, during the lease term, was granted an option to purchase the property exercisable after expiration of the lease term. Within 15 days after notification of the broker's option, the lessee expressed his desire to exercise his preemptive right and sent the lessor the initial payment under an option agreement to be executed by the lessor and lessee on the exact terms as the broker's option. Additionally, the lessee substantially complied with the requirements imposed by the lessor's notice of the broker's option, and the lessor waived any defective tender under such notice. Furthermore, the fact that the lease provided that the lessee had 15 days within which to "purchase" the property did not preclude the method used by the lessee to exercise his preemptive right.

(5) Real Estate Sales § 13--Options--Construction and Operation--Exercise of Option--As Determined by Provisions in Option Contract.

When the provisions of an option contract prescribe the particular manner in which the option is to be exercised, such provisions must be strictly followed. However, when the option contract merely suggests, but does not positively require, a particular means of communicating the exercise of the option, another method of communication is not precluded.

(6) Real Estate Sales § 15--Options--Exercise or Acceptance--Waiver of Defects.

With respect to the exercise of an option or of a preemptive right to purchase real property, although acceptance must be in the terms of the agreement, the person who granted the option or preemptive right can waive one or more of such terms. Thus, a waiver on the part of the person who granted the option or preemptive right results if such person does not, at the time of the tender by the optionee or holder of the preemptive right, specify the alleged defects in the tender.

COUNSEL

Houk, Hicks & Spain and Lloyd L. Hicks for Plaintiff and Appellant.

McCormick, Moock & McCormick, McCormick, Ide & Kalst, Walter K. McCormick, George L. Thurlow and Steven L. Kabot for Defendants and Respondents.

PETTITT, J. FN*

FN* Assigned by the Chairperson of the Judicial Council.

This case comes to this court on an appeal from an order granting respondents' motion for summary judgment and from the judgment entered thereon. The appeal involves the legal effect of respondent Joe J. Correia's (Correia) preemptory right, set out in a lease, to purchase real property owned by respondent Norene Stokes (Stokes). Stokes was lessor. All parties have agreed appellant's complaint presented issues of law only, and that a motion for

summary judgment was the appropriate vehicle for resolution of the issues involved.

Plaintiff and appellant, Norman Rollins (Rollins), filed a complaint for declaratory relief naming respondents, Stokes and Correia, as defendants.

The complaint essentially prayed that respondent Correia should be declared to have no right to acquire ownership of the leased property in question.

The lower court ruled that Correia's "option" under the lease between himself and Stokes was prior in time and superior to the rights of appellant to purchase (under the terms of a later option to purchase given by Stokes to appellant Rollins). In this connection the trial court made detailed findings of fact and conclusions of law. Among the findings and conclusions the court found and concluded that appellant was granted a valid option by Stokes but that it was subject to the prior rights of Correia. The court further found that at all relevant times appellant had full knowledge of the terms of the Correia lease including the so-called option provision. ***705**

Statement of Facts

The facts in this case are taken from declarations and various documents filed with the court. The lease in question was of farm property in Tulare County and was entered into on January 1, 1975. The term ended on December 31, 1977. The critical clause in the lease provided:

"Option: Should Lessors intend to sell the said real property during the term hereof, or any lawful extension hereof, they will first notify Lessee of any offer for the purchase of said property, and Lessee shall thereafter have the option for a period of 15 days within which to purchase the same upon the same terms and conditions as Lessor is willing to sell to any other persons."

The following facts are set out in appellant's declaration. For a long period of time appellant Rollins, a licensed real estate broker whose principal business was buying and selling real estate for his own account, was advertising that he was interested in buying property. Stokes contacted appellant, who looked at the Stokes property in question. Stokes at that time showed appellant the Correia lease and Stokes read the lease. The two of them then discussed the "option" provision set out in the lease. Appellant asked Stokes if she knew Correia had a right to purchase the property if she offered it for sale and Stokes said she did. Appellant then stated "I am not interested in bidding against your tenant and we'll have to overcome that problem before I would purchase the property and that I was not interested in the property unless I could get around the lease." Appellant and Stokes then discussed the possibility of an option.

The next day, February 9th, appellant and Stokes signed an "Option To Purchase." The option described the subject property and provided in relevant part:

"... a Purchase Price of $36,000.00 (Thirty six thousand Dollars), upon the following Terms And Conditions:

"$18,000. cash down payment including the above $1,000. 18,000. by a note, secured by a deed of trust on the subject property, executed by Rollins in favor of Stokes. Note to be payable in annual installments of $1500. or more per year plus interest at 7-1/2% per annum on deferred balances. The first payment of principal & interest shall be due one ***706** year from the recording of deed. Deed of trust shall not encumber the northwest 208' x 208' of the subject property.

"1. This option shall not be exercised prior to Jan. 5, 1978.

"2. All closing costs are to be charged according to normal Tulare County customers.

"3. Optionor is aware that optionee is a licensed real estate broker."

We note that the option could only be exercised

after the lease had expired on December 31, 1977.

Appellant gave Stokes a $1,000 check.

In her declaration, Stokes agreed that prior to signing the option to purchase, she told appellant that Correia had an option to purchase and that she did not believe appellant "could set the date ahead," and she "would have to tell Mr. Correia about it." This angered appellant.

On February 11, 1977, Stokes and appellant signed a "Memorandum of Option" for recording purposes.

About five days later, appellant's attorney received a letter from Stokes' attorney stating in essence that respondent Correia had to be offered the property on the same terms.

According to the proof of service, on March 4, 1977, Stokes caused to be served a copy of the "Option Agreement" and the following notice on respondent Correia:

"Joe J. Correia, 6739 Ave. 290, Visalia, California

"You are hereby notified that I have had an offer to purchase the property now under lease to you under the Farm Lease dated January 1, 1975 as follows:

"For a total price of $36,000.00 payable $1,000.00 down payment at this time, the further sum of $17,000.00 cash not later than February 9, 1978, at which time I would give you a deed to the property and you would execute a note for the remaining $18,000.00 payable in installments ***707** of $1500.00 or more per year together with interest at the rate of 7-1/2% on unpaid balances. First payment of principal to be due one year from delivery of deed to you. This note to be secured by a First Deed of Trust. Attached is a copy of the offer I now have.

"As you know, our lease provides that you will have first option to buy on above terms for a period of 15 days (from date this notice is delivered to you).

"If you do not evidence your matching the above offer within 15 days by delivering to me a check and your written agreement to purchase on these terms, your option shall have no further force or effect.

"DATED: March 2, 1977.

/s/ Nora Irene Stokes

NORA IRENE STOKES" [FN1]

> FN1 One of Stokes' attorneys sent a letter to appellant's attorney, dated March 3d, stating that Stokes had not cashed appellant's check upon his advice. Stokes' attorney also attached a copy of the "notice" that would be served on Correia.

On March 9th or 10th, 1977, Stokes' attorney received a letter from Correia's attorney stating:

"The purpose of this letter is to confirm ... Mr. Correia's desire to exercise his option to purchase as communicated to you in our telephone conversation of March 7, 1977."

On March 14, 1977, Stokes' attorney wrote to appellant's attorney that Correia desired to exercise his option to purchase the property owned by Stokes.

On March 18th, Stokes' attorney received a $1,000 check from Correia's attorney. (This was the 14th day after notice by Stokes to Correia.) According to Stokes' attorney's declaration, the attorney also received a letter from Correia's attorney indicating that the payment represented the initial payment under an option to purchase the property "to be executed by [Stokes] and [Correia] upon the exact terms as set forth in the Option to Purchase dated February 9, 1977, and signed by [appellant]." [FN2]
***708**

> FN2 Correia stated in his declaration that he authorized the initial payment under the option and intended to purchase the prop-

erty on the exact terms of the "Option to Purchase" signed by appellant. Correia also claimed he executed an "Option To Purchase" on February 9, 1977, and instructed his attorney to transmit it to Stokes.

On March 24, 1977, Stokes' attorney acknowledged receipt of the $1,000 check. Subsequently (apparently on or after March 31, 1977, the 27th day after the notice) Stokes' attorney received an "Option To Purchase" signed by Correia dated February 9, 1977. That document was practically identical to appellant's option to purchase.

Shortly after January 3, 1978, Stokes' attorney received a letter and check for $17,000 from Correia's attorney, which was the balance of the $18,000 down payment.

On February 6, 1978, appellant notified Stokes that he was exercising his option to purchase Stokes' property pursuant to the February 9, 1977 written option.

Discussion

The issues raised by appellant are first, whether the granting of the option to appellant triggered respondent Correia's preemptory right to purchase, and second, whether respondent Correia failed to exercise his preemptory right according to the applicable terms.

Appellant argues that Correia's preemptory right was only operative with respect to a *sale* during the lease term. Appellant interprets the clause in the lease to mean that the intended sale must be during the term of the lease. Further, the *intent to sell* which may be formulated during the lease does not trigger Correia's preemptory rights. Appellant hypothesizes that if Stokes had telephoned him the day after the lease expired and offered to sell the property, Correia should not be able to argue that Stokes had formulated the intent to sell during the lease term and that, therefore, he was entitled to notice and a preemptory right to purchase. Appellant also urges there was no intended sale during the lease term as appellant's option did not permit him to purchase the property until after the expiration of the lease term. Thus, again Correia's preemptory rights never came into being.

Appellant also relies on cases which hold that an option is not a sale of real property (see, e.g., *Hicks v. Christeson* (1917) 174 Cal. 712, 716 [164 P. 395]), so here the grant of the option to appellant did not constitute a sale of any interest in the property. Thus there is "again no ***709** basis for holding that the pre-emptive [*sic*] purchase rights set forth in the lease became operative."

Respondents filed a joint brief. They argue that the formulation of an intent to sell during the lease period triggered Correia's option to purchase; that Correia had a preemptory right to purchase and the decision to sell is critical, not the actual sale. Furthermore, respondents argue Stokes agreed to sell to appellant during the lease term as the option with appellant created a unilateral contract binding on Stokes, and when appellant decided to exercise the option a bilateral contract was created. (*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494 [113 Cal.Rptr. 705, 521 P.2d 1097].) Also, appellant's exercise or acceptance of the option related back to the giving of the option which was within the lease term. Thus under any of these theories Correia's preemptory right came into being.

Respondents also contend that appellant intended to circumvent the object of the parties to the lease which was to give Correia an option.

(1)Neither party points to any extrinsic evidence to aid in interpreting the written instruments.

As a result, we apply the general rule restated in *Davies Machinery Co. v. Pine Mountain Club, Inc.* (1974) 39 Cal.App.3d 18, 23 [113 Cal.Rptr. 784]: "In reviewing a trial court's interpretation of a written instrument where no conflicting extrinsic evid-

ence is received, an appellate court is not bound by the trial court's ruling but must give the writing its own independent interpretation." (See also 6 Witkin, Cal. Procedure (2d ed. 1971) §§ 257-260, pp. 4248-4251.)

(2)In *Anthony v. Enzler* (1976) 61 Cal.App.3d 872, 876 [132 Cal.Rptr. 553], the court aptly described an option contract:

"It is well established that an option is not a sale of property, but rather a sale of a right to purchase. The option becomes a contract of sale binding on both parties only on acceptance of the option by the optionee. This does not mean, however, that a new contract is in fact made by and at the time of the acceptance. On the contrary, the contract has already been made as far as the optionor is concerned, but is merely subject to conditions which are removed by acceptance [citations omitted]." (See also *Palo Alto Town & Country Village, Inc. v. BBTC Company, supra.*, 11 Cal.3d 494, 503.) ***710**

On the other hand, a preemptive right gives the holder the first right to buy when and if the owner later wants to sell. If the holder does not buy, the owner of the property may sell to anyone. Conversely, an option gives the holder a power to compel a sale regardless of whether the owner then wants to sell. (*Nelson v. Reisner* (1958) 51 Cal.2d 161, 166 [331 P.2d 17]; *Mercer v. Lemmens* (1964) 230 Cal.App.2d 167, 171 [40 Cal.Rptr. 803] [the preemptive right is "activated" when the owner has elected to sell]; see also 1 Witkin, Summary of Cal. Law (8th ed. 1973) § 131, pp. 127-128.)

(3)At the outset, there does not seem to be any dispute by the parties that the lease granted respondent Correia a preemptive right. Although the term "option" was used in the subject clause, the label does not control. (See 1A Corbin, Contracts (1963) § 261A, pp. 483-491.)

It may also be noted that the lessee Correia's first right of refusal or preemptive right was part of the consideration for his covenants under the lease. (See *Nelson v. Reisner, supra.*, 51 Cal.2d 161, 165-166.)

What then triggered Correia's preemptive right to purchase? The intent of the parties was that once a third party made an offer to Stokes that she was willing to accept, Stokes was required to notify Correia, whereupon Correia's preemptive right ripened into an option to purchase the property according to the terms and conditions of the third party's offer. The lease provision makes this clear as Correia had 15 days within which to purchase the property upon the same terms and conditions that Stokes was willing to sell to appellant.

Accordingly, when Stokes manifested her intent to sell the property by entering into the option contract with appellant and subsequently notified Correia, the preemptive right was activated. As stated in Corbin:

"An owner of land may receive 50 offers to buy it every single day, but if he does not care to sell the land, those 50 offers are not legally operative to give the holder of the right of first refusal the power to buy. It is the owner's selection of a particular offer as one he might be willing to accept, and his manifestation of that willingness by communicating the particular offer to the holder of the right which gives the holder a present power of buying the land on the terms of that offer." (1A Corbin, Contracts (1980 Pocket Supp.) § 261, p. 171.) ***711**

Such an interpretation is consistent with the conduct of the respondents, which is persuasive evidence in determining the meaning of written instruments. (*Davies Machinery Co. v. Pine Mountain Club, Inc., supra.*, 39 Cal.App.3d at p. 26; 1 Witkin, Summary of Cal. Law (8th ed. 1973) § 527, p. 449.)

Within a month after Stokes signed appellant's option contract, Stokes notified Correia pursuant to the lease so that Correia could make his election. Correia then communicated to Stokes his desire to exercise his preemptive right. Significantly re-

spondents proceeded under the preemptive clause of the lease even though appellant's option could only be exercised after the lease had expired. It is evident from respondents' conduct that they treated appellant's option contract, regardless of the postlease exercise clause, as equivalent to an "offer for the purchase" of the subject property so as to trigger Stokes' lease obligations and Correia's preemptive right.

We note that we do not have the type of situation suggested by appellant wherein Stokes, the lessor, merely entertained a subjective intent to sell the property (to no one in particular) and then after the lease expired, contacted a prospective buyer. If this were such a case, Correia would be hardpressed to assert his preemptive right.

Rather, the parties to the lease contemplated some objective manifestation of Stokes' intent to sell the property based on a third party's offer.

As an additional grounds to uphold the judgment, we look to option contract theory. From the lessor's or optionor's point of view (i.e., Stokes), there was a contract to sell the property during the lease term. (*Palo Alto Town & Country Village, Inc. v. BBTC Company*, *supra.*, 11 Cal.3d 494, 503-504.) When Stokes signed appellant's "option to purchase" she was contractually bound to sell the property to appellant if appellant exercised that option. Not only was there a contract to sell but once appellant exercised his option, the right to acquire the property related back to the time of the giving of the option (*Seeburg v. El Royale Corp.* (1942) 54 Cal.App.2d 1, 4 [128 P.2d 362]; *Anthony v. Enzler*, *supra.*, 61 Cal.App.2d 872, 876), which in this case was during the term of the lease. On either of these two grounds Stokes, for purposes of activating the preemptive right, sold the property during the lease term. ***712**

Thus the trial court was correct in ruling that although appellant may have had a valid option contract, his rights were subject to those of Correia. Simply stated, Correia's preemptive right was triggered during the lease term when we look to the theories of option and preemptive rights and the conduct of the parties. FN3

> FN3 Appellant and respondents agree that there are no California cases dealing directly with the factual situation presented here. (But see *Richfield Oil v. Security First Nat. Bank* (1958) 159 Cal.App.2d 184 [323 P.2d 834] [upholding a right to exercise preemptory right to purchase where property is sold at probate sale]; *Henderson v. Nitschke* (1971) (Tex.Civ.App.) 470 S.W.2d 410 [where the court held the lessor had formed an intent to sell which activated the lessee's preemptory right even though the purchase offer the lessor received from a third party was revoked before the lessee exercised the right of first refusal]; *Anderson v. Armour and Company* (1970) 205 Kan. 801 473 P.2d 84] [holding a trade/exchange of property was a sale].)

(4a)Appellant next argues Correia failed to exercise his preemptory right according to its terms.

The "option" clause in the lease did not specify a method for the exercise of the preemptive right. In this case we find it appropriate to analogize to the exercise of an option contract. (5)Hence, when the provisions of an option contract prescribe the particular manner in which the option is to be exercised, they must be strictly followed. (*Palo Alto Town & Country Village, Inc. v. BBTC Company*, *supra.*, 11 Cal.3d 494, 498.) Nevertheless, when the option contract merely suggests but does not positively require a particular means of communicating the exercise of the option, another method of communication is not precluded. (*Ibid.*; see also *Erich v. Granoff* (1980) 109 Cal.App.3d 920, 929 [167 Cal.Rptr. 538].)

(4b)The evidence reveals that Correia on two occasions notified Stokes' attorney that he intended to exercise his preemptive right to purchase the sub-

ject property. First, on March 9th or 10th Stokes attorney received a letter from Correia's attorney expressing Correia's desire to exercise his right. Second, on March 18th (the 14th day after Correia's receipt of the notice), Correia sent Stokes a $1,000 check representing the initial payment under an option to purchase to be executed by Stokes and Correia upon the exact terms as appellant's February 9 option.

Thus Correia validly exercised his preemptive right by way of his attorney's two letters and payment of $1,000, all of which were done within the 15 days specified in the lease clause. ***713**

Additionally, we hold that Stokes waived any defective performance in terms of Correia's compliance with the 15-day notice which required Correia to "... evidence [his] matching [appellant's] offer within 15 days by delivering to [Stokes] a check and [his] written agreement to purchase on [those] terms ...."

We have already pointed out that Stokes' attorney received Correia's $1,000 check before the 15th day after Stokes' notice to Correia concerning appellant's option. It has also been pointed out that Stokes did not receive Correia's written option agreement until after the 15th day. Nevertheless, we find Correia acted in a timely manner. His documentation was in substantial compliance with his right and the demand of Stokes. Furthermore, Stokes was satisfied. (6)Although acceptance must be in the terms of the option agreement, an optionor can waive one or more of the terms. (*Riverside Fence Co. v. Novak* (1969) 273 Cal.App.2d 656, 660 [78 Cal.Rptr. 536].) If an optionor does not specify the alleged defects in the tender by the optionee, then a waiver results. (*Layton v. West* (1969) 271 Cal.App.2d 508, 512 [76 Cal.Rptr. 507].) The reason for this rule is that an optionee should be able to remedy any defects in his tender and prevent the optionor from remaining silent at the time of the tender and later surprise the optionee with hidden objections. (*Ibid.*) This court believes the same rules should apply to the exercise of a preemptive right.

(4c)So although Correia did not deliver his matching offer within the 15-day period provided for in the notice, he substantially complied and Stokes waived any defective tender. (*Ibid.*)

Nonetheless, appellant seizes on the language that Correia had 15 days within which to "purchase" arguing that Correia had to purchase the property and not merely procure an option.

Read literally, appellant is correct. However, as we have stated, the intent of that clause was to grant Correia a preemptive right to enter into an agreement with Stokes on the same terms and conditions of an acceptable third-party offer. In this case the third-party's offer was an option contract.

Further, appellant's literal interpretation is without merit because it would frustrate Correia's preemptory right to purchase. For instance, by using an option contract, appellant could prevent a "purchase" from taking place within 15 days. The reason, of course, is that the option ***714** under appellant's option contract could not be exercised until well after the 15th day from Correia's receipt of the notice. Despite Stokes' intent to sell the property during the lease term, appellant's use of an option contract with a delayed exercise clause was designed effectively to foreclose Correia from exercising his preemptive right.

Such a result is inconsistent with the intent and the conduct of the parties to the lease.

Respondent Stokes is satisfied with respondent Correia's performance. Appellant should not be heard to complain.

The judgment is affirmed.

Franson, Acting P. J., and Hanson (P. D.), J., concurred.

Appellant's petition for a hearing by the Supreme Court was denied November 25, 1981.

Cal.App.5.Dist.
Rollins v. Stokes
123 Cal.App.3d 701, 176 Cal.Rptr. 835

END OF DOCUMENT

641 F.Supp.2d 901
(Cite as: 641 F.Supp.2d 901)

H

United States District Court,
N.D. California.
Richard STUART, Plaintiff,
v.
RADIOSHACK CORPORATION, Defendant.
No. C-07-4499 EMC.

April 30, 2009.

Background: Employee sued employer, claiming that the employer had violated the California Labor Code by failing to reimburse employees for expenses they incurred in carrying out inter-company store transfers by using their own cars on company business. The parties filed cross-motions regarding a defense.

Holdings: The District Court, Edward M. Chen, United States Magistrate Judge, held that:
(1) employer's duty to indemnify did not turn on whether an employee has made a request for reimbursement;
(2) whether employer had actual or constructive knowledge of expenses being incurred by employees was a triable fact issue; and
(3) employer's policies did not satisfy the employer's obligations under the California Labor Code.

