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## Contracts

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## *Contracts*

by *Robert G. Meiners\**

### **Statute of Frauds**

When is one estopped to plead the statute of frauds? California's complex and somewhat confusing view of this question again perplexed an appellate court in *Tomlins v. The American Ins. Co.*<sup>1</sup> To understand how the court met the problem two prior cases require review.

In a leading case decided in 1909, *Seymour v. Oelrichs*,<sup>2</sup> the supreme court took the unique position that even without having misrepresented a fact, one might be estopped to plead the statute of frauds as a defense if he makes a representation going to the requirements of the statute. Thus, if one made

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1. 258 Cal. App.2d 525, 66 Cal. Rptr. 92 (1968).

2. 156 Cal. 782, 106 P. 88 (1909).

## Contracts

a representation that a writing was not necessary, that a writing would be executed or that the statute would not be used as a defense, he would thereafter be estopped from pleading the statute as a defense.

In a 1950 case, *Monarco v. Lo Greco*,<sup>3</sup> in an opinion written by Justice Traynor this position was drastically changed. The rule announced in *Monarco* was that where either an unconscionable injury or unjust enrichment would result from a refusal by the court to enforce the oral contract, the doctrine of estoppel could be invoked whether or not plaintiff relied on a representation going to the requirements of the statute. The reasoning employed by the court in *Monarco* was that in reality it is not a representation going to the requirements of the statute that a person relies upon when he changes his position in reliance; it is the promise that the contract will be performed.

In the recent *Tomlins* case the one-year clause of the statute of frauds (Civil Code § 1624) was involved. Plaintiff left his employment for another position from which he was discharged one week thereafter. Plaintiff contended that he had a three-year contract. In the trial court the jury was instructed that the statute “does not apply where there have been representations that a writing will be executed in the future or where an unconscionable injury would result from the refusal to enforce the contract.”<sup>4</sup> (Emphasis added.) On appeal, it was held that this instruction was erroneous because the use of the disjunctive “or” permitted the jury to find an estoppel on a “mere” promise to reduce the agreement to writing without any element of unconscionable injury to the plaintiff. The court pointed out that the test in *Monarco* was either unconscionable injury or unjust enrichment and that where either element exists the doctrine of estoppel may be applied. The court went on to say that in holding unjust enrichment to be sufficient to invoke the doctrine of estoppel, *Monarco*, “. . . necessarily implies that such a promise, alone [i.e. a representation going to the requirements of the statute] and

3. 35 Cal.2d 621, 220 P.2d 737 (1950).

4. 258 Cal. App.2d at 528, 66 Cal. Rptr. at 94.

without either unconscionable injury or unjust enrichment, will not suffice to establish an estoppel.”<sup>5</sup>

Another case involving the one-year clause was *White Lightning Co. v. Wolfson*.<sup>6</sup> Here, the oral agreement provided that Wolfson was to receive a certain weekly salary plus one percent of the annual gross sales of White exceeding one million dollars. This percentage was to be payable quarterly. Since the computation and payment for the last quarter would obviously take some time, it could be argued that the contract could not be performed within one year. The supreme court, in an opinion by Justice Tobriner, pointed out that the California cases, in construing the one-year clause of the statute of frauds, have held that the statute applies only to contracts which, by their terms, cannot possibly be performed within one year. The court held that the provision making part of Wolfson’s compensation dependent upon an analysis of yearly gross sales did not in itself convert the oral contract into one which by its terms could not be performed within a year. The court’s reasoning coincides with the position taken by the few courts in other jurisdictions passing on the same point.

### Illegality

The problem of the contractor building a home without a license was presented in *Famous Builders, Inc. v. Bolin*.<sup>7</sup> The court did not have to struggle with the problem of whether the statute requiring a license was intended for purposes of revenue (in which case the unlicensed plaintiff can usually recover) or protection of the public (in which case, recovery is usually denied). Section 7031 of the Business and Professions Code states explicitly that an unlicensed contractor cannot recover. In commenting on this section the court reviewed the recent supreme court decision in *Latipac, Inc. v. Superior Court*,<sup>8</sup> pointing out the severity of the statute

5. 258 Cal. App.2d at 528, 66 Cal. Rptr. at 94.

6. 68 Cal.2d 336, 66 Cal. Rptr. 697, 438 P.2d 345 (1968).