Ordered accordingly.

Motion to certify appeal denied, 2009 WL 1817007.

West Headnotes

[1] Labor and Employment 231H ⚿195

231H Labor and Employment
231HIV Compensation and Benefits
231HIV(A) In General
231Hk195 k. Defending Claims Against Employee; Indemnity. Most Cited Cases

For purposes of the California Labor Code section requiring an employer to indemnify employees for necessary expenditures incurred in direct consequence of the discharge of the employee's duties, the employer's duty to indemnify does not turn on whether an employee has made a request for reimbursement, but rather, on whether the employer either knows or has reason to know that the employee has incurred a reimbursable expense; if it does, it must exercise due diligence to ensure that the employee is reimbursed. West's Ann.Cal.Labor Code § 2802.

[2] Federal Civil Procedure 170A ⚿2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases

Genuine issues of material fact as to whether employer had actual or constructive knowledge of expenses being incurred by employees in carrying out inter-company store transfers by using their own cars on company business precluded summary judgment as to whether the employer had a duty to indemnify the employees pursuant to the California Labor Code. West's Ann.Cal.Labor Code § 2802.

[3] Labor and Employment 231H ⚿195

231H Labor and Employment
231HIV Compensation and Benefits
231HIV(A) In General
231Hk195 k. Defending Claims Against Employee; Indemnity. Most Cited Cases

Employer's policies, indicating to employees that they were entitled to reimbursement under certain circumstances and explaining the process by which requests for reimbursement should be made, did not satisfy the employer's obligations under the Califor-

nia Labor Code section requiring an employer to indemnify employees for necessary expenditures incurred in direct consequence of the discharge of the employee's duties. West's Ann.Cal.Labor Code §§ 2802, 2856, 2861.

***902** Susan Frances Knight, U.S. Attorney's Office, San Jose, CA, for Plaintiff.

ORDER RE CROSS-MOTIONS RE EXHAUSTION DEFENSE

EDWARD M. CHEN, United States Magistrate Judge.

Currently pending before the Court are the parties' cross-motions regarding what the Court has termed, for purposes of convenience, the exhaustion defense. Defendant RadioShack Corp. has not labeled its motion as any particular kind of motion. Plaintiff Richard Stuart has styled his motion as a motion for partial summary adjudication or, in the alternative, as a motion in limine. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel and all other evidence of record, the Court concludes that the exhaustion defense as defined by RadioShack is not legally viable but that another defense, as described below, is and that, under the standard articulated below for that defense, Mr. Stuart has not provided sufficient evidence to warrant either partial summary adjudication or preclusion.

I. *DISCUSSION*

[1] California Labor Code § 2802 provides, in relevant part, that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." Cal. Lab.Code § 2802. Section 2802 is subject to an anti-waiver provision. California Labor Code § 2804 states in relevant part, that "[a]ny contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof [including the benefits provided in § 2802], is null and void." Cal. Lab.Code § 2804. The issue currently before the Court is whether an employee must first make a request for reimbursement with his or her employer before the employer's duty to indemnify is triggered.

In resolving this issue, the Court begins by rejecting Mr. Stuart's contention that § 2802 is not ambiguous on its face. As the Court previously indicated in its order granting class certification, § 2802 as phrased is ambiguous. Section § 2802 simply states that an employer *shall* reimburse; it says nothing about *when* the duty to reimburse is triggered. *See* Docket No. 65 (Order at 23-24); *cf. Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 570, 67 Cal.Rptr.3d 468, 169 P.3d 889 (2007) (noting that "[n]othing in the language of section 2802 restricts the methods that an employer may use to calculate reimbursement"). In resolving this ambiguity, the Court must "consider the consequences of each possible construction and will reasonably infer that the enacting body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity." *Id.* at 567, 67 Cal.Rptr.3d 468, 169 P.3d 889.

The Court is not persuaded that either party's construction is appropriate. Mr. Stuart's contention is that the duty to reimburse is triggered once the expense is incurred by the employee irrespective of any other circumstance. However, if the employer had no knowledge or reason to know that the expense was incurred and the employee withheld that information, it would hardly seem fair to hold the employer accountable, particularly when, under the California Labor Code Private Attorneys***903** General Act, an employer may be held liable for civil penalties and attorney's fees for a failure to reimburse in accordance with § 2802. *See* Cal. Lab.Code § 2699(a), (f), (g). In turn, RadioShack's contention is that the duty to reimburse is triggered *only* when an employee makes a request for reim-

bursement even if the employer knew or had reason to know the expense was incurred. While the employee, rather than the employer, is in the best position to know when he or she has incurred an expense and the details of that expense, *see* Docket No. 65 (Order at 24), such a narrow construction is at war with § 2802's "strong public policy ... favor[ing] the indemnification (and defense) of employees by their employers for claims and liabilities resulting from the employees' acts within the course and scope of their employment." *Edwards v. Arthur Andersen LLP,* 44 Cal.4th 937, 952, 81 Cal.Rptr.3d 282, 189 P.3d 285 (2008) (internal quotation marks omitted).

The Court concludes that a fair interpretation of §§ 2802 and 2804 which produces "practical and workable results," *Gattuso, id.,* at 567, 67 Cal.Rptr.3d 468, 169 P.3d 889, consistent with the public policy underlying those sections, focuses not on whether an employee makes a request for reimbursement but rather on whether the employer either knows or has reason to know that the employee has incurred a reimbursable expense. If it does, it must exercise due diligence to ensure that each employee is reimbursed.

Focusing on the employer's knowledge parallels the approach taken by both federal and state courts when considering the similar question whether an employer may be held liable for a failure to pay overtime. For example, in *Forrester v. Roth's I.G.A. Foodliner, Inc.,* 646 F.2d 413 (9th Cir.1981), the Ninth Circuit considered a claim for overtime pursuant to federal law, *i.e.,* the Fair Labor Standard Act ("FLSA"). Under the FLSA, "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours specified above at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). As used in § 207(a)(1), the term " '[e]mploy' includes to suffer or permit to work." *Id.* § 203(g). The Ninth Circuit stated that the words "suffer" and "permit" as used in the statute mean "with the knowledge of the employer." *See Forrester,* 646 F.2d at 414.

> Thus an employer who knows or should have known that an employee is or was working overtime must comply with the provisions of § 207. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, *even if the employee does not make a claim for the overtime compensation.*
>
> However, where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of § 207.

Id. (emphasis added).

Notably, the California Supreme Court has indicated its approval of the Ninth Circuit's interpretation of "suffer" and "permit" for purposes of state law wage claims. *See Morillion v. Royal Packing Co.,* 22 Cal.4th 575, 585, 94 Cal.Rptr.2d 3, 995 P.2d 139 (2000) (citing and quoting *Forrester*); *see also White v. Starbucks Corp.,* 497 F.Supp.2d 1080, 1083 (N.D.Cal.2007) (stating that, to prevail on a claim for overtime based on state law, the plaintiff had to prove that the employer "had ***904** actual or constructive knowledge of his alleged off-the-clock work").

The Court is persuaded that the analogy to the overtime cases is appropriate. Reimbursement for expenses is comparable to a wage. In both situations, an employee is owed compensation for services or acts performed for the employer's benefit. In both situations, the compensation is, under governing statutes, owed as a matter of right once incurred or accrued. Both obligations are subject to an anti-waiver provision-*i.e.,* under California law, there is an anti-waiver provision for wages just as there is

for reimbursement. *See* Cal. Lab.Code § 206.5 (providing that "[a]n employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made"); *id.* § 219(a) (providing that "no provision of this article can in any way be contravened or set aside by a private agreement"). And in both cases, there are practical considerations that arise when overtime or expenses may be incurred without the knowledge of the employer and where the employee takes no step to request compensation or reimbursement. In short, the same practical problems raised by RadioShack in the instant case with respect to reimbursement can occur with respect to overtime as well.

The Court therefore concludes that, for purposes of § 2802, before an employer's duty to reimburse is triggered, it must either know or have reason to know that the employee has incurred an expense. Once the employer has such knowledge, then it has the duty to exercise due diligence and take any and all reasonable steps to ensure that the employee is paid for the expense.[FN1]

> FN1. As the Court noted in its order granting class certification, the California Supreme Court is considering a somewhat similar matter-*i.e.*, what is the scope of an employer's duty to *provide* meal periods for its hourly employees; must it *ensure* that its hourly employees take such periods? *See Brinker Rest. Corp. v. Superior Court,* 85 Cal.Rptr.3d 688, 196 P.3d 216 (2008) (vacating Court of Appeal decision). The Court of Appeal concluded that an employer did not have a duty to ensure because the plain language of the statute said that an employer was only obligated to provide a meal period and the term "provide" means to supply or make available. *See Brinker Restaurant Corp. v. Superior Court,* 165 Cal.App.4th 25, 55, 80 Cal.Rptr.3d 781 (2008). A decision from the California Supreme Court is pending.
>
> Notably, § 2802 does not simply state that an employer has the obligation to "provide" an employee with reimbursement. Rather, the statute reads: "An employer *shall* indemnify his or her employee...." Cal. Lab.Code § 2802 (emphasis added). Given this language, the Court concludes that the duty of the employer is more expansive than that in *Brinker,* however that duty is ultimately defined by the Supreme Court.

[2] In the instant case, Mr. Stuart argues that the undisputed evidence establishes as a matter of law that RadioShack had either actual or constructive knowledge that employees were incurring expenses by virtue of using their personal vehicles to perform intercompany store transfers ("ICSTs"). The Court does not agree. It is true that the evidence submitted indicates that RadioShack expected as a general matter that employees would use their personal vehicles to conduct ICSTs, *see* Brooks Decl., Ex. 7 (Schultz Depo. at 22-24), and thus an entry into the database indicating an employee conducted an ICST may provide a reason to know (if not actual knowledge) that a reimbursable expense was incurred. However, based on the record before the Court, the Court cannot conclude as a matter of law that RadioShack had such knowledge or reason to know because there is no evidence as to who within RadioShack logged the information (thus making him or her knowledgeable), ***905** or who within RadioShack received or otherwise obtained that information (thus making him or her knowledgeable), and whether any of those persons' knowledge is imputable to the company.

[3] In contrast, RadioShack asserts that, as a matter of law, it has taken all reasonable steps to fulfill its obligation under § 2802 because (1) it has a policy that informs employees that " '[a]n employee who uses his or her own car on business will be reimbursed for mileage,' " except for " 'incidental business use of a car within the city or suburbs where

the store/office/headquarters is located,' " and (2) it has a policy that informs employees that " 'expenses incurred ... should be clearly listed on the travel claim form found on Answers online or posted on the expenses form within the PeopleSoft T & E system.' " Def.'s Op. Br. at 4. RadioShack argues that these policies are enough because, under California Labor Code § 2856 an employee is required to "substantially comply with all the directions of his employer concerning the service on which he is engaged." Cal. Lab.Code § 2856. Moreover, California Labor Code § 2861 specifies that "[a]n employee shall, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as is reasonable." Cal. Lab.Code § 2861.

RadioShack's argument is unavailing for several reasons. First, RadioShack provides no authority holding that §§ 2856 and 2861 define the employer's obligation under § 2802 once it knows or has reason to know that an employee has incurred reimbursable expenses. Indeed, §§ 2856 and 2861 are found in a different article of the California Labor Code than § 2802.[FN2] Moreover, § 2802 embodies a strong public policy favoring reimbursement; there does not appear to be any significant countervailing public policy underlying §§ 2856 or 2861. Second, the RadioShack policies quoted above simply indicate to employees that they are entitled to reimbursement under certain circumstances and explain the process by which requests for reimbursement should be made. Contrary to what RadioShack argues, they do not "demand" that an employee submit a request for reimbursement for an expense incurred. *See* Cal. Lab.Code § 2861 (providing that "[a]n employee shall, on demand, render to his employer just accounts of all his transactions in the course of his service"). Hence, RadioShack, by virtue of its cited policies, did not bring § 2861 into play. Promulgation of the policies cited by RadioShack do not in themselves fulfill its obligation under § 2802 if it knew or had reason to know an expense was incurred.

FN2. Sections 2856 and 2861 are in the article titled "Obligations of Employee"; § 2802 is in the article titled "Obligations of Employer."

II. *CONCLUSION*

For the foregoing reasons, the Court rejects RadioShack's contention that a duty to reimburse is not triggered until an employee makes a request for reimbursement. The Court concludes that the proper inquiry focuses on the employer's state of knowledge. Once an employer knows or has reason to know that the employee has incurred an expense, then it has the duty to exercise due diligence and take any and all reasonable steps to ensure that the employee is reimbursed for the expense. Promulgating the RadioShack policies alone did not fulfill that duty. However, because the evidence of record does not establish that RadioShack had actual or constructive knowledge of expenses being incurred solely by virtue of the ICST data (absent additional evidence as noted above), the Court **DENIES** Mr. Stuart's motion for partial summary adjudication without prejudice.

***906** The Court also denies his motion for preclusion. The Court's interpretation of § 2802 and the scope of employer's legal duty to reimburse thereunder shall be deemed a ruling in limine, defining the applicable law as defined herein for all further proceedings in this case.

This order disposes of Docket Nos. 88, 89, 94, and 96.

IT IS SO ORDERED.

N.D.Cal.,2009.
Stuart v. RadioShack Corp.
641 F.Supp.2d 901

END OF DOCUMENT

GRACE G. WILSON, Respondent,
v.
F. M. BAILEY et al., Appellants.
Sac. No. 4993.

Supreme Court of California
February 27, 1937.

HEADNOTES

(1) Contracts--Statute of Frauds--Equitable Estoppel.
Although under section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, certain contracts to be enforceable are required to be in writing, or that some note or memorandum thereof be in writing, subscribed by the party to be charged, or his agent, it is equally well settled that the facts of a particular case may give rise to an equitable estoppel against the party seeking to set up the statute of frauds and foreclose such party from relying thereon; and the same is true with reference to a verbal modification of a written contract, which section 1698 of the Civil Code provides may be altered only by a contract in writing, or by an executed oral agreement.

(2) Contracts--Equitable Estoppel--Fraud.
The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed, and it rests upon the principle that the statute of frauds having been enacted for the purpose of preventing fraud, it shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.
See 12 **Cal. Jur.** 933; 25 **R. C. L.** 700 (8 **Perm. Supp.**, p. 5603).
(3) Contracts--Equitable Doctrine--Application.
There is no good reason for limiting the operation of the doctrine of equitable estoppel to any particular class of contracts included within the statute of frauds, provided always the essential elements of the estoppel are present.

(4) Contracts--Option to Repurchase Property--Extension of Time--Equitable Estoppel.
Where a party conveyed real and personal property to another, and the latter gave the former an option to repurchase within a certain time, and before the expiration of the time assured the optionee that it would not be necessary for her to exercise her option within the contract time, but that for thirty days he would do nothing in the matter, an equitable estoppel against the optionor preventing him from relying upon the statute of frauds should be applied.

(5) Contracts--Tender--Time.
Where the contract, in such case, provided that the grantee should pay certain obligations connected with the property and was given authority to borrow money upon it, but agreed to reconvey it to the grantor upon the latter repaying the amount due him at the time the option was exercised and assuming the mortgage executed by him on the property as authorized by the contract, the grantee could not maintain that a tender of the amount due him one day after the expiration of the extended option period was too late, and that the grantor had not offered to assume the indebtedness created by the grantee on the property, where a prospective lessee refused to advance the necessary money therefor to the grantor, solely by reason of the fact that a lease had been placed upon the property by the grantee, which lease the court found was fraudulently executed by the grantee.

(6) Contracts--Assumption of Indebtedness.
Where the contract, in such case, did not provide for the assumption of indebtedness placed upon the property by the grantee under authority of the contract, the latter could not require as a condition precedent to the exercise of the option a tender of assumption of the indebtedness; and where the court

in its judgment directing a reconveyance of the property provided that plaintiff should assume the payment of the indebtedness and save the defendants harmless, this was as far as it was required to go to do equity.

(7) Contracts--Amount of Indebtedness--Findings--Accounting.
The trial court was justified in accepting as the amount due the defendant, in such case, the amount set forth by him in a letter, although he testified that he had expended money subsequent to that date in excess of the credit due from the application of rent, but made no real effort to substantiate the claim, which was denied by the plaintiff, who claimed that she did not owe the amount claimed by the defendant, but would accept that figure as proper; and under the circumstances an accounting was not necessary.

SUMMARY

APPEAL from a judgment of the Superior Court of Humboldt County. Harry W. Falk, Judge. Affirmed.

The facts are stated in the opinion of the court.

COUNSEL

E. S. Mitchell for Appellants.

A. G. Bradford for Respondent.

CURTIS, J.

Plaintiff sought by this action to compel a reconveyance by defendants to her of property, formerly owned by her, under a written option by her grantee to reconvey the property to her upon the performance by her of certain conditions. The facts, which are practically undisputed, are as follows: Plaintiff, prior to August 25, 1932, was the owner of a parcel of land in Eureka, California, upon which was located a service station. Having become involved financially, upon the 25th day of August, 1932, she entered into an agreement with the defendant, F. M. Bailey, whereby she conveyed this real and personal property to him. Defendant, as part of the same transaction, executed an agreement giving her an option to repurchase said real and personal property upon the payment to him of the amount due him at the time of the exercise of the option. By the same agreement as consideration for said conveyance, defendant agreed to assume and pay the deed of trust theretofore executed by the plaintiff in favor of the Bank of Italy, together with all charges in connection therewith, certain assessments upon the property as the instalments became due, the taxes due, and the balance of the purchase price upon certain equipment in use at the service station. The agreement provided that in order to pay off the deed of trust against the premises the grantee should have the right "to mortgage or encumber" said real and personal property, and that any encumbrance or mortgage placed against the property should take priority over said option. In accordance with said agreement, plaintiff executed said conveyance and it was recorded. She also executed a bill of sale for the personal property. During the subsequent year, defendant leased said service station to third parties and credited the rent received therefor toward the reduction of the indebtedness owed to him by the plaintiff. In a letter to the bank, dated August 21, 1933, defendant gave the bank authority to furnish plaintiff with information as to the amount due under the trust deed, and also furnished in said letter a statement of the amount owing him by the plaintiff on that date. Said statement is in the following figures: "Approximate balances. Bank loan-$1700. Cash ***419** Register-$60. Street Assessments-$597.25. Bailey Trading Company - $1006.91. Total - $2766.91." It appears that subsequent to the execution of the written agreement defendant's business had been incorporated under the name of the "Bailey Trading Company". Shortly before the expiration of the option, plaintiff negotiated with the Gilmore Oil Company for the purpose of securing from them an advance by means of which she could pay off defendant and secure a reconveyance of her property. Defendant refused to give a written extension without consulting his attorney. On Au-

gust 23, 1933, plaintiff and defendant met in front of the bank, and defendant stated to plaintiff that he would not give her an extension in writing, but that he would tell her in front of Mr. Charters, who was vice-president and manager of the bank, that he would extend the agreement for thirty days. It should be here noted that there is no dispute that the agreement was verbally extended. Plaintiff's testimony to this effect was corroborated by the testimony of her son who was also present, and by the testimony of Mr. Charters. Mr. Charters testified that plaintiff and defendant came into his office at the bank; that plaintiff asked Mr. Bailey, "Will you give me thirty days' extension on this proposition?"; that defendant stated that he would; that plaintiff said, "Will you put it in writing?", defendant said, "No, I will not put it in writing, but I will make the statement in Mr. Charters' presence"; plaintiff made some remark, "Be sure to remember that"; and he (Mr. Charters) replied that his memory was none too good and that he would make a note of it. He testified that he did make a pencil memorandum of it on the bottom of the letter, dated August 21, 1933, which defendant had sent to the bank giving the statement of the amount due from the plaintiff, which memorandum was as follows: "August 23/33. In my presence granted a 30 days extension from August 25, 1933, to Mrs. Wilson to redeem the property. H. F. Charters." The defendant, when interrogated on the witness stand under section 2055 of the Code of Civil Procedure, whether his version of the transaction was the same as that of plaintiff and Mr. Charters, replied that it was. He stated: "My recollection of it was that I stated that I would do nothing for another thirty days." To the question, "The idea, Mr. Bailey, was that this proposition should be held open for another thirty ***420** days was it not? defendant replied, "Correct". The brief of appellant contains the following statement: "On August 25th respondent had failed to exercise the option and asked for a thirty day extension, and appellants refused to extend the same in writing, but did state that they would reconvey at any time within thirty days according to the terms of the agreement." In the meantime, the former lessee of the service station had vacated the service station, and on September 11, 1933, there was recorded at the request of the defendant, a lease by defendant to one Lester Lee, a former employee, which was dated, August 25, 1933, but was not acknowledged by Lee until August 31, 1933. This lease was for a period of one year from September 1, 1933, to September 1, 1934, with an option for an extension of two years more. The Gilmore Oil Company upon learning of this lease refused to advance the necessary funds to the plaintiff by reason of the fact that the existence of the lease would prevent their taking over of the service station for the sale of their products. However, on September 25, 1933, the Gilmore Oil Company deposited in the Los Angeles branch of the Bank of America in escrow the sum of $1,006.91, payable to the defendant upon the clearing up by him of the lease to Lester Lee. On the same day, by wire, the Eureka branch of the Bank of America was instructed to pay out the money to defendant upon compliance by him with the terms of the escrow. And on the same afternoon, defendant was informed by telephone by the attorney for the plaintiff that the money was deposited subject to defendant's withdrawal upon compliance with the terms of the escrow. Upon the trial of the action, judgment was in favor of the plaintiff against the defendants. The court found, "It is true that prior to the 25th day of August, 1933, defendant, F. M. Bailey, verbally extended the said option for an additional period of thirty days and that defendant, F. M. Bailey, is estopped to assert the Statute of Frauds." It further found that, "It is true that defendant, F. M. Bailey, executed a promissory note to Bank of America, a corporation, and secured said promissory note by executing a deed of trust covering the lands and premises hereinbefore described. That in so executing said promissory note and deed of trust said defendant was acting as trustee for plaintiff," and "It is true that on August 25, 1933, F. M. Bailey, rendered to plaintiff a statement showing ***421** $1,006.91 due from plaintiff to defendant. That it is true that thereafter and prior to September 25, 1933, plaintiff tendered to defendant, F. M. Bailey, said

sum of $1,006.91, being all sums of money due to said F. M. Bailey by virtue of said agreement." The court also found that the defendant had verbally extended the option with reference to the personal property and was estopped to plead the statute of frauds with reference to said extension, and that the written lease to Lester Lee "was entered into fraudulently and without consideration and for the express purpose of creating a cloud upon the title of plaintiff". The judgment provided: (1) That defendants execute to plaintiff a good and sufficient conveyance of the real property, (2) that defendants execute to plaintiff a good and sufficient conveyance of the personal property involved in said controversy, (3) that plaintiff assume the payment of the promissory note and deed of trust executed by defendant, F. M. Bailey, to the Bank of America, and save defendants harmless therefrom, and (4) that the lease executed to Lester Lee be "and the same is hereby cancelled". From said judgment, defendants appeal.