7. 264 Cal. App.2d —, 70 Cal. Rptr. 17 (1968).

8. 64 Cal.2d 278, 49 Cal. Rptr. 676, 411 P.2d 564 (1966).

## Contracts

and the forfeiture it necessarily entails. For these reasons the supreme court has been reluctant to construe the statute more broadly than necessary for the achievement of its manifest purpose. However, factors in the *Latipac* case were not present in *Famous Builders*. The court said:

In the *Latipac* case the contracting party, after the lapse of its license, actually later secured a license; here no later license was ever acquired. In the *Latipac* case one of those in charge of the work of the contracting corporation had been authorized by the board to act in similar work through a license granted to another business enterprise, but here no such license existed.<sup>9</sup>

Sustaining the trial court's determination that the unlicensed contractor could recover, the appellate court pointed to failures, some of them wilful, on the part of the contractor as additional reasons for its holding. Although the contractor in this case did have a license when he began the work, his license expired before he had finished the work. Section 7031 of the Business and Professions Code is explicit in requiring the contractor to be licensed "at all times during the performance of such act or contract."

Another case involving a licensing violation was *California Chicks, Inc. v. William Viebrock*.<sup>10</sup> The statute in question was section 1263 of the Agricultural Code. Unlike the statute in *Famous Builders*, it is silent on the contractual effect to be given to a failure to secure a license. Section 1263 simply provides that "no person shall act as a . . . dealer . . . without having obtained a license." Plaintiff, the vendee of a contract for the purchase of eggs, brought an action against the defendant vendor for breach of contract. The trial court denied recovery because plaintiff did not have a produce dealer's license as required by section 1263. The appellate court reviewed the statutory sections involved and after an extensive discussion of the statutory licensing requirement concluded that the statute was intended for the protection

<sup>9</sup>. 264 Cal. App.2d at —, 70 Cal. Rptr. at 20.

<sup>10</sup>. 254 Cal. App.2d 638, 62 Cal. Rptr. 269 (1967).

of the public. Accordingly, the unlicensed plaintiff was unable to recover.

### Frustration of Purpose

Frustration of the purpose of a contract is well recognized as a defense to further performance of the contract. Commercial frustration of purpose is codified in sections 1932 and 1933 of the Civil Code. This doctrine has been extended to leasehold estates by the California courts but only where there is extreme hardship and total or nearly total destruction of a contemplated purpose of the contract by a fortuitous event that was not reasonably foreseeable by the parties when the contract was made.

In *Glenn R. Sewell Sheet Metal, Inc. v. Loverde*<sup>11</sup> an action was brought to declare a sublease of realty unenforceable for the remaining months of the leasehold. Plaintiffs operated a trailer park on the leased premises. When a cesspool-septic tank on the property broke down, public authorities ordered them to connect the trailer park sewage system to the public sewers or vacate the trailer park and surrender their operating permit. Since the cost of connecting to the public sewage system would have been approximately \$7,500.00, plaintiffs argued that the main value of the lease was destroyed. In upholding the lower court which denied relief to plaintiffs, the court pointed out that the doctrine of commercial frustration of purpose is based on the happening of a fortuitous event which a person cannot control or guard against in the exercise of due diligence. Plaintiffs did not fulfill this requirement. Assuming that they had, the court then asserted that plaintiffs failed to show that the event was not foreseeable to preclude "the inference that the risk was assumed."<sup>12</sup> Moreover, plaintiffs did not sufficiently prove extreme hardship.

<sup>11</sup> 264 Cal. App.2d —, 70 Cal. Rptr. 132 (1968), hearing granted October 23, 1968.

<sup>12</sup> 264 Cal. App.2d at —, 70 Cal. Rptr. at 135, hearing granted October 23, 1968.

## Contracts

### Mistake

The dividing line between unilateral mistake and mutual mistake was the subject of *Schaefer v. California-Western States Life Ins. Co.*<sup>13</sup> A father took out a “Junior Estate Builder” policy on his son. Subsequently, for an additional premium he took out additional coverage, known as payor insurance, whereby if he should die before the policy anniversary nearest his son’s 25th birthday, premiums would be waived until that date. Through a clerical error on the part of the insurance company a different rider was stapled to the policy. This rider was used only on endowment type policies and had the effect of waiving all premiums after the father’s death, not just those falling due before the policy anniversary date nearest the son’s 25th birthday.

The father died and the son contended that all premiums were thereby waived. The company disagreed. The son argued that the company’s attachment of the wrong rider on the policy was a unilateral mistake and that there were consequently no grounds for granting reformation of the contract. The court disagreed. The court first pointed out that the father who purchased the policy was not the usual purchaser of insurance: he “was one of Cal-Western’s most able and experienced sales agents [and] was thoroughly familiar with the policies offered by the company . . .”<sup>14</sup> What then was the effect of the company attaching the wrong rider to the policy? In the court’s opinion it was a mutual not a unilateral mistake: “Assuming, as we must, that when he received the policy with the additional rider requested, appellant’s father either did not read it or was mistaken as to its contents, he shared his mistake with that of the company.”<sup>15</sup>

### Acceptance

The problem of a subcontractor submitting a bid to a general contractor who thereafter remains silent was posed

<sup>13</sup>. 262 Cal. App.2d —, 69 Cal. Rptr. 183 (1968).

<sup>15</sup>. 262 Cal. App.2d at —, 69 Cal. Rptr. at 186.

<sup>14</sup>. 262 Cal. App.2d at —, 69 Cal. Rptr. at 184.

in *Southern Cal. Acoustics Co. v. C. V. Holder, Inc.*<sup>16</sup> Obviously, silence does not constitute acceptance, except perhaps where past dealings between the parties raise a duty on the part of the offeree to accept or reject the offer. Such was not in evidence here. However, plaintiff relied on an estoppel argument to the effect that defendant set in motion a set of circumstances which led plaintiff to reasonably believe that an acceptance had taken place. The court could find no estoppel since the defendant had no duty to speak. There was no previous dealing between the parties.

Obviously, acceptance of a contract may be manifested by conduct as well as by words. The subcontractor argued that the general contractor had manifested his acceptance by listing the subcontractor in the bid to the school district for the prime contract. Relying on a statute, the court rejected this contention. Section 4104 of the Government Code requires listing the names of subcontractors. No contract between a general contractor and a subcontractor is created by mere compliance with this statutory requirement.

A final argument by plaintiff was that he was entitled to enforceable contract rights not by virtue of his offer to the general contractor, which went unanswered, but as a third party donee beneficiary of the contract between the general contractor and the school district. The court, in rejecting this contention, referred to the same statute. This reference was apparently intended to go to the test which is most frequently employed in determining third party beneficiary rights. If the intent of the promisee is to confer a benefit upon the third person, he will qualify as a donee beneficiary and thus gain enforceable rights under the contract. Therefore, if the intent of the general contractor, as the promisee of the school district's promise to pay for the construction of school buildings, was to confer a benefit upon the subcontractors who submitted bids, the latter would be donee beneficiaries. The court found that plaintiff was, at most, an incidental bene-

<sup>16</sup> 264 Cal. App.2d —, 70 Cal. Rptr. 809 (1968), hearing granted September 25, 1968.

## Contracts

ficiary. Only donee and creditor beneficiaries get enforceable rights: incidentals do not.

## Mental Competence

In a case of first impression, *Smalley v. Baker*,<sup>17</sup> dealing with manic depressive psychosis and its effect on contractual capacity, the court reviewed the California statutes and cases dealing with mental competence. Section 39 of the Civil Code states, "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission . . . ." Section 39 concerns but one of three types of incompetency due to weakness of mind. The first is total weakness of mind which leaves a person entirely without understanding and renders him incapable of making a contract of any kind. This type of incapacity is set forth in section 38 of the Civil Code. The second is a lesser weakness of mind which does not leave a person entirely without understanding but destroys his capacity to make a contract and thus renders a contract subject to rescission. This type of incapacity is set forth in section 39 quoted above.