Appellants seek a reversal of said judgment upon the ground that "an option to purchase realty cannot be extended, except by writing, and must be exercised within the time provided". Two questions are thus presented: (1) "Is the defendant estopped from relying upon the statute of frauds with reference to the verbal extension of the option given to the plaintiff to repurchase the real and personal property?" and "Was the tender sufficient?" We are satisfied that the answer to both questions is in the affirmative.

(1) It is, of course, well settled, under the provisions of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, that certain contracts to be enforceable are required to be in writing, or that some note or memorandum thereof be in writing, subscribed by the party to be charged, or his agent. It is also equally well settled that the facts of a particular case may give rise to an equitable estoppel against the party seeking to set up the statute of frauds and foreclose such party from relying thereon. (*Seymour v. Oelrichs,* 156 Cal. 782 [106 Pac. 88, 134 Am. St. Rep. 154]; *Notten v. Mensing,* 3 Cal. (2d) 469 [45 Pac. (2d) 198].) And likewise, while it is settled in view of section 1698 of the Civil Code which provides that a written contract ***422** may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, that a written contract may not be varied or modified by an executory parol agreement, nevertheless, it is also true that the facts of a particular case may give rise to an equitable estoppel against the party who denies the verbal modification.

(2) *Seymour v. Oelrichs, supra,* which is the leading case in this state upon the subject of equitable estoppel, sets forth the basis of the doctrine at page 794, as follows: "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme'. (2 Pomeroy's Equity Jurisprudence, sec. 921.) It was said in *Glass v. Hulbert,* 102 Mass. 24, 35 [3 Am. Rep. 418]: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer but the infliction of an unjust and unconscientious injury and loss. In such case the party is held by force of his acts or silent acquiescence which have misled the other to his harm to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain

and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. (See 5 Browne on Statute of Frauds, sec. 457a.) In the section last cited, Mr. Browne says: 'A plaintiff ... must be able to show clearly ... not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement ***423** and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.' (3) We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that is that it applies 'in every transaction where the statute is invoked'. It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson v. Colgrove,* 100 U. S. 578, 580 [25 L. Ed. 618] and quoted therefrom in *Carpy v. Dowdell,* 115 Cal. 677, 687 [47 Pac. 695], as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." This broad rule with reference to equitable estoppel was recently reaffirmed in the case of *Notten v. Mensing, supra.* The latter case quoted with approval the rule stated in the case of *Anderson v. Hubble,* 93 Ind. 570, 576 [47 Am. Rep. 394], as follows: " 'It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must by his silence or his representation, have created a belief of the existence of a state of facts which would be unconscionable to deny, but it is not essential that he should have been guilty of positive fraud in his previous conduct ... All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon ***424** ... There need be no precedent corrupt motive or evil design.' "

(4) The undisputed facts of the instant case present, in our opinion, a proper case for the application of the rule of equitable estoppel. Prior to the expiration of the option, at a time when the plaintiff was negotiating with interested third parties for an advance to enable her to exercise the option for the repurchase of property worth five or six times the amount necessary to redeem, the defendant assured plaintiff that it would not be necessary for her to exercise her option within the given time but that for thirty days he would do nothing in the matter, implying by this statement, according to his own testimony, that he would leave the option open for that period of time. The irremediable change of position by the plaintiff in reliance upon the promise of the defendant justified the trial court in refusing to listen to the defendant seeking to deny the truth of his own representations.

In the case of *Notten v. Mensing, supra,* it was pointed out that at the trial the burden rested on the plaintiff to prove the oral agreement by full, clear and convincing evidence, and that if such agreement be proved by full, clear and convincing evidence, such agreement should be enforced according to its terms. As before noted, there is no question in this case that defendant in fact verbally extended the option. It is not denied. The judgment of the trial court giving effect to the agreement was, therefore, proper.

(5) Appellants attack the sufficiency of the tender both upon the ground that thirty-one days had elapsed prior to the deposit of the purchase price in escrow and the option had only been extended for thirty days, and upon the ground that the plaintiff had not offered to assume the indebtedness of defendant to the Bank of America, evidenced by the promissory note signed by him after he acquired the property, and secured by the deed of trust upon the property. In view of the fact that the Gilmore Oil Company refused to advance money to the plaintiff solely by reason of the fact that the lease to Lester Lee had been placed upon the property and they could not take over the service station, taken in conjunction with the finding of the trial court, supported by evidence, that the lease given by defendant to Lester Lee, his former employee, "was entered into fraudulently and without consideration and for the express purpose of ***425** creating a cloud upon the title of plaintiff ", defendant is in no position to complain of a one day's delay in exercising the option. He cannot thus take advantage of his own wrong.

(6) With reference to the assumption of defendant's liability to the Bank of America upon the note which he executed in pursuance of the agreement with plaintiff, it appears that nowhere in said agreement is there an express agreement on the part of the plaintiff to reassume said liability although there is a provision that any trust deed or mortgage placed upon the property should take priority over the option. The testimony of the district manager of the Gilmore Oil Company was to the effect that he, as representative of the Gilmore Oil Company, had prior to the exercising of the option on September 25, 1933, assured the defendant that the Gilmore Oil Company was willing to and would assume said liability, and that this was agreeable to the bank. And although the option agreement contained no express provision for the assumption of said liability, the trial court in its judgment has provided that the " plaintiff assume the payment of the promissory note and deed of trust executed by defendant, F. M. Bailey, to the Bank of America, and save the defendants harmless therefrom". By reason of the fact that the option agreement contained no provision for relieving the defendant of all liability upon the note and trust deed in the event of a repurchase of the property, defendant cannot now insist that plaintiff could only exercise her option by fulfilling such nonexistent requirement. We are of the opinion that the trial court in making provision in the judgment that the plaintiff assume the payment of the promissory note and deed of trust executed by defendant F. M. Bailey to the Bank of America, and save defendants harmless therefrom has gone as far as it is required to go in order to do equity under the circumstances. In view of the fact that the trust deed is a first lien upon the property and that the property is worth five or six times the amount of the indebtedness to the bank, there is little likelihood of defendant being called upon to make any payment upon his debt. As said before, if by reason of lack of foresight he has failed to include in the option agreement all of the provisions necessary to make him whole upon the exercise of the option, he cannot require as a condition precedent to the exercise of ***426** the option, a tender of performance of said missing provisions.

(7) We are likewise satisfied that the trial court was justified in accepting as the amount due to defendant the amount set forth by defendant in the letter of August 21, 1933, to the bank. Although defendant testified that he had expended money subsequent to that date in excess of the credit due from an application of the rent, he made no real effort to substantiate his claim, and it was denied by the plaintiff, who claimed that she did not owe the amount of $1,006.91 claimed by defendant, but was willing to accept that figure as the proper one. Under these circumstances an accounting was not necessary.

We have decided this appeal upon the issues as presented by the parties, although we are somewhat at a loss to understand why plaintiff did not seek to redeem said property as a deed absolute given merely as security, in which event she would have been entitled to redeem at any time until her right

had been foreclosed by an action of foreclosure brought by the defendant.

There seems to be little doubt, in view of the written option agreement which was entered into simultaneously with the conveyance by the plaintiff to the defendant and the fact that the payment of rent was applied by the defendant to the debt owing from the plaintiff, that the conveyance from the plaintiff to the defendant was in fact a mortgage. However, this issue was neither presented to the trial court, nor argued in the briefs of the parties, although there was a passing reference in the respondent's reply brief that "The whole transaction was intended not as an outright sale but as a conveyance for the purpose of securing to Bailey the indebtedness owed to him by Mrs. Wilson." In view of our holding that the option was in fact properly exercised by the plaintiff, it is not necessary for us to discuss the rights and remedies of the parties under a deed absolute which was in fact a mortgage.

The judgment is affirmed.

Thompson, J., Edmonds, J., Waste, C. J., Langdon, J., Shenk, J., and Seawell, J., concurred. ***427**

Cal.
Wilson v. Bailey
8 Cal.2d 416, 65 P.2d 770

END OF DOCUMENT

MARGUERITE WOOD, Individually and as Administratrix, etc., Appellant,
v.
FRED GUNTHER et al., Respondents.
Civ. No. 16595.

District Court of Appeal, Second District, Division 1, California.
Jan. 19, 1949.

HEADNOTES

(1) Partnership § 86--Liquidation--Agreement or Statute as Controlling.
Partners may agree in their contract of copartnership or by subsequent agreement that the firm shall not be dissolved by the death of a partner; that the interest of the deceased partner may be purchased by the surviving partners for a stated sum, or for an amount arrived at by a process or formula; or that the investment of the deceased partner in the firm shall continue. Under any of such situations the Uniform Partnership Law does not control the liquidation of a partnership. (Uniform Partnership Act, § 42; Civ. Code, § 2436.)
See 20 **Cal.Jur.** 806; 40 **Am.Jur.** 332.

(2) Husband and Wife § 69--Property--Determination of Character-- Presumptions.
It is presumed that the husband's interest in property acquired after marriage is community property.

(3) Husband and Wife § 134--Descent of Community Property.
While the interest of a partner in a partnership is not, as such, community property, yet as between the surviving spouse, the heirs at law, the administratrix and the individual creditors of the deceased partner's estate, it is governed by community property rules.

(4) Partnership § 91--Liquidation--Rights of Surviving Spouse of Deceased Partner.
Where the original agreement of copartnership entitled the widow of a deceased partner to continue the investment of her husband in the firm, which she chose to do, and where she entered into a subsequent partnership agreement in which it was stated that "This conveyance and agreement to convey the assets of the former partnership is made subject to probate administration," the use of the term "subject to probate administration" had but a single purpose, and that was to recognize the claim which the estate of the deceased partner might have against the assets of the partnership for the expenses of administration, taxes, creditors' claims or other expenses. In the absence of any such claims by the estate the widow was entitled to the interest of her deceased husband in the partnership, and the new partnership agreement was therefore valid.

(5) Partnership § 86--Liquidation--Rights and Duties.
Where a partner proposed to terminate the partnership and by the express terms of the partnership agreement such proposal instantly gave rise to a right on the part of the remaining partners to purchase the first partner's interest and thereby avoid a liquidation of the partnership, and where they made an offer to such partner to pay a designated sum for her interest, or in the alternative, to value her interest according to a formula set forth in the partnership agreement, and also requested that she advise them whether she would elect to take the designated sum without arbitration or whether she wished arbitration, it was her duty to accept the offer, to make a counterproposal or to demand arbitration, and failing expressly to do any of these under circumstances which obligated her to speak, she bound herself by her silence to take the offered sum.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Clarence M. Hanson, Judge. Affirmed.

Action for dissolution of a partnership and for other relief, to which defendants filed cross-complaints for specific performance and declaratory relief. Judgment that defendants were owners of all of assets of partnership, and that they pay to plaintiff a designated sum, affirmed.

COUNSEL

Michael F. Shannon and Thomas A. Wood for Appellant.

Baker & Kelleher, Fogel & McInerny and Cornelius W. McInerny, Jr., for Respondents.

WHITE, J.

In April of 1938, E. T. Goodman, Eva I. Goodman, his wife as first party; Fred Gunther and Florence Gunther, his wife as second party; and Carleton E. Wood and Marguerite Wood, his wife as third party, entered into a written agreement of partnership for the purpose of reducing ***720** to writing their interests in the business then being operated by them, namely, (1) distributors in the Santa Monica Bay District for the products of the Tidewater Associated Oil Company, and (2) the Santa Monica Auto Camp. This agreement provided among other things, that each of the parties thereto was the owner of an undivided one-third interest in and to each of the enterprises and in and to all of the property owned in connection with the operation of said business, including both real and personal property.

While it would appear from the foregoing that the partnership agreement was entered into by Messrs. Goodman, Gunther and Wood and their three spouses who signed as if they with their three husbands, were partners, a reading of the agreement in its entirety discloses that the wives were not to be partners and had signed merely to divest themselves of certain rights and to be invested with other certain specific rights in the partnership upon the happening of certain contingencies, as will immediately become manifest.

One of the contingencies just alluded to was contained in a provision of the agreement which provided that in the event of the death of any one of the partners, the surviving widow of such partner, if she so desired, had the right to sell to the surviving two partners, the deceased partner's interest in the business, provided that the widow of the deceased partner was legally entitled to receive the one-third interest of her deceased husband. The agreement further provided that the surviving widow could, if she so desired, retain her interest in the partnership.

Carleton E. Wood, one of the partners, died April 10, 1945. No action was thereafter taken by either his widow or the two surviving partners with regard to what should be done with the interest of the deceased partner in the business, and the business continued in operation.

On December 11, 1945, E. T. Goodman, another of the partners, died and the partnership terminated by operation of law.

On January 1, 1946, an agreement entitled "Partnership Agreement" was entered into between Fred Gunther, only survivor of the three original partners, and the respective widows of the two deceased partners, E. T. Goodman and Carleton E. Wood.

This agreement provided that each of the partners should have an equal one-third interest in the new business and recites that it was entered into pursuant to the desire of the partners ***721** "to form a new partnership which will continue the businesses carried on by the old partnership."

The agreement recites that "Fred Gunther and the respective spouses of the other parties for many years were partners in the operation" of the foregoing business, and that the agreement was entered into pursuant to the desire of the parties "to form a new partnership which will continue the businesses carried on by the old partnership." The instrument provided that each of the partners should have an equal one-third interest in the partnership.

Other provisions pertinent to a discussion of the issues presented on this appeal are:

"Should any of the partners desire to sell his interest in the partnership or to withdraw from the partnership, *or to terminate or dissolve the partnership,* he shall do so only upon the following terms:

"(a) Such partner shall give to each of the remaining partners 30 days written notice of such intention and shall, if the remaining partners or partner indicates his willingness to buy within said (30) days, sell to the remaining partner or partners the withdrawing partner's one-third (1/3) interest in the business subject to its liabilities, for an amount equal to the value of the selling partner's interest in the partnership according to standard accounting procedure; market value, not book value, is to be considered. Good will is not to be considered an asset.

"(b) The selling partner agrees to accept payment for his interest in cash to be paid within 90 days from the giving of notice of acceptance by the buying partner or partners.

"(c) Said option to purchase may be exercised by both of the remaining partners in equal proportion or if either of the remaining partners fails to exercise the option to buy and the other so exercises his option to buy, the one so electing shall have the right to purchase the whole of the selling partner's interest in the partnership. The selling partner shall not be required to sell unless the entire partnership interest of the selling partner is purchased.

"(d) Should there be any disagreement by the partners as to the value of the interest of the selling partner, the selling partner shall appoint an arbitrator and the buying partner or partners shall appoint another and if these two arbitrators are unable to agree, the two shall appoint a third and the value of the selling partner's interest fixed by the said arbitrators or any two of them shall determine the purchase ***722** price. All parties agree to be bound by such decision of the arbitrators. ..." (Emphasis added.)

Pursuant to the provisions of the agreement just set forth, the attorney for plaintiff Marguerite Wood, on July 10, 1946, addressed a letter to Fred Gunther and Eva I. Goodman, reading as follows:

"Mrs. Marguerite Wood has instructed me to notify you that, pursuant to the terms of the Contract of Partnership existing between yourself, Mrs. Goodman and Mrs. Wood, she proposes to terminate this partnership, and this letter is to be taken by you as a thirty days' notice to that effect."

In reply to this letter, defendant Fred Gunther, on August 6, 1946, addressed a letter to plaintiff Marguerite Wood reading as follows:

"In response to your notice of the 10th day of July, 1946, relating to your desire to terminate the partnership between Fred Gunther, Eva I. Goodman and Marguerite Wood, created by instrument dated Jan. 1st, 1946, I hereby indicate my willingness to buy your one-third interest in the business of said partnership subject to its liabilities or to buy in conjunction with Eva I. Goodman your one-third interest in the business of said partnership subject to its liabilities, for an amount equal to the value of your said interest in the said partnership, according to standard accounting procedure; market value, not book value, is to be considered. Good will is not to be considered an asset.

"In my opinion, the value of your said interest in said partnership, computed as aforesaid, is $45,000.00, which sum I will pay to you in cash within 90 days from the giving of this notice of acceptance should I be the sole purchaser.

"Should I purchase your said interest in conjunction with Eva I. Goodman, I will pay to you in cash within 90 days from the giving of this notice of acceptance one-half of said sum last above mentioned.

"Should there be any disagreement as to the value of your interest, I appoint Charles W. Ashford,

whose business address is 1632 Montana Avenue, Santa Monica, California, as an arbitrator to represent me.

"I will make payment to you in cash of the amount found by the arbitrators to be the value of your interest, or I will do so in conjunction with Eva I. Goodman, within the time required in the said partnership agreement.

"This acceptance is intended to conform to the terms of our said partnership agreement and all the terms and conditions ***723** thereof are incorporated in this notice of acceptance, and I will conform to and execute any and all of the provisions of said partnership agreement provided on my part to be performed whether expressly recited in this letter or not.

"Please advise me of your determination in this matter at your early convenience."

On August 9, 1946, defendant Eva I. Goodman addressed a letter to plaintiff Marguerite Wood, acknowledging receipt of the latter's communication of July 10, and advising that she had received a copy of the aforesaid letter of defendant Gunther wherein he expressed "a willingness to buy your one-third interest in the business of said partnership ... or to buy in conjunction with myself your one-third interest." Mrs. Goodman's letter then continued, "I wish to notify you that I am hereby joining in Mr. Gunther's letter of August 6, 1946, and that it is my desire to purchase your one-third interest in the business of said partnership ... in conjunction with Mr. Gunther." In other respects, such as conforming with the provisions of the partnership agreement of January 1, 1946, and incorporating by reference the terms of said agreement in this letter, the same was similar to the above mentioned communication written by defendant Gunther.

Thereafter, nothing was done between the parties with regard to the foregoing letter advising of plaintiff Marguerite Wood's proposal to terminate the partnership until October 23, 1946, when defendant Fred Gunther addressed the following letter to plaintiff Mrs. Wood:

"I wish to notify you that I will be ready on the 31st day of October, 1946, at the hour of 10:00 o'clock a. m. at your residence at 15420 Roscoe Boulevard, Van Nuys, California, or at such other place as you may designate within the County of Los Angeles, State of California, to pay to you the sum of $45,000.00 for your one-third interest in the partnership composed of Fred Gunther, Eva I. Goodman, and Marguerite Wood, created by agreement dated January 1st, 1946, in accordance with the terms and provisions of said agreement of January 1st, 1946, your notice thereunder of July 10th, 1946, and my reply dated August 6, 1946.

"I wish to further notify you that in the event that you sell one-half of your interest in said partnership to your partner, Eva I. Goodman, under the terms of said partnership agreement, I will be ready to pay to you the sum of $22,500.00 for one-half of your one-third interest at the time and place above mentioned. ***724**

"I shall be pleased to confer with you or your representative prior to October 31st, 1946, in order to make arrangements for payment to you and transfer to me."

On the morning of October 31, 1946, at about the hour of 9:30 o'clock, defendant Gunther telephoned plaintiff Marguerite Wood and requested her to come to his bank so that he might pay her either the sum of $45,000 or $22,500 in conformity with his letter of October 23. Mrs. Wood replied, "No, you promised to come over here." Defendant Gunther then proceeded to Mrs. Wood's home where he arrived about 11:45 a. m. and was met by a representative of plaintiff Wood's attorney who served upon defendant the complaint theretofore filed in the instant action. Upon this occasion defendant Gunther had two certified checks in the total sum of $45,000. He was advised that plaintiff Mrs. Wood was not at home and he thereupon delivered to the representative of her attorney a writing as follows:

"Dear Mrs. Wood:

"I hereby tender you $45,000 for a good title to a one-third interest in Gunther, Wood, and Goodman, or $22,500 for a good title to a one- sixth interest in Gunther, Wood, and Goodman if I purchase in conjunction with Eva I. Goodman."