A still lesser weakness of mind which provides sufficient grounds for rescission of a contract because of undue influence is set forth in Civil Code section 1575. Subdivision 2 of that section provides that undue influence consists "in taking an unfair advantage of another's weakness of mind." The court stated that since manic depressive psychosis is a mental illness, it is clearly a weakness of mind within the context of section 1575 of the Civil Code. Whether or not this form of psychosis is within the purview of section 39, which does not require undue influence, is another matter. The court pointed out that medical recognition of manic depressive psychosis did not occur until 1896. Civil Code section 39 was enacted in 1872, but most of the cases decided under it, formulating the test of contractual competency, took place after 1896. *Smalley* was a case of first impression since, before it, there were no California cases dealing with

<sup>17</sup> 262 Cal. App.2d —, 69 Cal. Rptr. 521 (1968).

manic depressive psychosis with respect to contractual incompetency. After reviewing the nature of manic depressive psychosis and the California law dealing with incompetency, the court concluded that a person suffering from such a psychosis is not incompetent under the traditional test of competency set out in section 39.

### Exculpatory Clauses

In *Akin v. Business Title Corp.*,<sup>18</sup> plaintiff vendor had entered into an escrow agreement with defendant escrow company. Due to an error in recording a chattel mortgage its value was lost to plaintiff. He brought action and received judgment.

On appeal, defendant urges the validity of an exculpatory clause contained in the escrow agreement. This clause would relieve defendant of any liability resulting from ordinary negligence. To support his argument defendant relied on a 1958 supreme court decision, *Simmons v. Bank of America*,<sup>19</sup> upholding the validity of an exculpatory clause and stating that contracts relieving individuals from their own ordinary negligence do not contravene public policy. Writing the opinion in *Akin*, a distinguished former law school dean, Justice Kingsley, indicated that *Simmons* is no longer to be considered controlling.

Plaintiff relied on a more recent supreme court decision, *Tunkl v. Regents of the University of California*.<sup>20</sup> In this case the court held an exculpatory clause invalid as against public policy on the ground that the clause was affected with a public interest. The court said that an exculpatory clause attempting to absolve a person from liability for negligence will be held invalid as affecting the public interest if it involves a transaction which exhibits some or all of the following characteristics:

[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking

18. 264 Cal. App.2d —, 70 Cal. Rptr. 287 (1968).

19. 159 Cal. App.2d 566, 323 P.2d 1043 (1958).

20. 60 Cal.2d 92, 32 Cal. Rptr. 33, 383 P.2d 441, 6 A.L.R.3d 693 (1963).

## Contracts

exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.<sup>1</sup>

After a comparison of the six criteria in *Tunkl* the court found that the transaction in this case was also one that “affects the public interest.” Thus it would appear that the *Tunkl* test, originating in a case involving an exculpatory clause relieving the U.C.L.A. Medical Center from negligence will be extended to other areas.

## Construction of Contracts

### *Performance Involving Personal Satisfaction*

What is meant by “underground”? Does it mean only under the surface of the earth or does it include gravel located under a concrete slab? And if the parties to a contract anticipate such disputes in interpretation, can the builder protect himself by inserting a clause whereby the contractor agrees to perform to the satisfaction of a certain architect?

1. 60 Cal.2d at 98–101, 32 Cal. Rptr. at 37–38, 383 P.2d at 445–446, 6 A.L.R.3d at 698–700.

These were the questions confronting the court in *Walnut Creek Elec. v. Reynolds Constr. Co.*<sup>2</sup> Plaintiff was an electrical subcontractor on a school construction job. The plans and specifications called for wrapping of “all conduits installed underground.” Plaintiff questioned the necessity of wrapping conduit pipes laid in gravel fill underneath the concrete slab of the building. He raised this matter with the architect for whom he had to perform “to satisfaction.” After consulting the expert opinion of an electrical engineer employed by him as a consultant on the project, the architect asserted that wrapping was included in the specifications. Plaintiff did the wrapping under protest and billed defendant general contractor for the amount involved.

The trial court did not pass on the question of what “underground” meant as set forth in this contract, but found that plaintiff had agreed to the finality of the architect’s determination. On appeal, the court disagreed. It held that the word “underground” was ambiguous and that despite the clause in the contract whereby plaintiff agreed to do the work “according to the plans and specifications and to the full satisfaction of said Architect,” the architect was not the final arbiter of this dispute. The court construed the above language as giving the architect authority to decide on matters of quality and quantity of performance, not to render “a legal interpretation of the subcontract or to resolve ambiguities in the plans and specifications.”

It would appear that if one anticipates any differences of opinion as to what is called for in contractual plans and specifications, and wants a third party to be the final decision-maker, he had best include definite language.