Plaintiff Mrs. Wood testified that she was at her home at the hour of 10 a. m. on the day in question, waited approximately one-half hour when she departed to keep a previously made appointment.

The complaint filed herein on October 31, 1946, by plaintiff Marguerite Wood was for dissolution of the partnership created by the agreement of January 1, 1946, for an accounting and the appointment of a receiver to take possession of the property and assets of said partnership.

Defendants filed separate answers and also filed cross-complaints. Defendant Fred Gunther's cross-complaint embodied four causes of action, three for specific performance and one for declaratory relief. The cross- complaint filed by defendant Eva I. Goodman prayed for specific performance.

Following trial the court made findings that the interest of Carleton E. Wood in the original partnership formed through the agreement of April, 1938, was the community property of Carleton E. Wood and his surviving widow, defendant Marguerite Wood, plaintiff herein. That there were no unpaid creditors of the estate of Carleton E. Wood, and that the time for filing or presenting claims against said estate expired November 16, 1945. "That it is true that Marguerite *725 Wood (plaintiff herein) was legally entitled to receive the undivided one-third (1/3) of her deceased husband, Carleton E. Wood, in the partnership created by the agreement of April, 1938." That all of the assets of said partnership had been transferred to and vested in the partnership created by the agreement of January 1, 1946, between plaintiff Marguerite Wood, defendants Eva I. Goodman and Fred Gunther. That plaintiff did not at any time prior to the filing of the complaint herein, indicate to or advise either defendants Fred Gunther or Eva I. Goodman that the proffered sum of $45,000 for her interest in the partnership was not satisfactory or agreeable to her, or was not the value of her said interest "subject to its liabilities, according to standard accounting procedure, market value, not book value, to be considered, good will not to be considered as an asset." That at no time did plaintiff indicate to either of her partners that she would not accept their offer of $45,000 for her interest "in order that they might agree upon a single arbitrator to represent them in the manner provided in the agreement of January 1, 1948." That plaintiff did not at any time appoint an arbitrator to represent her to fix the value of her interest in the partnership formed through the agreement of January 1, 1946. That the sum of $45,000 "was and is adequate, fair and just when determined in the manner prescribed in the said partnership agreement of January, 1946." That plaintiff "was obligated to reply to the communications of Fred Gunther of August 6, 1946, and Eva I. Goodman of August 9, 1946, within a reasonable time," but did not do so. That her silence constituted an acceptance of the proposal made by defendants Gunther and Goodman. That plaintiff had sold her interest in the partnership for the sum of $45,000.

Judgment was entered that "Fred Gunther and Eva I. Goodman are the owners of all of the assets of the partnership known as Gunther, Wood and Goodman, established by the agreement dated April, 1938, and by the agreement of January 1, 1946. That defendants and cross-complainants pay to plaintiff and cross-defendant the sum of $45,000.00."

Plaintiff and cross-defendant prosecutes this appeal from such judgment.

Appellant first contends that the cross-complaints filed herein by respondents Fred Gunther and Eva I. Goodman do not state facts sufficient to constitute a cause of action.

This claim is grounded on the contention that "the

so-called partnership of January 1, 1946, did not acquire title to any ***726** of the assets that were owned by the partnership operated by E. T. Goodman, Fred Gunther and Carleton Wood under the agreement dated April, 1938."

As we view appellant's contention it is that upon the death of her husband, the partnership of which he was a member, established by the agreement of April, 1938, was *ipso facto,* terminated by his demise, that his interest vested in the surviving partners, subject to their duty to liquidate the business, account to the administratrix of his estate and pay over to such administratrix one-third of the amount remaining after liquidation. Appellant argues that such was the understanding of the parties to the partnership agreement of January 1, 1946, is evidenced by the provisions therein contained, such as "This conveyance and agreement to convey the assets of the former partnership is made subject to probate administration" in the matter of the estates of the two deceased partners. That the agreement of January 1, 1946, also contained the provision for continuation of the original partnership created by the agreement of April, 1938, "subject, however, to any accounting that may be required in the said estates." That the provision in the agreement of January 1, 1946, that the surviving partner should not be obligated to liquidate the original partnership but shall continue to operate the same indicates that the parties did not intend a present conveyance of anything owned by the original partnership to the partnership created by the contract of January 1, 1946. In other words, appellant urges that the partnership established by the agreement of January 1, 1946, was not to receive anything by way of assets until the following *conditions precedent* set forth in said agreement were complied with:

1. The completion of the probate administration of the two estates;

2. The securing during the probate administration of the two estates, of orders of court permitting the transfer from one partnership to the other by the two surviving widows if the court had jurisdiction to make such order;

3. The ability of the two widows, upon the completion of the probate administration of their respective husbands' estates, to make such a transfer as would vest title in the partnership attempted to be created by the contract of January 1, 1946;

4. That since there was no allegation in the cross-complaints that the foregoing "conditions precedent" had been complied with, the pleadings did not state a cause of action. ***727**

(1) It is well settled that partners may agree in their contract of copartnership or by subsequent agreement that the firm shall not be dissolved by the death of a partner; that the interest of the deceased partner may be purchased by the surviving partners for a stated sum, or for an amount arrived at by a process or formula, or that the investment of the deceased partner in the firm shall continue. Under any of such situations the Uniform Partnership Law does *not* control the liquidation of a partnership (Uniform Partnership Act, § 42 [Civ. Code, § 2436]; *Gibboney v. Derrick,* 338 Pa. 317 [12 A.2d 111]; *In re Eddy's Estate,* 175 Misc. 1011 [26 N.Y.S.2d 115]. *Cf. Rankin v. Newman,* 114 Cal. 635 [46 P. 742, 34 L.R.A. 265]; *Stilgenbaur v. U. S.,* 115 F.2d 283; *Keyes v. Hurlbert,* 43 Cal.App.2d 497 [111 P.2d 447]; *Lanier v. Bowdoin,* 282 N.Y. 32 [24 N.E.2d 732]).

As heretofore noted, the wives of the original partners were parties to the original partnership agreement of April, 1938, not as partners, but for the purpose of surrendering certain rights and to be invested with other specific rights, dependent upon the happening of certain contingencies. One of such contingencies was the death of a partner, upon the occurrence of which the original agreement provided that his surviving spouse, if she then was "legally entitled to his one-third interest in the partnership," could elect, (1) to sell the interest to the surviving partners in an amount to be ascertained by arbitrators as set forth in the agreement, or, (2) to continue the investment of her deceased spouse

in the partnership.

In the case at bar the court found on substantial evidence that there were no creditors of the estate of the deceased partner Carleton E. Wood; that he died intestate; that the unpaid costs of administration are less than the sum received from the sale by the administratrix of certain personal property of the estate; that the deceased partner Wood left surviving his widow, appellant herein, and two children.

(2) As was said by the trial judge in his memorandum ruling when the cause was before him, "Under the law of this state it is presumed that the husband's interest in property acquired after marriage is community property. His interest in the partnership was acquired after marriage and the presumption that it was acquired with community funds has not been rebutted by evidence. (3) While the interest of a partner in a partnership is not, as such, community property, yet as between the surviving spouse, the heirs at law, the administratrix ***728** and the individual creditors of the deceased partner's estate, it is governed by community property rules. (9 Cal.L. Rev p. 221, note 109.) Moreover, it appears that the widow filed with the state a claim that the partnership interest was community property and the state inheritance tax has been assessed on that basis.

"Accordingly, it follows that the widow was in the language of the original partnership agreement, 'legally entitled to receive the undivided one-third interest' therein of her deceased husband. Being thus entitled, she was by the contract of partnership entitled to defer the liquidation of the partnership. Her right by that contract was superior to the rights of the administratrix, the heirs at law, and the individual creditors of the decedent."

(4) The original agreement of copartnership entitled appellant to continue the investment of her husband in the firm, which she chose to do. By the partnership agreement of January 1, 1946, the manifest intention of the parties was that appellant would convey whatever rights she had, whether as stated by the trial court, "it was a chose in action, or a specific interest in the partnership property." It seems manifest that the use of the term "subject to probate administration" had but a single purpose, and that was to recognize the claim which the estate of the deceased partner Carleton E. Wood might have against the assets of the partnership for the expenses of administration, taxes, creditors' claims or other expenses. There was accordingly inserted in the agreement a provision that appellant would hold the new partnership harmless as against any such claims that might be asserted.

Appellant, in her capacity as administratrix of the estate of her deceased husband, is a party to this action. As such, she makes no claim that the assets of the partnership are needed to satisfy any claims in the estate. The court found on ample evidence that no such claims by the estate existed, and that appellant as the surviving spouse of one of the original partners, was "legally entitled to his one-third interest in the partnership." The agreement of January 1, 1946, was therefore valid and not subject to the infirmities applied thereto by appellant.

It is next asserted by appellant that the cross-complaints fail to state a cause of action for the further reason that there had never been an acceptance of the offer made by appellant to respondents, that on the contrary, there was a rejection thereof and a counterproposal which was not accepted. Also, ***729** that it was error to hold that appellant Wood was obligated to reply to the letters of respondents under date of August 6, 1946 and August 9, 1946, and that her failure to reply constituted an acceptance of the counterproposal made by respondents Gunther and Goodman.

(5) Mindful of the rule that ordinarily an acceptance of an offer must be absolute and unqualified, but also remembering that under certain circumstances, acceptance of a counteroffer can be inferred from conduct on the offeree's part indicative thereof, we are persuaded that the last two mentioned contentions of appellant were correctly decided against

her by the learned trial judge in his memorandum ruling rendered at the conclusion of the trial. We therefore adopt the same as part of this opinion. It is as follows:

"The July 10 notice signed by plaintiff's agent reads as follows: 'Mrs. Marguerite Wood has instructed me to notify you that, pursuant to the terms of the Contract of Partnership existing between yourself, Mrs. Goodman and Mrs. Wood, she proposes to terminate this partnership, and this letter is to be taken by you as a thirty-days notice to that effect.'

"As will be observed, the proposal is not to *sell* her interest but a proposal *to terminate* the partnership. However, by the express terms of the contract a proposal to terminate instantly gave rise to a right on the part of the remaining partners to purchase plaintiff's interest and thereby avoid a liquidation of the partnership. In short, the notice by the plaintiff was not an offer to sell her interest in the partnership pursuant to the formula therein laid down, but a notice to terminate the partnership. To avoid the effect of that notice, the remaining partners were required to make an offer to the plaintiff within the terms of the partnership agreement. Such an offer was made by the partner Gunther on August 6, 1946, and concurred in by the partner Goodman on August 7. The offer was to pay $45,000 for plaintiff's interest, or in the alternative, to value her interest according to the formula set forth in the partnership agreement, as she might elect. The offer advised plaintiff that as provided by the agreement the buyer had named as his arbitrator one Ashford. The offer requested, in effect, that plaintiff advise the offeror as to whether she would elect to take $45,000 without arbitration or whether she wished arbitration. It was then the duty of the plaintiff, as will presently be shown, to accept the proposed $45,000 or to make a counterproposal, or to demand that the matter proceed to arbitration. She did not do so. When she ***730** later received from Mr. Gunther the letter dated October 24, 1946, in which he stated that he would be at her home at 10 o'clock a. m on October 31st to pay her $45,000, or at any other place which she might designate, she was definitely advised that Mr. Gunther was proceeding on the assumption that she did not disagree with his offer of $45,000; and that she had no counteroffer to make and that she did not expect to designate an arbitrator so as to follow the provisions of the contract. Again, to that letter she made no response. Inasmuch as she did not do so, Mr. Gunther was entitled to assume that she was satisfied with the offer of $45,000. When, then, on the morning of October 31st he telephoned her, stating he was ready to pay the $45,000, and asked if she would meet him at his bank rather than at her home, her answer was that his letter had designated her home. To be sure, her answer did not say whether she accepted or rejected his proposal, but she knew he proposed to pay her $45,000 on that morning and she agreed he might proceed to her home. She was then under a duty to accept or reject his offer, and by her silence, under the circumstances, she bound herself to take $45,000. Upon arriving at her home he was met by plaintiff's attorney and a process server who immediately served a copy of the summons and complaint in the within action. At no time up to that moment had plaintiff given any indication that $45,000 was or was not acceptable for the one-third interest. On the contrary, then, and for some time previously, she had regarded the new partnership agreement as not binding upon her, but this view she never disclosed to the defendants Gunther or Goodman until the complaint in this case was served upon them.

"The law does not permit one to play fast and loose in situations where one owes a duty to another. This is not the case of a stranger offering to buy her interest, whatever it may have been in the partnership, for $45,000. To such a person she would owe no duty to speak at all, but in this case she was one of three fiduciary partners in a firm of persons, who had a contract with one another, under which they owed duties, one to the other; and, consequently, silence made the acceptance. Whether the acceptance arose within a reasonable time after August 6th, or within a reasonable time after October 24th, it

clearly did arise at the conclusion of the telephone conversation on October 31, 1946. If, by chance, arbitrators might have set a higher figure than $45,000 on her interest, the ***731** plaintiff cannot complain because she alone was the person at fault.

"The rule which must be deemed controlling in this case is well- established. In *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N.E. 495, Justice Holmes, speaking for the court, pointed out that in certain situations, as where there is a duty to speak, an offer may be accepted by silence and so bind the offeree. In that case the Justice said: 'The proposition stands on the general principle that *conduct* which imports acceptance or assent *is* acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party,-a principle sometimes lost sight of in the cases.'

"So, in *Laredo Nat. Bank v. Gordon*, 61 F.2d 906, it is said: 'It is true that, generally speaking, an offeree has a right to make no reply to offers, and hence that his silence is not to be construed as an acceptance. But, where the relation between the parties is such that the offeror is justified in expecting a reply, *or the offeree is under a duty to reply*, the latter's silence will be regarded as acceptance. Under such circumstances, "one who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the natural interpretation of his conduct," etc. Williston on Contracts, sections 91, 91a.'

"The evidence along with the proper inferences therefrom makes it clear that plaintiff, in July, 1946, wished to terminate the partnership, but that she did not wish to sell her interest as it might be valued by arbitrators restricted, as they would be, to following the valuation provided by the formula. By her silence she unquestionably hoped to accomplish her aim by the challenges which she now makes. But she has misconstrued her rights under the law. She is now limited to receiving $45,000." (Emphasis included.)

For the foregoing reasons, the judgment is affirmed.

Doran, Acting P. J., concurred.

A petition for a rehearing was denied February 14, 1949, and appellant's petition for a hearing by the Supreme Court was denied March 17, 1949. Carter, J., voted for a hearing. ***732**

Cal.App.2.Dist.
Wood v. Gunther
89 Cal.App.2d 718, 201 P.2d 874

END OF DOCUMENT

Williston on Contracts

Database updated May 2009

Richard A. Lord

Chapter
46. Conditions Relating to Time of Performance

References

§ 46:12. Time of the essence in equity—Option contracts

West's Key Number Digest

West's Key Number Digest, Contracts ⚿172, 211

A.L.R. Library

Sufficiency As to Parties Giving or Receiving Notice of Exercise of Option to Renew or Extend Lease, 34 A.L.R. 4th 857

What Constitutes Timely Notice of Exercise of Option to Renew or Extend Lease, 29 A.L.R. 4th 956

Circumstances Excusing Lessee's Failure to Give Timely Notice of Exercise of Option to Renew or Extend Lease, 27 A.L.R. 4th 266

Necessity for Payment or Tender of Purchase Money Within Option Period in Order to Exercise Option, in Absence of Specific Time Requirement for Payment, 71 A.L.R. 3d 1201

Legal Encyclopedias

Am. Jur. 2d, Contracts § 478

Forms

Williston on Contracts 4th—Forms § 46F:14

In an option contract, the party giving the option is protected only by the condition that the optionee can only exercise it strictly in accordance with its terms.[7] There is, however, no obligation on the part of the optionee to perform.[8] The question here, therefore, is not one of a constructive condition imposed to prevent injustice, but of an express condition which must be performed in a literal manner in order to hold the optionor liable.[9] Consequently, whether the question arises either at law or in equity, it is well settled that time is of the essence of an option.[10] No express provision making time of the essence is required in an option contract for it

to be so,[11] since an option by its very terms must be exercised within a specified time and otherwise in accordance with specified conditions.[12] Time may not be considered as being of the essence of the contract only where the option contract expressly so provides.[13] It is possible, however, that an option contract may contain collateral provisions relating to matters other than acceptance of the option as to which time is not of the essence and, as to these provisions, whether time will be deemed to be of the essence will depend on the ordinary rules of interpretation for such clauses.[14]

Although literal compliance with the condition as to time is required, a distinction should be noted: If the option offers a unilateral contract, then performance—and not merely an indication of an intention to exercise the option—must be tendered within the stated period.[15] A typical case involving an option to purchase timber demonstrates this point.[16] In that case, the option provided that for and in consideration of an amount paid as a deposit, defendant granted to plaintiffs' assignors a 24-day option to purchase certain described timber, agreeing to execute and deliver a warranty deed covering the timber to a designated bank if and when an additional amount was deposited in the bank before a particular date. Optionees placed a bank draft together with the option contract in the hands of the president of the bank where the deed was to be delivered with the understanding, however, that the optionees did not intend to release the draft for deposit until defendant presented the deed and it was compared with the option contract. That afternoon, defendant having failed to deliver the deed, the optionees requested the return of the draft and destroyed it. Thereafter, the parties engaged in further negotiations, but the grantor of the option took the position that the option had expired by its terms upon the failure of the optionees to actually deposit the balance in the bank in accordance with the agreement. The trial court gave judgment for defendant optionor. The court of appeals, affirming, said:

"[The trial court] viewed the contract as requiring the appellee to execute and deliver the deed only after the money was actually deposited. Since it was never deposited, the option expired by its own terms. For a number of reasons stated in their brief, appellants insist that this ruling is erroneous. These propositions, though stated variously, converge upon a common point; namely, that the obligation of the optionees to deposit the money and that of appellee to execute and deliver the deed were mutually dependent and required simultaneous action by the parties.

"We agree with the trial court that the language of the option did not obligate appellee to meet the optionees at the bank. His obligation to perform arose only 'if and when' the money was deposited. There is no question here of whether a proper tender was made or whether appellee's failure to appear at the bank on the crucial date constituted an anticipatory breach of the option agreement such as would excuse a tender. The contract sought to be enforced was not a contract for sale where under certain circumstances concurrent performance will be presumed to have been intended in the absence of an express provision to the contrary. Appellee, under the express terms of the option, was required to do nothing until the optionees signified their acceptance by depositing the money. The mode of acceptance was agreed to by the parties and appellee had a right to insist upon it. The apparent ability of the optionees to deposit the money, conditioned upon their unilateral requirement that appellee first execute and deliver the deed, unaccompanied by an actual deposit, was not substantial compliance, in fact, it was not compliance at all, with the terms of the option.

"An option, when supported by a valid consideration, constitutes a continuing offer to sell which is irrevocable during the period specified therein. Until it is exercised it contains no elements of a sale. Such a contract is necessarily unilateral, since it binds the optionee to do nothing but grants him the right to accept the offer or not, as he may choose, within the time and in the manner specified. When he accepts the offer in the prescribed manner and before expiration thereof, the contract for sale is complete and is binding upon both parties. It is incum-

bent upon the optionee to exercise the option in the manner provided in the contract and, unless such requirements are waived, his failure to do so, or his attempt to exercise it in another manner, is inoperative to form a binding contract for sale....