### Arbitration

Contracts containing clauses in which the parties agreed to submit disputes to arbitration were the subjects of three cases. In two cases one of the parties to the contract was resisting arbitration. In the third, the dispute had gone to

2. 263 Cal. App.2d —, 69 Cal. Rptr. 667 (1968).

## Contracts

arbitration and the losing party sought to have the award set aside while the winner sought to have the award confirmed.

In *Bianco v. Superior Court*,<sup>3</sup> the contract contained the standard clause, "In the event that a dispute shall arise between the parties relating to this agreement, such dispute shall be submitted to arbitration . . .". Plaintiffs filed a complaint for rescission of the contract and for other relief. Defendant petitioned the court for an order compelling arbitration, and the court granted his petition. On appeal, the order compelling arbitration was set aside. Section 1281.2 of the Code of Civil Procedure contains two restrictions, one of which is that "grounds exist for the revocation of the agreement." The court discussed the statutory history of this provision and concluded that when such a petition is made, it is the duty of the court to determine whether or not grounds exist for revocation of the contract. This, the trial court failed to do when it issued its order compelling arbitration.

In *A & E Plastik Pak Co. v. Monsanto Company*,<sup>4</sup> the 9th circuit reversed the district court's denial of an injunction against arbitration on the grounds that the lower court abused its discretion. The party resisting arbitration had alleged that the contract violated the Sherman Anti-Trust Act. Since one of the issues to be arbitrated involved a crucial factual anti-trust issue, this issue was not a proper subject for arbitration.

The case of *United States v. Ets-Hokin Corporation*<sup>5</sup> illustrates the problem encountered by the parties when they do not submit to the arbitrator a stipulated issue for his final resolution. California law is the same as federal law insofar as grounds for vacating an award are concerned. Under section 1286.2 of the Code of Civil Procedure, one of the grounds for setting aside an arbitrator's award is that the arbitrator exceeded his authority. How can a court determine whether or not an arbitrator, in rendering his award, has

3. 265 Cal. App.2d —, 71 Cal. Rptr. 322 (1968).

5. 284 F.Supp. 471 (D.C. [1966]), affd. 397 F.2d 935.

4. 396 F.2d 710 (9th Cir. [1968]).

exceeded his authority when there is no stipulation as to exactly what he is to decide? Because of the difficulty in answering this question, it is the practice of many arbitrators, when the parties cannot agree in framing the issue, to have them stipulate that after hearing the evidence and arguments, the arbitrator shall determine the issue and then proceed to decide it. Such was not the situation here. However, after an extensive discussion of the record of the arbitration proceedings, the court concluded that the arbitrator did not exceed his authority. The court also reiterated the majority view that regardless of the degree to which the view of an arbitrator on the facts and the law may be open to question, a court will not set the award aside for errors either in law or in fact. In short, a court will not substitute its judgment for that of the arbitrator.

### Repudiation of Breach

Whether or not an employer had repudiated its breach of contract before the employee had changed her position, was the issue facing the court in *Pichignau v. City of Paris*.<sup>6</sup> It is clear that under California law, a party who has committed a breach of contract can repudiate the breach and thus be liable only for damages between the time of the breach and the repudiation of the breach, rather than for the entire remainder of the contract. In the *Pichignau* case, plaintiff was employed as a saleslady at I. Magnin's, a leading fashion store in San Francisco. She met Madame De Tessan, a principal shareholder and chairman of the board of directors of City of Paris, a well known San Francisco department store. After negotiations, plaintiff entered into a five-year contract of employment with City of Paris. Eighteen months later, City of Paris terminated the contract.

It was conceded for purposes of the trial of defendant's special defense that defendant had breached the contract. The critical issue facing the court was whether defendant had repudiated its breach before plaintiff had changed her

6. 264 Cal. App.2d —, 70 Cal. Rptr. 147 (1968).

## Contracts

position. A series of letters were exchanged between the parties. Plaintiff was offered re-employment at her former salary, but subject to discharge on 15 days' notice and subject also to defendant's right to insist that the contract had been terminated when plaintiff was first discharged. The court pointed out that retraction of breach must be clear and unequivocal and that the party who purports to repudiate its breach may not impose new conditions not in accord with the original contract.