"We are invited to indulge in a discussion of grammar and punctuation and reach the conclusion that appellee's agreement to deliver the deed 'if and when the additional sum of $199,000.00, is deposited in said bank ..., on or before May 28 ...' actually means that he was to execute and deliver the deed simultaneously with the making of the deposit of the money. The option agreement does not say this and we can not, by definition of words which are clear and unambiguous in their context, rewrite the contract for the parties."[17]

Where the option offers a bilateral contract, instead of an offer for a unilateral agreement, while acceptance must be made within the time specified, performance need not necessarily be started or completed that promptly, in the absence of controlling stipulations to that effect.[18] However, an option may require both that notice of intention to exercise the option be given within a specified time and also that the performance be rendered by a certain date. In that case, the failure to give the required notice on time is fatal, as is the subsequent failure to render performance on time.[19]

The principle that time is of the essence of an option contract is just as true of options embodied in other contracts, such as leases with an option to renew, as it is of a pure option.[20] Thus, where a lease or contract contains an option to renew it for a further term but fails to provide a time limit within which the option must be exercised, the time for giving notice of renewal does not usually extend beyond the last day of the original term.[21] While it has been held that an option to renew a lease "at the expiration of the term of this lease" must be exercised at or before the termination of the lease so that there is no gap between the terms,[22] an option to be exercised at the "end," "termination," or "expiration" of a period is usually interpreted to mean that the option holder may give notice or perform after the close of the period provided that he or she does so within a reasonable time.[23] Moreover, equity may grant a further extension if the situation seems to warrant it.[24] Even though a time limit for exercise of the option to renew is provided in the contract, it has sometimes been held that equity may provide relief where the failure to renew is caused by inadvertence or oversight, the optionor has not substantially changed position in reliance on the failure, and the application of the general rule that time is of the essence would work an unconscionable result or a forfeiture.[25] Indeed, in spite of a specific time limit for giving a notice of renewal stated in a lease, some jurisdictions treat a holding over by the tenant after the expiration of the lease as an outward manifestation of the tenant's intention to exercise the option to renew[26] and a concomitant waiver of the time condition by the lessor.[27] Moreover, a course of dealing between the parties frequently has an effect on whether the exercise of an option is timely.[28]

Of course, there is a fundamental difference between the renewal of a lease and the renewal of a commercial contract. A lease deals with an estate in real property and, therefore, the time and manner of renewal must be determined with respect to that estate. However, the analogy is so strong that it has been applied to long-term commercial contracts in which the privilege of renewal had not been made dependent on prior notice, with courts holding that the continuation of performance by a party having an option to renew and the other party's continued acceptance of that performance are sufficient to bind both parties to a renewal of that agreement.[29] Furthermore, courts of equity have liberally interpreted contracts that provided that an option of purchase might be exercised "at any time," and permitted the exercise of the option years later where this was not inequitable to the other party.[30]

Time is likewise of the essence of options to terminate or cancel an existing contract, and the same prin-

ciples apply.[31]

Where an option requires notice of intention to exercise it,[32] as distinguished from acceptance of an irrevocable offer,[33] the courts generally require the notice to be received by the party to be notified in order to be effective.[34]

CUMULATIVE SUPPLEMENT

Cases:

Option contracts are irrevocable offers; the party giving the option is protected only by the condition that the optionee can only exercise it strictly within a specified time and otherwise in accordance with specified terms. Cappuccio v. Pfizer, Inc., 42 Employee Benefits Cas. (BNA) 1475, 2007 WL 2593704 (E.D. Pa. 2007) (quoting text).

[END OF SUPPLEMENT]

[FN7]
Fourth Circuit
Patterson v. Alabama Vermiculite Corp., 149 F. Supp. 548 (W.D. S.C. 1957)

Sixth Circuit
Midland Properties Co. v. Union Properties, Inc., 148 F. Supp. 150, 4 Ohio Op. 2d 110, 77 Ohio L. Abs. 581 (N.D. Ohio 1957) ("The option could only be exercised in the manner provided for therein by depositing the cash and releases in escrow on or before the time specified ...
"Since the cash and releases were not deposited in escrow, the option was never exercised. There never was an acceptance of the offer. There never was any contract. There could be no exercise of the option by plaintiff after the option had expired.").

Ark.
Moffatt v. Wyman, 222 Ark. 247, 258 S.W.2d 533 (1953)

Cal.
Simons v. Young, 93 Cal. App. 3d 170, 155 Cal. Rptr. 460 (4th Dist. 1979) (with regard to lease containing option to renew requiring written notice of election to renew not less than three months from termination, the court said: "Lessee's contention that the notice requirement should be construed as a covenant rather than a condition is devoid of merit. The specification in a lease of a time by which notice of exercise by the lessee of an option to renew the lease must be given is universally considered to be a condition precedent to the exercise of the option. [citations] Indeed, by the very nature of an option agreement it must be. As to the lessee-optionee, an option to renew the lease constitutes an irrevocable offer that can be converted into an enforceable contract only by acceptance on the terms specified in the offer. [citations] Moreover, lessee did not promise to give notice of his election to exercise the option and was not bound to do so.")

Sheveland v. Reed, 159 Cal. App. 2d 820, 324 P.2d 633 (3d Dist. 1958)

Colo.
Dunton Mortg. Co. v. Breymaier, 136 Colo. 343, 316 P.2d 1048 (1957)

Del.
Martin v. Star Pub. Co., 50 Del. 181, 126 A.2d 238 (1956)

Fla.
Mathews v. Kingsley, 100 So. 2d 445 (Fla. Dist. Ct. App. 2d Dist. 1958)

Ga.
Gulf Oil Corp. v. Willcoxon, 211 Ga. 462, 86 S.E.2d 507 (1955) (court said that "an option is peculiarly an agreement of which time is of the essence")

Bowles v. Babcock & Wilcox Co., 209 Ga. 858, 76 S.E.2d 703 (1953) (to the effect that the general rules of contracts apply)

Ill.
Northern Ill. Coal Corp. v. Cryder, 361 Ill. 274, 197 N.E. 750, 101 A.L.R. 1420 (1935)

Md.
Shea v. Marton, 214 Md. 539, 136 A.2d 247 (1957)

cf.: Triton Realty Co. v. Frieman, 210 Md. 252, 123 A.2d 290 (1956)

Minn.
Manteuffel v. Theo. Hamm Brewing Co., 238 Minn. 140, 56 N.W.2d 310 (1952) (time expressly made of the essence)

N.J.
Socony-Vacuum Oil Co. v. Pabian, 32 N.J. Super. 390, 108 A.2d 503 (Ch. Div. 1954)

Pa.
cf.: Cosgrove v. Kappel, 403 Pa. 108, 168 A.2d 319 (1961)

Tenn.
Gulf Refining Co. v. Belz, 204 Tenn. 47, 315 S.W.2d 403 (1958)

Tex.
McCaleb v. Wyatt, 257 S.W.2d 880 (Tex. Civ. App. Fort Worth 1953), writ refused n.r.e.

Copeland v. Bennett, 243 S.W.2d 264 (Tex. Civ. App. El Paso 1951)

Wash.
cf.: Duprey v. Donahoe, 52 Wash. 2d 129, 323 P.2d 903 (1958)

A.L.R. Library

Validity of option to purchase realty as affected by indefiniteness of term provided for exercise, 31

A.L.R. 3d 522.

[FN8] As to an option constituting a unilateral contract binding the optionee to do nothing, but granting the right to accept an offer in the manner specified, see § 5:16.

Ga.
Hughes v. Holliday, 149 Ga. 147, 99 S.E. 301 (1919) (because of the one-sided nature of the option, time of election by optionee is of the essence of the agreement)

N.J.
Socony-Vacuum Oil Co. v. Pabian, 32 N.J. Super. 390, 108 A.2d 503 (Ch. Div. 1954) (citing text, the court said: "In the limitations to be put upon the exercise of an option of this character, time is normally of the essence. The distinction between the unilateral burden of an option and the mutual obligation of a contract is vital, and affords every reason for discerning between the two the difference that makes time of the essence in the one case though not in the other.")

N.Y.
T. I. P. Holding No. 2 Corp. v. Wicks, 63 A.D.2d 263, 407 N.Y.S.2d 709 (2d Dep't 1978) (contract for the sale of a parcel of land for development as a shopping center, with a rider providing that for the contract to continue in force, purchaser would be required to make an additional deposit upon concluding feasibility studies, file for rezoning, and make an additional payment a year later; the contract thus gave the purchaser the option to proceed by making further payments or cancel with previous payments being retained by the sellers as liquidated damages; the court said: "The contract here, in clear and unambiguous language, stated that $50,000 was to be paid on or before August 25, 1977. The land, which had been evaluated at $3,375,000 in the contract (assuming rezoning could be obtained), had been held off the market by its owners for a period of one year, for which the sum of $50,000 was paid. [The purchaser] had no obligation to complete the purchase or to make any payments beyond that sum during the first year. To continue to have the right to bar [the sellers] from placing the property back on the market, if it desired to do so, it was obligated to pay an additional $50,000 by August 25, 1977. [The sellers] had no right to seek specific performance and no right to insist that site plans, etc., be expeditiously filed; in short, they had no right to demand anything at all from [the purchaser]. They could only sit by and passively wait to see whether they would receive $50,000 by August 25, 1977. If they did not, the sole consequence of the nonreceipt of that sum by that day was the automatic termination of [the purchaser's] rights under the contract without any recourse of any kind against it. In plain effect, those provisions constituted an option, pure and simple.")

[FN9] As to the requirement of literal compliance with express conditions, see Ch 38.

U.S. Supreme Court
Kelsey v. Crowther, 162 U.S. 404, 16 S. Ct. 808, 40 L. Ed. 1017 (1896)

Waterman v. Banks, 144 U.S. 394, 12 S. Ct. 646, 36 L. Ed. 479 (1892)

Fifth Circuit
Reynolds v. Maples, 214 F.2d 395 (5th Cir. 1954)

Ninth Circuit

Title Ins. & Guaranty Co. v. Hart, 160 F.2d 961 (C.C.A. 9th Cir. 1947)

Tenth Circuit
Basler v. Warren, 159 F.2d 41 (C.C.A. 10th Cir. 1947) (citing text)

Alaska
Australaska Corp. v. Sisters of Charity of House of Providence in Territory of Wash., 397 P.2d 966 (Alaska 1965) (optionee in contract for purchase of land and building may not on his default avoid forfeiture because zoning restrictions had not been removed, though at his request optionor had warranted that there were no restrictions, since optionor had no duty to secure their removal until exercise of option and tender of performance by optionee)

Cal.
Sheveland v. Reed, 159 Cal. App. 2d 820, 324 P.2d 633 (3d Dist. 1958)

Iowa
Iowa Gateway, Inc. v. Interstate Power Co., 350 N.W.2d 141 (Iowa 1984) (option to repurchase facility by its terms was to be executed 60 days prior to estimated date of completion of facility, not from date of actual completion, so that time for exercising option was not extended when actual completion date occurred later than estimated date of completion)

Md.
Odyssey Glass Corp. v. Simenaur, 47 Md. App. 645, 425 A.2d 249 (1981) (citing text)

S.C.
Cotter v. James L. Tapp Co., 267 S.C. 647, 230 S.E.2d 715 (1976) (where lease granted tenant option to lease areas in shopping center adjacent to tenant's department store and right to renew option for additional period upon payment of specified amount, attempt to exercise renewal option by letter was insufficient, the court saying: "It is also well settled in this state that if the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option are required. [citations]

"In its answer defendant asserts that its letter of February 13 was a valid exercise of the renewal option. The renewal option, however, contains no notice requirements. It provides that the primary option may be extended for an additional three years upon payment of a specified option cost.

"Thus, the fact that defendant gave notice prior to March 1, 1975, that it wished to extend the primary option is completely irrelevant. Plaintiffs were entitled to exact compliance with the terms of the option and there is simply [no] way to equate a requirement to pay money with the giving of written notice. Defendant could have given written notice every day in the month of February, 1975, and such notice still would not have satisfied a requirement to pay money. Plaintiffs, upon receiving defendant's letter, could assume that timely tender of the option cost would be forthcoming. Defendant, however, neglected to pay or tender the option cost on or prior to March 1, 1975, and the primary option lapsed on that date.

...

"Finally, the courts have recognized that harsh results in option cases are necessary to further more compelling considerations of public policy. [citation] When an individual grants an option he ties up his rights and property for a specified period of time without binding the other side. For this reason he is entitled to strict compliance with time limits and other terms of the option. Thus, if the optionee fails to comply with the terms of the option, even though he may have an excuse, he must bear the responsibility and not the optionor.").

A.L.R. Library

Necessity for payment or tender of purchase money within option period in order to exercise option, in absence of specific time requirement for payment, 71 A.L.R. 3d 1201.

[FN10]
U.S. Supreme Court
Waterman v. Banks, 144 U.S. 394, 12 S. Ct. 646, 36 L. Ed. 479 (1892)

Second Circuit
Green v. Hamilton Intern. Corp., 493 F. Supp. 596 (S.D. N.Y. 1979) (citing text)

Alling v. C.D. Cairns Irrevocable Trusts Partnership, 927 F. Supp. 758 (D. Vt. 1996)

Third Circuit
In re Intermet Realty Partnership, 26 B.R. 383 (Bankr. E.D. Pa. 1983) (applying Pennsylvania law, the court said: "Time is always of the essence in an option contract and, unless exercised, an option expires on the specified date.")

In re Roswog, 48 B.R. 689 (Bankr. M.D. Pa. 1985)

Matter of Schnur Enterprises, Inc., 42 B.R. 202 (Bankr. W.D. Pa. 1984)

Fifth Circuit
Campbell v. Fetty, 271 F. 671 (C.C.A. 5th Cir. 1921)

Tenth Circuit
Rosenfield v. Kay Jewelry Stores, Inc., 384 F.2d 98 (10th Cir. 1967)

Basler v. Warren, 159 F.2d 41 (C.C.A. 10th Cir. 1947)

Tax Court
Reily v. Commissioner of Internal Revenue, 53 T.C. 8, 1969 WL 1675 (T.C. 1969) (citing text)

Ala.
Colonial Baking Co. of Alabama v. Pine Dale, Inc., 436 So. 2d 856 (Ala. 1983)

Murphy v. Schuster Springs Lumber Co., 215 Ala. 412, 111 So. 427 (1926)

National Sec. Ins. Co. v. Stewart, 43 Ala. App. 274, 188 So. 2d 774 (1965)

Ariz.
Ensign v. Bohn, 1 Ariz. App. 386, 403 P.2d 321 (1965)

Ark.
Bollen v. McCarty, 252 Ark. 442, 479 S.W.2d 568 (1972) (citing text; under agreement for purchase of real property providing that purchaser had right to withdraw offer and receive refund of earnest money if notice of withdrawal were filed on or before October 6, finding of fact by chancellor that notice of withdrawal was not exercised until October 7 left no room for exercise of equity and purchaser was denied recovery of earnest money)

Cal.
Hendren v. Yonash, 243 Cal. App. 2d 672, 52 Cal. Rptr. 738 (1st Dist. 1966)

Santa Clara Properties Co. v. R. L. C., Inc., 217 Cal. App. 2d 840, 32 Cal. Rptr. 333 (1st Dist. 1963)

cf.: Katemis v. Westerlind, 142 Cal. App. 2d 799, 299 P.2d 383 (2d Dist. 1956)

cf.: Western Helicopter Operations v. Nelson, 118 Cal. App. 2d 359, 257 P.2d 1025 (4th Dist. 1953)

Auslen v. Johnson, 118 Cal. App. 2d 319, 257 P.2d 664 (3d Dist. 1953)

C.O. Bashaw Co. v. A.U. Pinkham Co., 77 Cal. App. 591, 246 P. 1064 (1st Dist. 1926) (option contract involving property with fluctuating value)

Colo.
Rubber, Inc. v. Jenkins, 40 Colo. App. 165, 570 P.2d 1317 (1977)

Conn.
Kakalik v. Bernardo, 184 Conn. 386, 439 A.2d 1016 (1981) (citing text)

D.C.
cf.: Brier v. Orenberg, 90 A.2d 832 (Mun. Ct. App. D.C. 1952)

Fla.
Howard Cole & Co. v. Williams, 157 Fla. 851, 27 So. 2d 352 (1946)

Ga.
Bowden v. Mews Development Corp., 247 Ga. 546, 277 S.E.2d 653 (1981)

Gulf Oil Corp. v. Willcoxon, 211 Ga. 462, 86 S.E.2d 507 (1955)

Ill.
Stull v. Hicks, 59 Ill. App. 3d 665, 16 Ill. Dec. 874, 375 N.E.2d 981 (5th Dist. 1978)

cf.: Northwest Racing Ass'n v. Hunt, 20 Ill. App. 2d 393, 156 N.E.2d 285 (2d Dist. 1959)

Ind.
Calwell v. Bankers Trust Co., 113 Ind. App. 345, 47 N.E.2d 170 (1943)

Iowa
Steele v. Northup, 259 Iowa 443, 143 N.W.2d 302 (1966)

Ky.
cf.: May v. Mohr, 282 S.W.2d 144 (Ky. 1955)

Thompson v. Fairleigh, 300 Ky. 144, 187 S.W.2d 812 (1945)

Rounds v. Owensboro Ferry Co., 253 Ky. 301, 69 S.W.2d 350 (1934)

Rogers Bros. Coal Co. v. Day, 222 Ky. 443, 1 S.W.2d 540 (1927)

Md.
Green Manor Corp. v. Tomares, 266 Md. 472, 295 A.2d 212 (1972)

Maryland City Realty, Inc. v. Vogts, 238 Md. 290, 208 A.2d 701 (1965)

Foard v. Snider, 205 Md. 435, 109 A.2d 101 (1954) (citing text, the court said: "A question more difficult to answer, had the appellees relied on the point, would be whether [plaintiff] did exercise the option within the six months' period specified in it. Time is of the essence in a unilateral contract, such as an option, both in law and in equity, whether expressly declared to be so or not. [citations] Each such agreement must be scrutinized to see what it requires to be done within the specified time, either expressly or by necessary implication. Does it require completed performance, that is, actual payment, or does it require tender of the agreed price? Generally, there is contemplated only a notice of acceptance of, and a readiness and willingness to perform, the irrevocable offer which is an option. Whatever the option requires must be done.")

Mass.
Hurd v. Cormier, 358 Mass. 736, 267 N.E.2d 116 (1971) (quoting text)

Cities Service Oil Co. v. National Shawmut Bank of Boston, 342 Mass. 108, 172 N.E.2d 104 (1961)

Donovan Motor Car Co. v. Niles, 246 Mass. 106, 140 N.E. 304 (1923)

Johnson v. Worcester Business Development Corp., 1 Mass. App. Ct. 527, 302 N.E.2d 575 (1973)

Mich.
Shell Oil Co. v. Mammina, 353 Mich. 9, 90 N.W.2d 676 (1958)

Lantis v. Cook, 342 Mich. 347, 69 N.W.2d 849 (1955)

Rapanos v. Plumer, 41 Mich. App. 586, 200 N.W.2d 462 (1972) (strict compliance with the terms of an option is the rule in Michigan)

Minn.
Merriman v. Sandeen, 267 N.W.2d 714, 24 U.C.C. Rep. Serv. 718 (Minn. 1978)

Miss.
Frazier v. Northeast Mississippi Shopping Center, Inc., 458 So. 2d 1051 (Miss. 1984)

Robinson v. Martel Enterprises, Inc., 337 So. 2d 698 (Miss. 1976)

Mo.
Fisher v. Lavelock, 282 S.W.2d 557 (Mo. 1955)

Lane v. Nunn, 211 Mo. App. 280, 243 S.W. 427 (1922)

Nev.
McCall v. Carlson, 63 Nev. 390, 172 P.2d 171 (1946)

N.H.
Langdon v. Sibley, 100 N.H. 373, 127 A.2d 156 (1956)

N.J.
Brick Plaza, Inc. v. Humble Oil & Refining Co., 218 N.J. Super. 101, 526 A.2d 1139 (App. Div. 1987)

Sosanie v. Pernetti Holding Corp., 115 N.J. Super. 409, 279 A.2d 904 (Ch. Div. 1971)

N.Y.
Willmott v. Giarraputo, 5 N.Y.2d 250, 184 N.Y.S.2d 97, 157 N.E.2d 282 (1959)

Kotcher v. Edelblute, 223 A.D. 451, 228 N.Y.S. 455 (1st Dep't 1928), rev'd on other grounds, 250 N.Y. 178, 164 N.E. 897 (1928)

Saleh v. Karp, 17 Misc. 2d 293, 182 N.Y.S.2d 908 (Sup 1959), judgment modified on other grounds, 13 A.D.2d 706, 214 N.Y.S.2d 472 (2d Dep't 1961)

N.C.
Trogden v. Williams, 144 N.C. 192, 56 S.E. 865 (1907)

N.D.
Alfson v. Anderson, 78 N.W.2d 693 (N.D. 1956)

Horgan v. Russell, 24 N.D. 490, 140 N.W. 99 (1913)

Ohio
Urology Services, Inc. v. Greene, 1986 WL 2937 (Ohio Ct. App. 8th Dist. Cuyahoga County 1986) (quoting text)

Glickman v. Coakley, 22 Ohio App. 3d 49, 488 N.E.2d 906 (8th Dist. Cuyahoga County 1984)

Okla.
Garfield Oil Co. v. Champlin, 1920 OK 12, 78 Okla. 91, 189 P. 514 (1920)

Pa.
New Eastwick Corp. v. Philadelphia Builders Eastwick Corp., 430 Pa. 46, 241 A.2d 766 (1968)

Appeal of Powell, 385 Pa. 467, 123 A.2d 650 (1956)

L. E. Wallach, Inc. v. Toll, 381 Pa. 423, 113 A.2d 258 (1955)

Western Sav. Fund Soc. of Philadelphia v. Southeastern Pennsylvania Transp. Authority, 285 Pa. Super. 187, 427 A.2d 175 (1981) (quoting text)

R.I.
Moulson v. Iannuccilli, 84 R.I. 85, 121 A.2d 662 (1956)

S.C.
Cotter v. James L. Tapp Co., 267 S.C. 647, 230 S.E.2d 715 (1976)

Tenn.
Ray v. Thomas, 191 Tenn. 195, 232 S.W.2d 32 (1950) (citing text)

Allen v. National Advertising Co., 798 S.W.2d 766 (Tenn. Ct. App. 1990) (citing text)

Tex.
Texas Pac. Coal & Oil Co. v. Patton, 238 S.W. 202 (Tex. Comm'n App. 1922), reh'g overruled, 240 S.W. 303 (Tex. Comm'n App. 1922)

Zeidman v. Davis, 161 Tex. 496, 342 S.W.2d 555 (1961) (in the absence of equities, an optionee is held to strict compliance with the terms of an option agreement)

Greenbaum v. Cortez, 644 S.W.2d 510 (Tex. App. Corpus Christi 1982), dismissed, (Jan. 12, 1983)

Smith v. Hues, 540 S.W.2d 485 (Tex. Civ. App. Houston 14th Dist. 1976), writ refused n.r.e.

Herber v. Sanders, 336 S.W.2d 783 (Tex. Civ. App. Amarillo 1960)

Idalou Co-op. Cotton Gin v. Gue, 317 S.W.2d 240 (Tex. Civ. App. Dallas 1958), writ refused n.r.e.

Oliver v. Corzelius, 215 S.W.2d 231 (Tex. Civ. App. El Paso 1948), judgment aff'd in part, rev'd in part on other grounds, 148 Tex. 76, 220 S.W.2d 632 (1949) and (disapproved of by, Owen v. Hendricks, 433 S.W.2d 164, 30 A.L.R.3d 929 (Tex. 1968))

Gambill v. Snow, 189 S.W.2d 33 (Tex. Civ. App. Eastland 1945), writ refused w.o.m. (citing text)

West Texas Utilities Co. v. Ellis, 102 S.W.2d 234 (Tex. Civ. App. Austin 1937), judgment rev'd on other grounds, 133 Tex. 104, 126 S.W.2d 13 (Comm'n App. 1939)

Mercantile Nat. Bank at Dallas v. Chanowsky, 89 S.W.2d 1068 (Tex. Civ. App. Waco 1936)

Duff v. Davis, 70 S.W.2d 836 (Tex. Civ. App. Beaumont 1934), writ dismissed

Investors' Utility Corp. v. Challacombe, 39 S.W.2d 175 (Tex. Civ. App. Waco 1931)

Utah
Catmull v. Johnson, 541 P.2d 793 (Utah 1975)

Wash.

Chandler v. Doran Co., 44 Wash. 2d 396, 267 P.2d 907 (1954)

Andersen v. Brennen, 181 Wash. 278, 43 P.2d 19 (1935)

Wis.
Clear View Estates, Inc. v. Veitch, 67 Wis. 2d 372, 227 N.W.2d 84 (1975)

Wyo.
Braten v. Baker, 78 Wyo. 273, 323 P.2d 929 (1958)

[FN11]
Cal.
Rosenaur v. Pacelli, 174 Cal. App. 2d 673, 345 P.2d 102 (1st Dist. 1959)

Wis.
Conrad Milwaukee Corp. v. Wasilewski, 30 Wis. 2d 481, 141 N.W.2d 240 (1966)

[FN12]
Cal.
Rosenaur v. Pacelli, 174 Cal. App. 2d 673, 345 P.2d 102 (1st Dist. 1959) (an option, by its terms, must be exercised within a time specified, and time is therefore of the essence, and no express provision to that effect is required)

Tex.
cf.: Exxon Corp. v. Pollman, 729 S.W.2d 302 (Tex. App. Tyler 1986), writ granted, (Jan. 28, 1987) and writ withdrawn, (May 6, 1987) and writ refused n.r.e., (May 6, 1987) (option provision which gave the lessee the right to purchase the leased premises at any time during the term of the lease was exercisable not only during the initial term of the lease but during extensions of the lease)

[FN13]
Ninth Circuit
G.S. Johnson Co. v. Nevada Packard Mines Co., 272 F. 291 (D. Nev. 1920)

Ala.
Allen v. Storie, 579 So. 2d 1316 (Ala. 1991)

Cal.
Hendren v. Yonash, 243 Cal. App. 2d 672, 52 Cal. Rptr. 738 (1st Dist. 1966)

Santa Clara Properties Co. v. R. L. C., Inc., 217 Cal. App. 2d 840, 32 Cal. Rptr. 333 (1st Dist. 1963)

Auslen v. Johnson, 118 Cal. App. 2d 319, 257 P.2d 664 (3d Dist. 1953)

Ga.
Bowden v. Mews Development Corp., 247 Ga. 546, 277 S.E.2d 653 (1981)

Gulf Oil Corp. v. Willcoxon, 211 Ga. 462, 86 S.E.2d 507 (1955)

Mont

Thomas v. Standard Development Co., 70 Mont. 156, 224 P. 870 (1924) (holding that an option is not a contract within the meaning of the statute)

N.D.
Asplund v. Danielson, 56 N.D. 485, 217 N.W. 848 (1928)

Horgan v. Russell, 24 N.D. 490, 140 N.W. 99 (1913)

Okla.
Washoma Petroleum Co. v. Eason Oil Co., 1935 OK 780, 173 Okla. 430, 49 P.2d 709 (1935)

Crutchfield v. Griffin, 1929 OK 386, 139 Okla. 35, 280 P. 1075 (1929)

Mitchell v. Probst, 1915 OK 828, 52 Okla. 10, 152 P. 597 (1915)

[FN14]
N.D.
Horgan v. Russell, 24 N.D. 490, 140 N.W. 99 (1913) (where an option contract for the purchase of land contained a stipulation as to the manner of acceptance and the period of time within which acceptance could be made, and provided that time shall be of the "essence of this agreement," and a subsequent stipulation was made as to performance and time of performance to be allowed by the parties after acceptance of the option—the time within which the contract is to be performed after acceptance not being clearly and beyond question stipulated to be of the essence of the contract—performance attempted by a tender of payment by the purchaser three days after the expiration of that time is within the time allowed and is therefore valid in equity)

Or.
Albachten v. Miller, 216 Or. 379, 339 P.2d 427, 72 A.L.R.2d 1122 (1959) (clause of contract that if optionee decides to exercise option on October 1, 1955, she shall give optionors not less than 30 days notice in writing of her intention to do so, was not of the essence; the court observed: "While time is of the essence with respect to the date of exercise of an option, the general rule in connection with specific performance is that time is not necessarily of the essence. [citations] Nor is it of the essence with respect to the performance of other acts called for in the option contract. And in determining whether specific performance should be granted, literal and exact performance may be weighed in connection with such factors as the nature of the particular provision, good faith and prejudice. [citations]
"Did the option contract contemplate the act of giving notice was to constitute exercise of the option? If so, the time of essence rule would apply and the notice, not having been literally and strictly given, this suit may not be maintained.

...

"In our opinion the giving of the notice was not intended to and did not constitute the exercise of the option. ... No binding contract came into being with the notice. Contractual rights would vest only with the exercise of the option on October 1st, 1955. And we may here suggest that the parties never contemplated time was to be of the essence so far as the 30-day notice stipulation is concerned. ... Such being the nature and effect of the provision for notice, and the notice not constituting an exercise of the option, it follows the time of the essence rule is inapplicable.").

[FN15]
U.S. Supreme Court
cf.: Kelsey v. Crowther, 162 U.S. 404, 16 S. Ct. 808, 40 L. Ed. 1017 (1896)

Fourth Circuit
cf.: Patterson v. Alabama Vermiculite Corp., 149 F. Supp. 548 (W.D. S.C. 1957)

Fifth Circuit
cf.: Atlantic Refining Co. v. Moxley, 211 F.2d 916 (5th Cir. 1954)

Sixth Circuit
Midland Properties Co. v. Union Properties, Inc., 148 F. Supp. 150, 4 Ohio Op. 2d 110, 77 Ohio L. Abs. 581 (N.D. Ohio 1957)

Ala.
Murphy v. Schuster Springs Lumber Co., 215 Ala. 412, 111 So. 427 (1926)

Eastis v. Beasley, 214 Ala. 651, 108 So. 763 (1926) (enforcement, after death, of option accepted during life)

Ariz.
Ernst v. Deister, 42 Ariz. 379, 26 P.2d 648 (1933)

Cal.
Leslie v. Federal Finance Co., 14 Cal. 2d 73, 92 P.2d 906 (1939) (citing text)

Kelley v. Rouse, 188 Cal. App. 2d 92, 10 Cal. Rptr. 235 (1st Dist. 1961)

Scarbery v. Bill Patch Land & Water Co., 184 Cal. App. 2d 87, 7 Cal. Rptr. 408 (4th Dist. 1960)

State v. Agostini, 139 Cal. App. 2d 909, 294 P.2d 769 (1st Dist. 1956) (quoting text)

Royal Grocery Co. v. Oliver, 57 Cal. App. 278, 207 P. 61 (1st Dist. 1922)

Colo.
Byers v. Denver Circle R. Co., 13 Colo. 552, 22 P. 951 (1889)

Conn.
Roberts v. Norton, 66 Conn. 1, 33 A. 532 (1895)

Del.
Cunningham v. Esso Standard Oil Co., 35 Del. Ch. 371, 118 A.2d 611 (1955)

Ga.
Floyd v. Morgan, 60 Ga. App. 496, 4 S.E.2d 91 (1939)

Idaho
Virginia Mining Co. v. Haeder, 32 Idaho 240, 181 P. 141 (1919)

Durant v. Comegys, 2 Idaho 936, 28 P. 425 (1891)

Ill.
Dikeman v. Sunday Creek Coal Co., 184 Ill. 546, 56 N.E. 864 (1900)

Longfellow v. Moore, 102 Ill. 289, 1882 WL 10224 (1882)

Ky.
Thompson v. Fairleigh, 300 Ky. 144, 187 S.W.2d 812 (1945) (citing text)

Smith v. Howard, 32 Ky. L. Rptr. 211, 105 S.W. 411 (Ky. 1907)

La.
cf.: Bellestri v. Clark, 239 La. 713, 119 So. 2d 836 (1960)

Md.
Coleman v. Applegarth, 68 Md. 21, 11 A. 284 (1887)

Mass.
Cobb v. Library Bureau of New Jersey, 264 Mass. 431, 162 N.E. 902 (1928)

Mich.
Olson v. Sash, 217 Mich. 604, 187 N.W. 346 (1922)

Minn.
cf.: Davis v. Godart, 131 Minn. 221, 154 N.W. 1091 (1915) (where a purchaser was given a right "to relinquish the land at the end of one year" and to receive back the price, and the vendee gave notice that he desired to exercise the privilege 12 days after the lapse of the year, a majority of the court held that the vendee had no right to rescind until the end of the year and was entitled to a reasonable time thereafter and that 12 days delay was not unreasonable)

Mo.
Hollmann v. Conlon, 143 Mo. 369, 45 S.W. 275 (1898)

N.J.
Potts v. Whitehead, 20 N.J. Eq. 55, 1869 WL 167 (Ch. 1869), aff'd, 23 N.J. Eq. 512, 1872 WL 154 (Ct. Err. & App. 1872)

N.Y.
Warner-Quinlan Co. v. Smith, 134 Misc. 649, 236 N.Y.S. 241 (Sup 1929), aff'd, 229 A.D. 814, 242 N.Y.S. 762 (3d Dep't 1930), aff'd, 255 N.Y. 582, 175 N.E. 322 (1930) (lease with option of purchase)

N.C.
Hudson v. Cozart, 179 N.C. 247, 102 S.E. 278 (1920) (where the option clearly looks to the formation of a unilateral contract, performance, or tender, must be made or excused)

N.D.
Asplund v. Danielson, 56 N.D. 485, 217 N.W. 848 (1928)

Ohio
State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 11 Ohio Op. 2d 204, 166 N.E.2d 365 (1960)

Okla.
Washoma Petroleum Co. v. Eason Oil Co., 1935 OK 780, 173 Okla. 430, 49 P.2d 709 (1935)

Mitchell v. Probst, 1915 OK 828, 52 Okla. 10, 152 P. 597 (1915)

Or.
Clarno v. Grayson, 30 Or. 111, 46 P. 426 (1896)

Pa.
Barnes v. Rea, 219 Pa. 279, 68 A. 836 (1908)

Tenn.
Chapman Drug Co. v. Chapman, 207 Tenn. 502, 341 S.W.2d 392 (1960)

Tex.
Jones v. Gibbs, 133 Tex. 627, 130 S.W.2d 265 (Comm'n App. 1939) (discussing strict compliance in the exercise of an option for an extension of time under a logging contract)

Works v. Wyche, 344 S.W.2d 193 (Tex. Civ. App. Dallas 1961), writ refused n.r.e., (June 14, 1961)

Vt.
Sowles v. Hall, 62 Vt. 247, 20 A. 810 (1890)

Wash.
Andersen v. Brennen, 181 Wash. 278, 43 P.2d 19 (1935)

Olsen v. Northern S. S. Co., 70 Wash. 493, 127 P. 112 (1912)

[FN16]
Fifth Circuit
Reynolds v. Maples, 214 F.2d 395 (5th Cir. 1954)

[FN17]
Fifth Circuit
Reynolds v. Maples, 214 F.2d 395 (5th Cir. 1954)

[FN18]
Second Circuit
Shubert Theatrical Co. v. Rath, 271 F. 827, 20 A.L.R. 846 (C.C.A. 2d Cir. 1921)

Fifth Circuit
cf.: Grey v. Nickey Bros., 271 F. 249 (C.C.A. 5th Cir. 1921)

Ark.
Pictorial Paper Package Corporation v. Swamp & Dixie Laboratories, 197 Ark. 287, 122 S.W.2d 529, 119 A.L.R. 1491 (1938) (buyer's duty to give seller instructions to ship where former has not exercised

his option under contract to require shipment before time specified)

Cal.
Leslie v. Federal Finance Co., 14 Cal. 2d 73, 92 P.2d 906 (1939) (citing text)

Ga.
Floyd v. Morgan, 60 Ga. App. 496, 4 S.E.2d 91 (1939) (citing text in dissent)

cf.: Snead v. Wood, 24 Ga. App. 210, 100 S.E. 714 (1919)

Idaho
Idaho Grimm Alfalfa Seed Growers' Ass'n v. Stroschein, 42 Idaho 12, 242 P. 444, 47 A.L.R. 916 (1926)

Ill.
Whitelaw v. Brady, 3 Ill. 2d 583, 121 N.E.2d 785 (1954) (the unilateral option may be made into a bilateral contract)

Northern Ill. Coal Corp. v. Cryder, 361 Ill. 274, 197 N.E. 750, 101 A.L.R. 1420 (1935) (in a case involving difficulties in closing the sale of property after an option to purchase it had been accepted, the court said: "An option, so long as it remains unaccepted, is a unilateral writing lacking the mutual elements of a contract, but when accepted by the optionee there emerges, as the result of such acceptance, an executory contract inter partes, with the optionor as the vendor and the optionee as the vendee, for the sale and purchase of the optioned property, mutually binding upon the optionor and optionee and containing mutual rights and obligations enforceable as such in accordance with the established rules relating to executory contracts. [citation]
"It is earnestly argued by the defendants that under the provisions of the option the optionee was not only required to exercise the option within the period fixed by its terms but was compelled within the same time to tender the purchase price....

"While some confusion has arisen in the adjudicated cases with reference to time being the essence of contracts of the type here before us, yet we believe it has been occasioned by failure to differentiate between the provisions pertinent to the exercise of the option, by which acceptance it has been converted into an executory contract, and those relating to its performance. [citation] It is obvious that when the option contract here was accepted by the optionee certain obligations were hereby imposed upon the optionors, among which was the duty of the optionors, upon request, to furnish an abstract of title, certified to date, showing good merchantable title in the optionors to the premises, subject only to the lien of the $21,000 mortgage, and allow the optionee a reasonable time for the examination of the abstract; also to furnish the optionee with information as to the amount, if any, by which the mortgage debt had been reduced, in order that the optionee might know the amount to be paid to the optionors to conclude the purchase of the premises....

"... Time was the essence of the option but was not of the essence of the performance of the contract. ... It follows that the contract was to be performed within a reasonable time after notice of its acceptance.").

Ill.
Fuchs v. Peterson, 315 Ill. 370, 146 N.E. 556 (1925)

Ky.
Rounds v. Owensboro Ferry Co., 253 Ky. 301, 69 S.W.2d 350 (1934)

Minn.
cf.: Berkner v. Segal, 168 Minn. 62, 209 N.W. 536 (1926)

N.J.
Monmouth County Electric Co. v. Consolidated Gas Co. of N.J., 83 N.J.L. 531, 83 A. 900 (N.J. Ct. Err. & App. 1912)

N.Y.
Kotcher v. Edelblute, 250 N.Y. 178, 164 N.E. 897 (1928)

T. I. P. Holding No. 2 Corp. v. Wicks, 63 A.D.2d 263, 407 N.Y.S.2d 709 (2d Dep't 1978) (contract for the sale of a parcel of land for development as a shopping center, with a rider providing that for the contract to continue in force, purchaser would be required to make an additional deposit upon concluding feasibility studies, file for rezoning, and make an additional payment a year later; the court said: "To the extent that the payment provision relating to the option portion was not adhered to by [purchaser], the rules generally applicable to options should apply, to wit, that such provisions must be complied with strictly in the manner and within the time specified [citations]. To the extent that its provisions relate to delivery of title (such as inability to perform on the law date), the general rule that time is not of the essence would be applicable.")

Noble v. Higgins, 214 A.D. 135, 211 N.Y.S. 833 (3d Dep't 1925), aff'd, 243 N.Y. 538, 154 N.E. 596 (1926) (quoting text)

N.C.
cf.: Winders v. Kenan, 161 N.C. 628, 77 S.E. 687 (1913)

Pa.
cf.: Markley v. Godfrey, 254 Pa. 99, 98 A. 785 (1916)

Vt.
cf.: Durfee House Furnishing Co. v. Great Atlantic & Pacific Tea Co., 100 Vt. 204, 136 A. 379, 50 A.L.R. 1309 (1927)

[FN19]
Ala.
cf.: Long v. Hirs, 270 Ala. 131, 116 So. 2d 605 (1959) (option in lease to purchase property provided that it may be exercised "only by notifying the owner in writing of desire to exercise the option and depositing with Title Insurance Company ... on the same date the full purchase money in cash in escrow"; however, since continuance of option on month-to-month basis was conditioned on paying rent on time and faithful and prompt performance of all obligations under lease, court held that tenant could not exercise option once tenant had defaulted in performing his obligations under the lease)

Ark.
cf.: Moffatt v. Wyman, 222 Ark. 247, 258 S.W.2d 533 (1953) (after foreclosure of property, parties

entered into contract to repurchase, providing that time was the essence of the contract and that the right to repurchase must be exercised on or before a specific date; the purchaser had not paid the repurchase price on that date; however, specific performance of the repurchase agreement was granted on the basis that the provision that time of payment was of the essence had been waived)

Nev.

Hennessey v. Price, 96 Nev. 33, 604 P.2d 355 (1980) (rental agreement with option to purchase was of definite duration and, thus, valid, where option was to stay in effect only so long as lessees continued their month-to-month tenancy and was to be exercisable only when lessors offered home for sale)

N.Y.

Arroyo v. Patayne Estates, Inc., 25 A.D.2d 424, 266 N.Y.S.2d 565 (1st Dep't 1966) (citing text)

Ohio

Ahmed v. Scott, 65 Ohio App. 2d 271, 19 Ohio Op. 3d 273, 418 N.E.2d 406 (6th Dist. Lucas County 1979) ("If a lease expressly requires notice of the exercise of a renewal option, such notice must be given in order to renew the lease. Holding over is insufficient to exercise the renewal option. [citations] The transmittal of notice by the lessee to the lessor expressing the intention to renew the lease as required by the provisions of the lease is a condition precedent to a renewal of that lease
"... Equity will not relieve a lessee of the consequences of his failure to give written notice of renewal of the lease within the time required by the provisions of the lease when the failure resulted from the negligence of the lessee unaccompanied by fraud, mistake, accident or surprise and unaffected by the conduct of the lessor.").

Pa.

cf.: Barnes v. Hustead, 219 Pa. 287, 68 A. 839 (1908)

S.C.

Pope v. Goethe, 175 S.C. 394, 179 S.E. 319, 99 A.L.R. 1005 (1935)

Tex.

Braugh v. Enyart, 658 S.W.2d 221 (Tex. App. Corpus Christi 1983), writ refused n.r.e., (Feb. 8, 1984) (citing text)

Ducc Realty Co. v. Cox, 356 S.W.2d 807 (Tex. Civ. App. Waco 1962) (citing text)

Utah

cf.: Hofmann v. Sullivan, 599 P.2d 505 (Utah 1979) (in reversing decision that tenant could not specifically enforce option to purchase condominium since lease contained ambiguities, court held there was no ambiguity in option provision, despite fact it contained no provision as to when payments on option would be made, since effect of such provision was to call for payment of cash at time of exercise of option)

Wash.

Chambers v. Slethei, 136 Wash. 84, 238 P. 924 (1925)

Wis.

Anderson v. Riegel, 229 Wis. 200, 281 N.W. 915 (1938) (citing text; heirs of one decedent were given

an option to purchase within 90 days after notice of a contemplated sale, and option therefore expired at the end of 90 days)

[FN20]

Ark.

Synergy Gas Corp. v. H.M. Orsburn & Son, Inc., 15 Ark. App. 128, 689 S.W.2d 594 (1985) (under lease granting tenant option to extend on notice given at least 30 days before expiration of term, tenant's attempted exercise of option was untimely where he gave notice on 30th day before expiration of primary term)

Cal.

cf.: In re Morris' Estate, 173 Cal. App. 2d 676, 343 P.2d 942 (1st Dist. 1959) (lease containing option to renew)

Colo.