## Damages

*Amerson v. Christman*<sup>7</sup> involves a somewhat complex situation in which a number of separate appeals were filed. In the lower court, plaintiff homeowner sued defendant contractor for breach of a contract to construct a house. From that judgment, which held that the contractor was in breach and awarded plaintiff \$11,931.62, the homeowner filed two appeals and the contractor, one. On the question of damages the court reiterated the usual rule that when the contractor breaches, the measure of damages is the cost of completion. On the question of special damages, plaintiff introduced evidence as to his loss of use of the house and the cost of caring for his mother and son. The trial court refused to award special damages despite the fact that plaintiff's testimony was uncontroverted. The appellate court returned the matter to the trial court for an assessment of special damages, after quoting section 3300 of the Civil Code. The court also refused to find a novation, pointing out the usual requirement that a novation involves the substitution of a new obligation for an existing one and thus the extinguishment of the old contract.

The problem of awarding loss of profits as part of plaintiff's damages resulting from defendant's breach of contract was encountered in *Dulien Steel Products, Inc. v. A.J. Industries, Inc.*<sup>8</sup> Defendant owned a gold mine in Juneau, Alaska. Plaintiff purchased all the facilities for salvage purposes. When

7. 261 Cal. App.2d 811, 68 Cal. Rptr. 378 (1968).

8. 264 Cal. App.2d —, 70 Cal. Rptr. 787 (1968).

defendant breached, the lower court assessed damages on the basis of the difference between the gross price for which the materials could have been sold at the nearest market and the gross cost to plaintiff for purchasing and dismantling the materials and transporting them to the market. The defendant argued for the more familiar measure of damages rule applicable to a sale of goods, i.e., the difference between contract price and market price. To this argument the appellate court replied as follows: "Defendant's breach (repudiation) of the contract prevented plaintiffs from salvaging and reselling any of the materials. In the circumstances, the court could properly award plaintiffs the loss of anticipated profits resulting from defendant's breach."<sup>9</sup>

### Parol Evidence

The introduction of parol evidence in cases involving written instruments was the subject of several cases. In *Masterson v. Sine*,<sup>10</sup> Masterson and his wife had conveyed real property to Sine and his wife, Masterson's sister. Part of the transaction included an option whereby the grantors could repurchase the property from the grantees. Thereafter, Masterson was adjudged bankrupt. His trustee in bankruptcy and his wife brought this action for declaratory relief to establish their right to enforce the option. The trial court refused to allow the admission of extrinsic evidence offered by the Sines to show that the parties wanted the property kept in the Masterson family and that the option was thus personal to the Mastersons and could not be exercised by Mr. Masterson's trustee in bankruptcy. The court based the exclusion of such testimony on the parol evidence rule. The supreme court, in an opinion written by Chief Justice Traynor, held this to be error.

Whether or not the parol evidence rule prevents the introduction of extrinsic evidence depends initially upon whether or not the parties to a written contract have agreed to its being a complete and final embodiment of the terms of the

<sup>9</sup> 264 Cal. App.2d at —, 70 Cal. Rptr. at 794.

<sup>10</sup> 68 Cal.2d 222, 65 Cal. Rptr. 545, 436 P.2d 561 (1968).

## **Contracts**

contract, i.e., an integration. If they have not, the second consideration is whether or not the extrinsic evidence which is offered adds to or varies the terms of the written contract. If it does not and the writing is not an integration, extrinsic evidence may be admitted.

However, the problem is further complicated by this question: how do you determine whether or not the parties intended the written contract to be a complete and final integration of their transaction? Specifically, do you arrive at this determination by examining only the written instrument or do you consider the extrinsic evidence and its relevance to the writing? The court pointed out that California cases have held that whether or not there is an integration must be determined solely from the face of the written instrument. This rule has not been consistently applied however and the requirement that the writing must appear incomplete on its face has been repudiated in many other California cases.

The court noted that in formulating a rule governing parol evidence, several policies must be accommodated. One policy is based on an assumption that written evidence is more accurate than human memory. Another policy is the fear of fraud by interested parties.

In the opinion of the court, evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. Therefore, the rule must be based on the credibility of the evidence. One standard is that of section 240 (1) (b) of the Restatement of Contracts which allows evidence of a collateral agreement if it "might naturally be made as a separate agreement by parties situated as were the parties to the written contract." The Uniform Commercial Code section 2-202 would exclude such evidence in even fewer cases. The official comment to this section states, "If the additional terms are such that, if agreed upon, they would certainly have been included in the document . . . then evidence of their alleged making must be kept from the trier of fact."