Rocky Mountain Gold Mines v. Gold, Silver & Tungsten, 104 Colo. 478, 93 P.2d 973 (1939) (quoting text in dissent which criticizes the decision on the ground that an option is involved and therefore comes under the rule that time is of the essence in options)

D.C.

Brinkley v. Scheffel, 190 A.2d 262 (D.C. 1963) (the court said: "In Warthen v. Lamas, 43 A.2d 759 (Mun. Ct. App. D.C. 1945), we said that when no specific form of notification is required, a tenant wishing to exercise a privilege of renewal may do so in writing, orally, or by affirmative act 'sufficiently evidencing his purpose.' But we made it plain that such act or acts must 'definitely impart notice' to the lessor that the lessee was exercising his option to renew, and that such notice must indicate an unconditional and unqualified determination of the lessee to obtain an extended term, obligating himself as well as the lessor.")

La.

Southern Ventures Corp. v. Texaco, Inc., 372 So. 2d 1228 (La. 1979) (lease requiring notice of renewal no later than 60 days prior to expiration of initial term)

Miss.

Frazier v. Northeast Mississippi Shopping Center, Inc., 458 So. 2d 1051 (Miss. 1984) (option in 10-year lease to expand premises 5 years after start of lease)

N.Y.

95 East Main Street Service Station, Inc. v. H & D All Type Auto Repair, Inc., 162 A.D.2d 440, 556 N.Y.S.2d 385 (2d Dep't 1990) (written notice by certified mail required nine months before expiration of lease; the court observed: "Since the notice exercising the option was not given within the specified time period, it was ineffective.")

T. I. P. Holding No. 2 Corp. v. Wicks, 63 A.D.2d 263, 407 N.Y.S.2d 709 (2d Dep't 1978) (both an option and a contract to purchase real property may be embodied within one document, and, to the extent that provisions of such a document relate to the option portion, the rules generally applicable to options should apply, meaning "that such provisions must be complied with strictly in the manner and within the time specified")

Wis.
Conrad Milwaukee Corp. v. Wasilewski, 30 Wis. 2d 481, 141 N.W.2d 240 (1966) (citing text)

[FN21]
Fourth Circuit
Lewis-Hale Coal Co. v. Enterprise Fuel Co., 33 F.2d 727 (C.C.A. 4th Cir. 1929) (citing text; notice mailed following day was too late)

Cal.
ADV Corp. v. Wikman, 178 Cal. App. 3d 61, 223 Cal. Rptr. 262 (4th Dist. 1986)

Ga.
Rogers v. Burr, 97 Ga. 10, 25 S.E. 339 (1895) (in spite of provision for 30 days prior notice)

Whitmire v. Colwell, 159 Ga. App. 682, 285 S.E.2d 28 (1981)

Idaho
cf.: Krepcik v. Tippett, 109 Idaho 696, 710 P.2d 606 (Ct. App. 1985) (termination of agricultural lease for nonpayment of rent also operated to terminate option to purchase, and thus letter written by tenants months after rent default and initiation of possessory action against them, expressing interest in exercising option to purchase, was of no effect)

Ind.
Carsten v. Eickhoff, 163 Ind. App. 294, 323 N.E.2d 664 (3d Dist. 1975)

La.
Willard E. Robertson Corp. v. Benson Continental Motors, Inc., 476 So. 2d 7 (La. Ct. App. 5th Cir. 1985) (where lease provided option for renewal at end of primary term, but specified no time for exercise of option, lessee's exercise several months before end of primary term was proper, the court rejecting the lessor's argument that renewal had occurred too early)

Speedee Oil Change No. 2, Inc. v. National Union Fire Ins. Co., 444 So. 2d 1304 (La. Ct. App. 4th Cir. 1984)

Md.
Brown Method Co. v. Ginsberg, 153 Md. 414, 138 A. 402 (1927)

Mo.
Rutledge & Taylor Coal Co. v. Mermod, Jaccard & King Jewelry Co., 209 Mo. App. 292, 237 S.W. 849 (1922)

N.J.
Monmouth County Electric Co. v. Consolidated Gas Co. of N.J., 83 N.J.L. 531, 83 A. 900 (N.J. Ct. Err. & App. 1912)

Or.
Blakeslee v. Davoudi, 54 Or. App. 9, 633 P.2d 857, 29 A.L.R.4th 897 (1981)

A.L.R. Library

What constitutes timely notice of exercise of option to renew or extend lease, 29 A.L.R. 4th 956.
Sufficiency of provision of lease to effect second or perpetual right of renewal, 29 A.L.R. 4th 172.
Circumstances excusing lessee's failure to give timely notice of exercise of option to renew or extend lease, 27 A.L.R. 4th 266.

[FN22]
Utah
I.X.L. Furniture & Carpet Installment House v. Berets, 32 Utah 454, 91 P. 279 (1907)

[FN23]
Cal.
Altman v. Blewett, 93 Cal. App. 516, 269 P. 751 (3d Dist. 1928) (involving contracts to purchase lots in housing tract that included options to purchase portions of adjoining lots when street is extended through those lots; time for exercising options did not arrive until judgment was entered in condemnation action brought by the city opening street, and tenders by purchasers 5 days after the condemnation judgment in one instance, and 1½ months in another, were timely, the court saying: "The few days elapsing in this case after plaintiffs became entitled to demand a conveyance, before making their demand, cannot be regarded as in any way constituting equitable laches.")

Minn.
Davis v. Godart, 131 Minn. 221, 154 N.W. 1091 (1915) (land sale contract)

N.Y.
Joannides v. Assimacy, 216 A.D. 133, 214 N.Y.S. 692 (1st Dep't 1926)

R.I.
Caito v. Ferri, 44 R.I. 261, 116 A. 897 (1922) (lease)

Wash.
Central Guarantee Co. v. National Bank of Tacoma, 137 Wash. 24, 241 P. 285, 45 A.L.R. 721 (1925)

W. Va.
cf.: Ammar v. Cohen, 96 W. Va. 550, 123 S.E. 582 (1924) (court permitted tenant with option to renew "at the termination" of the old term to exercise the option two days after the end of the term, but the court reached this result by finding the equities in the tenant's favor rather than by a construction that a reasonable time was allowed after the term)

A.L.R. Library

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease, 34 A.L.R. 4th 857.
Waiver or estoppel as to notice requirement for exercising option to renew or extend lease, 32 A.L.R. 4th 452.

[FN24]

Third Circuit
Matter of Opus One, Inc., 33 B.R. 190 (Bankr. W.D. Pa. 1983) (lessor of commercial premises waived right to written notice of lessee's option to extend lease for additional five-year term where lessee gave timely oral notice, lessor had actual knowledge of lessee's intent through court-ordered agreement requiring lessee to pay arrearages, and lessor repeatedly withheld information from lessee necessary to the renewal)

Cal.
Bergin v. Van Der Steen, 107 Cal. App. 2d 8, 236 P.2d 613 (2d Dist. 1951) (citing text)

N.Y.
cf.: Kotcher v. Edelblute, 250 N.Y. 178, 164 N.E. 897 (1928)

Tenn.
Southern Region Indus. Realty, Inc. v. Chattanooga Warehouse and Cold Storage Co., Inc., 612 S.W.2d 162, 27 A.L.R.4th 259 (Tenn. Ct. App. 1980) (lessee, although it failed to comply with provisions of lease requiring that it give written notice of its intention to renew lease at least 90 days prior to expiration of primary term, was entitled to benefit of equitable rule that relieves tenant from literal compliance with terms of lease when good faith effort has been made to comply and tenant is not guilty of willful or gross negligence, and lessor has not been prejudiced by delayed notice, where lessee mailed renewal letter within specified time and its nondelivery appeared to be accidental, where termination of lease would result in extreme economic hardship to lessee and where there was no evidence that any loss would result to lessor should lessee be permitted to renew lease for additional term)

Tex.
Tye v. Apperson, 689 S.W.2d 320 (Tex. App. Fort Worth 1985), writ granted, (Oct. 30, 1985) and writ withdrawn, (Jan. 15, 1986) and writ refused n.r.e., (Jan. 15, 1986) (although an option agreement required exact and full performance of all the lessees' obligations and provided that the breach of any of the terms and conditions of the lease would, at optionors' election, effect a termination or lapse of the option agreement, the optionors' right to terminate the grant of the option was not self-executing and the optionors were too late in declaring the option agreement lapsed where, despite numerous violations or breaches of the lease agreement, they failed to so declare until well after the agreement had been properly exercised by the lessee)

W. Va.
Ammar v. Cohen, 96 W. Va. 550, 123 S.E. 582 (1924)

Wis.
Gessler v. Erwin Co., 182 Wis. 315, 193 N.W. 363 (1923) (where a contract of license to manufacture and sell a patented article in foreign commerce contained the provision that "if the licensee shall fulfill all the terms and conditions of this agreement within said period of 5 years, an extension of this agreement shall be granted for the life of the patent," it was held in actions for specific performance and an accounting by the licensee that the licensee's failure to give notice that he exercised the right of extension was immaterial as the licensor knew of the licensee's purpose to exercise the right, and, further, because of the licensor's hostile attitude, any notice of extension would have been a useless ceremony)

[FN25]

First Circuit
cf.: In re Millyard Restaurant, Inc., 110 B.R. 103 (Bankr. D. N.H. 1990) (citing text; under New Hampshire law, although "equity will give relief to a lessee who has failed to exercise the option within the required time, if the delay is slight, the delay has not prejudiced the landlord, and the failure to grant relief would result in such hardship to the tenant as to make literal enforcement of the renewal provision unconscionable," tenant's nearly two-month delay in notifying landlord of intention to exercise option to renew lease, without satisfactory explanation, could not be excused)

Third Circuit
Matter of Opus One, Inc., 33 B.R. 190 (Bankr. W.D. Pa. 1983) (commercial lessee's notice of intent to renew lease was timely, even though it varied in form from that specified in lease, where lessor had actual knowledge of lessee's intent to renew, and where lessor repeatedly refused to supply information necessary for lessee to exercise its option)

Conn.
Xanthakey v. Hayes, 107 Conn. 459, 140 A. 808 (1928) (delay three days and improvements of $4,000)

F.B. Fountain Co. v. Stein, 97 Conn. 619, 118 A. 47, 27 A.L.R. 976 (1922)

cf.: Tartaglia v. R.A.C. Corp., 15 Conn. App. 492, 545 A.2d 573 (1988) (tenant not entitled to relief where delay was not slight)

D.C.
Duncan v. G.E.W., Inc., 526 A.2d 1358 (D.C. 1987) (lessee was entitled to equitable relief from failure to give timely notice of its intention to renew lease where lessee had made substantial improvements worth more than $400,000, which improvements would give lessor substantial windfall if strict terms of option to renew were enforced while lessee would suffer irreparable loss if equity did not intervene, delay in giving notice was slight, lessee had decided to renew lease much before time for giving notice and lessors had every expectation that lessee would exercise its renewal option, lessors did not rely to their detriment on lessee's failure to give timely notice of renewal, and lessee's failure to provide timely notice was result of honest and understandable mistake)

Ill.
Linn Corp. v. LaSalle Nat. Bank, 98 Ill. App. 3d 480, 53 Ill. Dec. 885, 424 N.E.2d 676 (1st Dist. 1981) (where lease could be construed as requiring that tenants make substantial improvements in consideration for option to renew, court held that "under the particular circumstances of this case, we think that the trial court exercising its equitable powers could have excused strict compliance with the one year written notice condition of the option to renew")

Ky.
cf.: Rounds v. Owensboro Ferry Co., 253 Ky. 301, 69 S.W.2d 350 (1934)

N.H.
Fletcher v. Frisbee, 119 N.H. 555, 404 A.2d 1106 (1979) (citing text)

N.Y.
J. N. A. Realty Corp. v. Cross Bay Chelsea, Inc., 42 N.Y.2d 392, 397 N.Y.S.2d 958, 366 N.E.2d 1313

(1977) (citing text as to the nature of an option, court held that equity will give relief to a lessee who has failed to exercise the option within the required time, if the delay is slight, the delay has not prejudiced the landlord, and the failure to grant relief would result in such hardship to the tenant as to make literal enforcement of the renewal provision unconscionable, saying: "It is a settled principle of law that a notice exercising an option is ineffective if it is not given within the time specified [citations]. 'At law, of course, time is always of the essence of the contract' [citation]. Thus the tenant had no legal right to exercise the option when it did, but to say that is simply to pose the issue; it does not resolve it. Of course the tenant would not be asking for equitable relief if it could establish its rights at law

"The major obstacle to obtaining equitable relief in these cases is that default on an option usually does not result in a forfeiture. The reason is that the option itself does not create any interest in the property, and no rights accrue until the condition precedent has been met by giving notice within the time specified. Thus equity will not intervene because the loss of the option does not ordinarily result in the forfeiture of any vested rights [citations]. The general rule is customarily stated as follows: 'There is a wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of a defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture'. [citation] ...

"But when a tenant in possession under an existing lease has neglected to exercise an option to renew, he might suffer a forfeiture if he has made valuable improvements on the property. This of course generally distinguishes the lease option, to renew or purchase, from the stock option or the option to buy goods. This was a distinction which some of the older cases failed to recognize [citations]. More recently it has been noted that 'although the tenant has no legal interest in the renewal period until the required notice is given, yet an equitable interest is recognized and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed' [citation].").

N.Y.

95 East Main Street Service Station, Inc. v. H & D All Type Auto Repair, Inc., 162 A.D.2d 440, 556 N.Y.S.2d 385 (2d Dep't 1990) (the court said: "In some cases, an equitable interest is recognized and protected against forfeiture, where the tenant has in good faith made improvements of a substantial character intending to renew the lease, the landlord is not harmed by the delay in notice, and the tenant would sustain substantial loss if the lease were not renewed [citations]. However, in this case, the tenants failed to set forth evidence sufficient to show that they made substantial improvements with the intent to renew the lease; nor has it been shown that the tenants have an interest in the premises as a long-standing location for a retail business [citation]. Indeed, it would appear the tenants deliberately delayed exercising the option to renew while they looked for another location and considered the possibility of selling or assigning the lease.")

Nanuet Nat. Bank v. Saramo Holding Co., 153 A.D.2d 927, 545 N.Y.S.2d 734 (2d Dep't 1989)

Wash.

Beaudry v. Harman, 28 Wash. App. 719, 626 P.2d 50 (Div. 3 1981) (citing text)

Wharf Restaurant, Inc. v. Port of Seattle, 24 Wash. App. 601, 605 P.2d 334 (Div. 1 1979) (under prin-

ciples of equity, lessee which failed to exercise option to renew set forth in lease would be granted specific performance for additional five-year term where, inter alia, lessee's failure to give notice was purely inadvertent, inequitable forfeiture would otherwise result, lessor did not change its position in reliance on failure to give timely notice, and lease was long term lease)

[FN26]

Ark.

Riverside Land Co. v. Big Rock Stone & Material Co., 183 Ark. 1061, 40 S.W.2d 423 (1931)

Colo.

cf.: Buckley Bros. Motors, Inc. v. Gran Prix Imports, Inc., 633 P.2d 1081, 32 A.L.R.4th 445 (Colo. 1981) (lessors' waiver of lessee's failure to give proper notice to extend original lease the first time did not constitute waiver of strict compliance with notice requirement for further extensions; the court noting: "The lessee's argument that it was a holdover tenant at the time of the exercise of the purchase option and, thus, was entitled to exercise the option is without merit. The cases cited by the lessee are all inapposite to the case at hand. Here the parties entered into a new lease, and the lessors' intent that the old lease and the purchase option were terminated was evident. While the lessee retained possession after the termination of the first lease under a holdover provision of that instrument, its status as a holdover tenant ended with the execution of the new lease.")

La.

cf.: Bennett v. Weinberger, 160 La. 1001, 107 So. 780 (1926)

Mont

Barth v. Ely, 85 Mont. 310, 278 P. 1002 (1929) (law action for rent due)

N.J.

Straus v. Robbin, 4 N.J. Misc. 631, 133 A. 868 (Sup. Ct. 1926)

Tex.

cf.: Thermo Products Co. v. Chilton Independent School Dist., 647 S.W.2d 726, 10 Ed. Law Rep. 447 (Tex. App. Waco 1983), writ refused n.r.e., (June 1, 1983) (option to purchase, set forth in a lease, did not survive during the period the lessees held over the leased premises thereby permitting exercise by the lessees three or more years after the lease terminated)

[FN27] As to the effect of waiver when time is of the essence, see § 46:14.

Ark.

Riverside Land Co. v. Big Rock Stone & Material Co., 183 Ark. 1061, 40 S.W.2d 423 (1931)

N.J.

Straus v. Robbin, 4 N.J. Misc. 631, 133 A. 868 (Sup. Ct. 1926)

N.C.

Coulter v. Capitol Finance Co., 266 N.C. 214, 146 S.E.2d 97 (1966) (acceptance of increased rent which lease provides shall be paid during renewal period constitutes waiver of tenant's failure to give required notice of intention to renew)

Trial Strategy

Lessee's Excusable Failure To Give Timely Notice Exercising Option To Renew Lease, 50 Am. Jur. Proof of Facts 2d 519.

[FN28] As to the effect of usage, generally, see Ch 34.

Cal.
Leonhardi-Smith, Inc. v. Cameron, 108 Cal. App. 3d 42, 166 Cal. Rptr. 135 (2d Dist. 1980) (in consolidated actions for declaratory relief and unlawful detainer arising out of a dispute between the executor of a decedent's estate and lessees of real property owned by the decedent as to whether the lessees had effectively exercised an option to renew the lease, the trial court properly entered judgment in favor of the lessees, where, though written notice of exercise of the option was not given the executor prior to 90 days before expiration of the lease term as required by the option provision, there was evidence the lessees had orally informed the executor of their desire to renew more than 90 days before expiration, and, within that period, complied with the executor's request for a written notice, where the executor accepted the belated written notice and subsequent rents at the rate applicable to the extension, and where substantial improvements were made by the lessees to the property in reliance on the continuation of the lease)

La.
Aguillard's Enterprises Inc. v. Smith, 439 So. 2d 1158 (La. Ct. App. 4th Cir. 1983), writ denied, 444 So. 2d 1224 (La. 1984) (where lessee, relying on past dealings with lessor and similarity between earlier lease and present lease, dispatched written notice of intention to exercise option to renew within time period allowed by lease, but where notice was not received until after time period had elapsed, notice was timely exercise of option to renew, notwithstanding general rule that acceptance must be communicated to be effective, in that lease was ambiguous as whether notice would be effective upon receipt or upon mailing, lessor's son had drafted lease, and lease contained clause that permitted use of mail to serve notices)

Minn.
Trollen v. City of Wabasha, 287 N.W.2d 645 (Minn. 1979) (lessee was excused, under equitable principles, from strict compliance with lease provision requiring notice to extend lease to be given six months prior to termination of lease where lessee's conduct was neither willful nor grossly negligent, his reliance upon past dealings between himself and lessor caused him to neglect ascertaining his obligations under lease, lessee's delay in giving notice was relatively slight, and literal enforcement of notice requirement would cause lessee unconscionable hardship)

[FN29]
Ninth Circuit
Pyrate Corp. v. Sorensen, 44 F.2d 323 (C.C.A. 9th Cir. 1930)

N.Y.
Jacob Dold Packing Co. v. Kings County Refrigerating Co., 176 A.D. 407, 162 N.Y.S. 1035 (2d Dep't 1917)

Tex.