Applying this reasoning to the case at hand the court pointed out that the deed was silent on the question of assignability.

The type of instrument was then considered when the court reasoned that the difficulty of accommodating the formalized structure of a deed to the insertion of collateral agreements makes it less likely that all the terms of such an agreement were included. The court speculated on reasons why the option may have been placed in the deed and concluded that this case is one in which it can be said that a collateral agreement such as this “might naturally be made as a separate agreement” (using the Restatement test). From this, the court reasoned, “*A fortiori*, the case is not one in which the parties ‘would certainly’ have included the collateral agreement”<sup>11</sup> (using the U.C.C. test, without pointing out that it has no application to a transaction involving real property). Thus, the court concluded that the evidence offered to prove that the parties agreed that the option was not assignable to one other than a person in the Masterson family should have been admitted.

Dissenting, Justice Burke, with whom Justice McComb concurred, said that the majority opinion undermines the parol evidence rule as it has been known since 1872, renders suspect instruments of conveyance absolute on their face, materially lessens the reliance which can be placed on written instruments which affect title to realty, and opens the door, albeit unintentionally, to a new technique for the defrauding of creditors. The majority was also said to have arrived at its holding by a series of false premises not supported either in the record of this case or in the California cases cited.

In *Houghton v. Kerr Glass Mfg. Corp.*,<sup>12</sup> a clause in the written contract provided, “In the event the company decides to discontinue the plastic [sic] division, you will be guaranteed one year’s basic salary in advance at time of termination.” Was the employee entitled to the one year’s salary if the employer transferred the business to another corporation? Or was he entitled to the salary only if he lost his job? (In this case the employee continued his employment with no interruption in pay but with a new employer.) Nat-

<sup>11</sup>. 68 Cal.2d at 228–229, 65 Cal. Rptr. at 549, 436 P.2d at 565.

<sup>12</sup>. 261 Cal. App.2d 530, 68 Cal. Rptr. 43 (1968).

## Contracts

usually the plaintiff-employee argued the former premise and the defendant-employer, the latter.

The trial court admitted extrinsic evidence as to the meaning of the written provision in the contract. This was held to be error and the judgment for plaintiff was reversed. The trial court, in accepting defendant's version of the meaning and effect of the paragraph quoted above committed reversible error because there was no substantial evidence to support the interpretation which it adopted. Although the appellate court did agree that extrinsic evidence may be admitted to show the circumstances under which an agreement was made, it pointed out that certain parol evidence concerning what the parties intended the meaning of the integration to be, cannot be admitted as an aid in interpreting the writing.

In two cases concerning leases, *Beverly Hills Oil Co. v. Beverly Hills Unified Sch. District*<sup>13</sup> and *Interpublic Group of Companies v. On Mark Engineering Co.*,<sup>14</sup> involve the usual question of whether or not an ambiguity exists in the language of a written integration. Obviously, if an ambiguity does exist, parol evidence is admissible, since it does not add to or vary the terms of the writing. It helps to determine what the terms of the writing are. In both cases it was held that ambiguity existed in the written integration and that parol evidence was thus properly admitted.

## Specific Performance

In *Am-Cal Investment Co. v. Sharlyn Estates, Inc.*,<sup>15</sup> a purchaser under a written agreement for the sale of real property sought specific performance of the contract after the defendant-seller committed an anticipatory breach. The "cardinal issue" was whether or not the plaintiff-purchaser was financially ready and able to pay the purchase price within the time required by the contract. Plaintiff contended that he need only prove an ability to pay the purchase price at the time of trial as distinguished from the time required

13. 264 Cal. App.2d —, 70 Cal. Rptr. 640 (1968).

15. 255 Cal. App.2d 526, 63 Cal. Rptr. 518 (1967).

14. 381 F.2d 29 (9th Cir. [1967]).

under the contract. The court rejected this contention and stated that an essential basis for specific performance must be a showing of performance, tender of performance, or ability and willingness to perform within the time required by the contract. If such showing is not made, specific performance will be denied, notwithstanding a breach by the seller.

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