Hall v. Willmering, 209 S.W. 226 (Tex. Civ. App. Amarillo 1919), writ refused, (June 21, 1919)

[FN30]
Cal.
Kaplan v. Reid Bros., 104 Cal. App. 268, 285 P. 868 (1st Dist. 1930) (the court limited the time of exercise to a reasonable time because of the rule against perpetuities, but permitted the option-holder to elect after six years)

Wis.
Wisconsin Club v. John, 202 Wis. 476, 233 N.W. 79 (1930) (40 years held not to be unreasonable)

[FN31]
Second Circuit
USA Network v. Jones Intercable, Inc., 729 F. Supp. 304 (S.D. N.Y. 1990) (quoting text)

USA Network v. Jones Intercable, Inc., 704 F. Supp. 488 (S.D. N.Y. 1989) (quoting text)

Ark.
Motion Picture Advertising Service Co. v. Cannon, 186 Ark. 1107, 57 S.W.2d 1043 (1933)

Colo.
Bennett's, Inc. v. Krogh, 115 Colo. 18, 168 P.2d 554, 164 A.L.R. 1010 (1946) (time for exercise of reserved option to terminate, cancel or rescind contract)

Fla.
cf.: Royal Continental Hotels, Inc. v. Broward Vending, Inc., 404 So. 2d 782 (Fla. Dist. Ct. App. 4th Dist. 1981) (in an action for breach of a contract which contained a clause stating that the contract would remain in effect for five years and would be automatically renewed thereafter on a five-year basis unless either party were to serve "notice of its intention to cancel 30 days prior to the termination of the first year, or during any yearly renewal thereof," the trial court properly found the clause to be ambiguous and therefore properly admitted parol evidence to resolve the ambiguity; on the basis of such evidence, trial court found that there was an initial contract term of five years during which contract could not be canceled)

Md.
Brown Method Co. v. Ginsberg, 153 Md. 414, 138 A. 402 (1927)

N.Y.
T. I. P. Holding No. 2 Corp. v. Wicks, 63 A.D.2d 263, 407 N.Y.S.2d 709 (2d Dep't 1978) (in connection with contract to purchase property for development, which was construed as providing that installments paid by purchaser were in consideration of being given an option for a limited time to carry out the next stage of the development, the court said: "whether we read the various provisions of the agreement as 'options to cancel' or 'options to continue' is devoid of legal or factual significance; they are one and the same thing")

S.C.
Columbia Weighing Mach. Co. v. Rhem, 164 S.C. 376, 162 S.E. 427 (1931)

Wash.
Central Guarantee Co. v. National Bank of Tacoma, 137 Wash. 24, 241 P. 285, 45 A.L.R. 721 (1925)

[FN32]
First Circuit
cf.: Lawrence v. O'Connell, 141 F. Supp. 316 (D.R.I. 1956), judgment aff'd, 238 F.2d 476 (1st Cir. 1956)

Seventh Circuit
Jacobs v. J.C. Penney Co., 74 F. Supp. 444 (W.D. Wis. 1947), judgment aff'd, 170 F.2d 501 (7th Cir. 1948)

Eighth Circuit
cf.: Crancer v. Lareau, 1 F.2d 117 (C.C.A. 8th Cir. 1924)

cf.: Kern v. Prudential Ins. Co. of America, 187 F. Supp. 398 (E.D. Mo. 1960), judgment aff'd, 293 F.2d 251 (8th Cir. 1961)

Ala.
Long v. Hirs, 270 Ala. 131, 116 So. 2d 605 (1959)

Ill.
Welsh v. Jakstas, 401 Ill. 288, 82 N.E.2d 53 (1948)

Kan.
cf.: Gardner v. Spurlock, 184 Kan. 765, 339 P.2d 65 (1959)

Md.
Compania de Astral, S. A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 49 A.L.R.2d 646 (1954)

Pa.
Detwiler v. Capone, 357 Pa. 495, 55 A.2d 380 (1947)

Vt.
Ackerman v. Carpenter, 113 Vt. 77, 29 A.2d 922 (1943)

Wis.
cf.: Caley v. Flegenheimer, 8 Wis. 2d 72, 98 N.W.2d 473 (1959)

[FN33] As to the exercise of an option by performing the requested act or entering into a bilateral contract, see § 5:18.

As to the communication of acceptance, see §§ 6:5 to 6:9.

Second Circuit
Shubert Theatrical Co. v. Rath, 271 F. 827, 20 A.L.R. 846 (C.C.A. 2d Cir. 1921) (a true acceptance of an option-offer is subject to the general rules as to communication of an acceptance)

[FN34]

Seventh Circuit

Matter of Heather Companies, 36 B.R. 863 (Bankr. N.D. Ill. 1984) (where lease did not specify manner of notice to be given by lessee to lessor so as to provide notice of intention to renew lease, and where evidence presented by lessee was clearly more persuasive that oral notice was given by lessee to partner of lessor than evidence of lessor's employees that it was not, oral notice would be sufficient and lessee would be entitled to possession of premises under renewal of lease)

Ill.

Sanni, Inc. v. Fiocchi, 111 Ill. App. 3d 234, 66 Ill. Dec. 945, 443 N.E.2d 1108 (2d Dist. 1982) (where shopping center was in probate at time lessee rented shop for use as beauty salon, lease provided option to renew on giving 90 days written notice "to the lessor (or its assigns)," and estate was distributed in separate parcels to daughter and wife of deceased, lessee was required to give notice to daughter, who was owner of beauty shop and lessor at time option to extend was exercised, and not to wife of deceased who was personal representative of estate at time lease was executed and who was devisee of other shops in shopping center)

Daehler v. Oggoian, 72 Ill. App. 3d 360, 28 Ill. Dec. 250, 390 N.E.2d 417 (1st Dist. 1979) (where written lease was silent concerning manner in which option to renew was to be exercised, testimony by defendant in forcible detainer action that he had given lessor oral notice that he was renewing would be competent evidence to show he had exercised his option)

Iowa

Wheeler v. McStay, 160 Iowa 745, 141 N.W. 404 (1913)

La.

cf.: Ottermann v. Ganus, 455 So. 2d 1385 (La. 1984) (lessee properly exercised option to renew lease by sending letter that was properly addressed, stamped and sent by certified mail; rebuttable presumption of receipt by addressee arose, and successor in interest to lessor, his wife, did not successfully rebut presumption by testifying that her husband had not received letter, since she had not opened her husband's mail and had no basis for her assertion that he had not received letter, and fact that letter had not been in her file was not dispositive as several other pertinent items were missing from file)

Bankston v. Bankston's Estate, 401 So. 2d 436 (La. Ct. App. 1st Cir. 1981), writ denied, 406 So. 2d 627 (La. 1981) (where lease-option agreement specified exercise of option within 24-month duration of lease and required, if option was exercised, notification by ordinary mail prior to expiration of lease on April 30, exercise of option was timely, even though lessor did not receive notification until May 1, since lessee posted letter of acceptance on April 27; phrase "exercise the option" as contained in lease-option agreement did not require purchase of property during term of lease, but only referred to acceptance of offer)

Md.

Compania de Astral, S. A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 49 A.L.R.2d 646 (1954) (holding that notice of acceptance of an option is not effective until received by the grantor of the option)

Brown Method Co. v. Ginsberg, 153 Md. 414, 138 A. 402 (1927)

Mass.

McTernan v. LeTendre, 4 Mass. App. Ct. 502, 351 N.E.2d 566 (1976) (citing text)

Korey v. Sheff, 3 Mass. App. Ct. 266, 327 N.E.2d 896 (1975) (citing text)

Minn.

Hoban v. Hudson, 129 Minn. 335, 152 N.W. 723 (1915)

N.J.

McCrory Stores Corp. v. Goldberg, 95 N.J. Eq. 152, 1 N.J. Misc. 446, 122 A. 113 (Ch. 1923)

N.Y.

Arroyo v. Patayne Estates, Inc., 25 A.D.2d 424, 266 N.Y.S.2d 565 (1st Dep't 1966) (citing text; where contract gave purchaser option to be exercised by notice sent by certified mail, return receipt requested, postmarked not later than a specified date, and notice was postmarked on a later date, option was not effectively exercised)

S.C.

Carmichael v. Dan Nance Corp., 274 S.C. 357, 264 S.E.2d 601 (1980) (under lease providing that notice of option to renew be personally delivered to specified address by January 30, 1978, notice was sufficient where lessee delivered notice personally to that address on January 30, 1978, and left a note of notice at the apartment door, and mailed a copy to lessor on January 31, though lessor was not at that address and had not occupied those premises for several years, where no instructions were left as to where lessor or representative could be found and where lessee had never received notice of change of address)

WILLSTN-CN § 46:12

END OF DOCUMENT

CHINO BASIN WATERMASTER
Case No. RCV 51010
Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On April 12, 2010 I served the following:

1) **EXHIBIT LIST TO WATERMASTER OPPOSITION TO PARAGRAPH 31 MOTION – INCLUDING EXHIBITS 1-26**
2) **COMPENDIUM OF CASES CITED IN OPPOSITION TO PARAGRAPH 31 MOTION**

/_x_/ BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:
See attached service list: Mailing List 1

/___/ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee.

/___/ BY FACSIMILE: I transmitted said document by fax transmission from (909) 484-3890 to the fax number(s) indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting fax machine.

/_x_/ BY ELECTRONIC MAIL: I transmitted notice of availability of electronic documents by electronic transmission to the email address indicated. The transmission was reported as complete on the transmission report, which was properly issued by the transmitting electronic mail device.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 12, 2010 in Rancho Cucamonga, California.

Alexandra Perez
Chino Basin Watermaster

MICHAEL CAMACHO
6055 ZIRCON AVE.
RANCHO CUCAMONGA, CA 91701

KEN WILLIS
LEAGUE OF CA HOMEOWNERS
99 "C" STREET, SUITE 209
UPLAND, CA 91786

ROBERT BOWCOCK
INTEGRATED RESOURCES MGMNT
405 N. INDIAN HILL BLVD
CLAREMONT, CA 91711-4724

MICHAEL WHITEHEAD
P.O. BOX 6010
EL MONTE, CA 91734

GEOFFREY VANDEN HEUVEL
CBWM BOARD MEMBER
8315 MERRILL AVENUE
CHINO, CA 91710

PAUL HOFER
11248 S TURNER AVE
ONTARIO, CA 91761

BOB KUHN
669 HUNTERS TRAIL
GLENDORA, CA 91740

CHARLES FIELD
4415 FIFTH STREET
RIVERSIDE, CA 92501

TOM HAUGHEY
CITY OF CHINO
PO BOX 667
CHINO, CA 91708-0667

GLEN DURRINGTON
5512 FRANCIS ST
CHINO, CA 91710

ROBERT DELOACH
P.O.BOX 638
RANCHO CUCAMONGA, CA 91729

BOB FEENSTRA
P.O. BOX 17482
ANAHEIM HILLS, CA 92817

MARK KINSEY
10575 CENTRAL AVE.
P.O. BOX 71
MONTCLAIR, CA 91763

Members:

Al Lopez	lopezsixto@netzero.net
Alice Shiozawa	afshioza@gswater.com
Andy Campbell	acampbell@ieua.org
Andy Malone	amalone@wildermuthenvironmental.com
Anthony La	ala@ci.upland.ca.us
April Woodruff	awoodruff@ieua.org
Arnold Rodriguez	jarodriguez@sarwc.com
Ashok Dhingra	ash@akdconsulting.com
Ben Lewis	benjamin.lewis@gswater.com
Ben Pak	bpak@cbwm.org
Bill Kruger	citycouncil@chinohills.org
Bill Thompson	bthompson@ci.norco.ca.us
Bob Bowcock	bbowcock@irmwater.com
Bob Bowcock	bbowcock@irmwater.com
Bob Feenstra	bobfeenstra@gmail.com
Bob Kuhn	bgkuhn@aol.com
Bob Lawhn	rlawhn@rrienergy.com
Bonnie Tazza	bonniet@cvwdwater.com
Brenda Fowler	balee@fontanawater.com
Brian Geye	bgeye@autoclubspeedway.com
Brian Hess	bhess@niagarawater.com
Carl Hauge	chauge@water.ca.gov
Charles Field	cdfield@att.net
Charles Moorrees	cmoorrees@sawaterco.com
Cindy Cisneros	Cindy_Cisneros@ci.pomona.ca.us
Cindy LaCamera	clacamera@mwdh2o.com
Craig Stewart (craig.stewart@amec.com)	craig.stewart@amec.com
Curtis Stubbing	Curtis_Stubbings@praxair.com
Dan Arrighi	darrighi@sgvwater.com
Dan Hostetler	dghostetler@csupomona.edu
Dave Argo	argodg@bv.com
Dave Crosley	DCrosley@cityofchino.org
David D DeJesus	tvmwddiv2rep@gmail.com
David D DeJesus	davidcicgm@aol.com
David Penrice	dpenrice@acmwater.com
David Ringel	david.j.ringel@us.mwhglobal.com
David Starnes	david.starnes@mcmcnet.net
Dennis Poulsen	dpoulsen@californiasteel.com
Dennis Williams	dwilliams@geoscience-water.com
Diana Sturgeon	dsturgeon@chinohills.org
Don Cutler	dcutler@jcsd.us
Don Galleano	donald@galleanowinery.com
Donna Stokes	dstokes@cityofchino.org
Earl Elrod	earl.elrod@verizon.net
Edward Gonsman	Edward.Gonsman@cdcr.ca.gov
Eldon Horst	ehorst@jcsd.us
Eunice Ulloa	eulloa@cbwcd.org
Frank Brommenschenkel	frank.brommen@verizon.net
Frank LoGuidice	faloguidice@sgvwater.com
Gene Koopman	GTKoopman@aol.com
Geoff Willis	gwillis@sheppardmullin.com
Geoffrey Vanden Heuvel	GeoffreyVH@juno.com
Gerald Yahr	yahrj@koll.com
Gerard Thibeault	gthibeault@rb8.swrcb.ca.gov
Geye, Brian	BGeye@autoclubspeedway.com
Grace Cabrera	grace_cabrera@ci.pomona.ca.us
Greg Woodside	gwoodside@ocwd.com
Ida Martinez	idam@cvwdwater.com
Isabel Martinez	imartinez_wfa@verizon.net
Jack Safely	jsafely@wmwd.com
James Jenkins	cnomgr@airports.sbcounty.gov

Jeff Pierson	jpierson@unitexcorp.com
Jeffrey L. Pierson	jpierson@intexcorp.com
Jill Willis	jnwillis@bbklaw.com
Jim Hill	jhill@cityofchino.org
Jim Taylor	jim_taylor@ci.pomona.ca.us
Joe Graziano	jgraz4077@aol.com
Joe P LeClaire	jleclaire@wildermuthenvironmental.com
John Anderson	janderson@ieua.org
John Ayers	jayers@sunkistgrowers.com
John Bosler	JohnBo@cvwdwater.com
John Huitsing	johnhuitsing@gmail.com
John Kennedy	jkennedy@ocwd.com
John Mura	jmura@chinohills.org
John Rossi	jrossi@wmwd.com
Jon Lambeck	jlambeck@mwdh2o.com
Jorge Rosa Jr.	Jorge.Rosa@sce.com
Julie Velez	JVelez@sdcwa.org
Justin Brokaw	jbrokaw@hughes.net
Karen Johnson	kejwater@aol.com
Kathy Kunysz	kkunysz@mwdh2o.com
Kathy Tiegs	Kathyt@cvwdwater.com
Ken Jeske	kjeske@eee.org
Ken Kules	kkules@mwdh2o.com
Ken Manning	KManning@CBWM.ORG
Ken Waring	kwaring@jcsd.us
Kenneth Willis	kwillis@homeowners.org
Kevin Blakeslee	kblakeslee@dpw.sbcounty.gov
Kevin Sage	Ksage@IRMwater.com
Kurt Berchtold	kberchtold@rb8.swrcb.ca.gov
Kyle Snay	kylesnay@gswater.com
Lindsay Gomez	lgomez@wildermuthenvironmental.com
Lisa Hamilton	Lisa.Hamilton@corporate.ge.com
Marguerite P Battersby	pbattersby@sheppardmullin.com
Maribel Sosa	Maribel_Sosa@ci.pomona.ca.us
Mark Norton	mnorton@sawpa.org
Marsha Westropp	MWestropp@ocwd.com
Martin Zvirbulis	martinz@cvwdwater.com
Michael Whitehead	mlwhitehead@sgvwater.com
Michelle Lauffer	mlauffer@jcsd.us
Mike Thies	mthies@spacecenterinc.com
Neil Miller	neil_miller@ci.pomona.ca.us
W. C. "Bill" Kruger	wkrugers@earthlink.net
W. C. "Bill" Kruger	citycouncil@chinohills.org

Members:

Manuel Carrillo	Manuel.Carrillo@SEN.CA.GOV
Maria Linzay	mlinzay@ci.upland.ca.us
Maria Mendoza	mmendoza@wildermuthenvironmental.com
Maribel Sosa	Maribel_Sosa@ci.pomona.ca.us
Mark Kinsey	mkinsey@mvwd.org
Mark Ward	mark_ward@ameron-intl.com
Mark Wildermuth	mwildermuth@wildermuthenvironmental.com
Marla Doyle	marla_doyle@ci.pomona.ca.us
Marsha Westropp	MWestropp@ocwd.com
Martha Davis	mdavis@ieua.org
Martin Rauch	martin@rauchcc.com
Martin Zvirbulis	martinz@cvwdwater.com
Marv Shaw	mshaw@ci.ontario.ca.us
Masha Klachko Blair	mklachko-blair@bhfs.com
Maynard Lenhert	directorlenhert@mvwd.org
Melanie Otero	melanie_otero@ci.pomona.ca.us
Michael Camacho	mcamacho@pacificaservices.com
Michael T Fife	MFife@bhfs.com
Mike Maestas	mmaestas@chinohills.org
Mohamed El-Amamy	melamamy@ci.ontario.ca.us.
Nate Mackamul	Nate.Mackamul@cdcr.ca.gov
Nathan deBoom	n8deboom@gmail.com
Pam Sharp	PSharp@chinohills.org
Pam Wilson	pwilson@bhfs.com
Pat Glover	pglover@cityofchino.org
Patrick Mead	pmead@dpw.sbcounty.gov
Patrick Sheilds	psheilds@ieua.org
Paul Deutsch (paul.deutsch@amec.com)	paul.deutsch@amec.com
Paul Hofer	farmwatchtoo@aol.com
Paul Schenk	pschenk@ldking.com
Peggy Asche	peggy@wvwd.org
Pete Hall	r.pete.hall@cdcr.ca.gov
Peter Hettinga	peterhettinga@yahoo.com
Phil Krause	pkrause@parks.sbcounty.gov
Phil Rosentrater	prosentrater@wmwd.com
Raul Garibay	raul_garibay@ci.pomona.ca.us
Richard Atwater	Atwater@ieua.org
Rick Hansen	rhansen@tvmwd.com
Rick Rees (Richard.Rees@amec.com)	Richard.Rees@amec.com
Rob Vanden Heuvel	Robert.t.van@gmail.com
Robert C. Hawkins	RHawkins@earthlink.net
Robert Cayce	rcayce@airports.sbcounty.gov
Robert DeLoach	robertd@cvwdwater.com
Robert Neufeld	rrneufeld@sbvwcd.dst.ca.us
Robert Nobles	Robert.Nobles@cdcr.ca.gov
Robert Tock	rtock@jcsd.us
Robert Young	rkyoung@fontanawater.com
Roger Han	roger_han@praxair.com
Ron Craig	RonC@rbf.com
Sam Fuller	samf@sbvmwd.com
Sandra S. Rose	directorrose@mvwd.org
Sandy Lopez	slopez@ci.ontario.ca.us
Sarah Kerr	skerr@ci.ontario.ca.us.
Sarah Schneider (sarah.schneider@amec.com)	sarah.schneider@amec.com
Scott Burton	sburton@ci.ontario.ca.us
Scott Slater	sslater@bhfs.com
Shaun Stone	sstone@ci.upland.ca.us
Sherrie Schnelle	sschnelle@chinohills.org
Sonya Bloodworth	sbloodworth@wmwd.com
Steve Arbelbide	sarbelbide@californiasteel.com
Steve Nix	snix@chinohills.org

Steve Riboli	steve.riboli@sanantoniowinery.com
Ted Leaman	tleaman@sunkistgrowers.com
Terry Catlin	tlcatlin@verizon.net
Tim Hampton	tim_hampton@ci.pomona.CA.US
Tim Skrove	tskrove@mwdh2o.com
Toby Moore	TobyMoore@gswater.com
Tom Cruikshank	tcruikshank@spacecenterinc.com
Tom Harder	thomas_harder@att.net
Tom Haughey	tom@haugheyinsurance.com
Tom Love	TLove@ieua.org
Toni Medel	mmedel@RBF.com
Tracy Tracy	ttracy@mvwd.org
Umesh Shah	ushah@jcsd.us
Van Jew	vjew@mvwd.org
Vicki Hahn	vhahn@tvmwd.com
William P. Curley	wcurley@rwglaw.com
WM Admin Staff	

Members:

Alfred E. Smith	asmith@nossaman.com
Allen W. Hubsch	awhubsch@hhlaw.com
Amy Steinfeld	asteinfeld@bhfs.com
Andrew Lazenby	lazenbyag@bv.com
Art Kidman	akidman@mkblawyers.com
Barbara Swanson	Barbara_Swanson@yahoo.com
Beth Barry	bethb@cvwdwater.com
Bob Feenstra	bobfeenstra@gmail.com
Carol	marie@tragerlaw.com
Carol Davis	cdavis@lagerlof.com
Chris Swanberg	chris.swanberg@corr.ca.gov
Dan McKinney	dmckinney@rhlaw.com
Eric Garner	elgarner@bbklaw.com
Fred Fudacz	ffudacz@nossaman.com
Jean Cihigoyenetche	Jean_CGC@hotmail.com
jeeinc@aol.com	jeeinc@aol.com
Jennifer Novak	jennifer.novak@doj.ca.gov
Jill Willis	jnwillis@bbklaw.com
Jim Markman	jmarkman@rwglaw.com
Jim@city-attorney.com	Jim@city-attorney.com
jimmy@city-attorney.com	jimmy@city-attorney.com
John Cotti	jcotti@localgovlaw.com
John Schatz	jschatz13@cox.net
Joseph S. Aklufi	AandWLaw@aol.com
Kuperberg, Joel	jkuperberg@rutan.com
Marguerite P Battersby	pbattersby@sheppardmullin.com
Mark Hensley	mhensley@localgovlaw.com
Michelle Staples	mstaples@jdplaw.com
Rodney Baker	rodbaker03@yahoo.com
smt@tragerlaw.com	smt@tragerlaw.com
Steve Kennedy	skennedy@bbmblaw.com
Steven K. Beckett	skbeckett@bbmblaw.com
Steven Lee	slee@rhlaw.com
Steven R. Orr	sorr@rwglaw.com
Tom Bunn	TomBunn@Lagerlof.com
Tom McPeters	THMcP@aol.com
Tram Tran	ttran@mkblawyers.com
William J. Brunick	bbrunick@bbmblaw.com
William P. Curley	wcurley@rwglaw.com