

Cal Law Trends and Developments

Volume 1970 | Issue 1

Article 16

January 1970

Contracts

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Contracts

*by Claude D. Rowher**

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The author extends his appreciation to David V. Ainsworth, student at Golden Gate College, School of Law, for his assistance in the preparation of this article.

I. Contract Interpretation

Recent decisions have brought about a number of changes in the area of contract interpretation. Although the general trends seem clear and commendable, the details are often obscure and bothersome.

Whatever was left of the "face-of-the-document" approach to parol evidence rule problems in California was buried in 1968.¹ The trial court must now learn the nature of the extrinsic evidence before it can properly rule on its admissibility.² No written instrument can be interpreted or labeled clear and unambiguous until all circumstances surrounding its execution are known and considered.³

The requirement that a trial court may not exclude extrinsic evidence out of hand but must consider its nature to determine its admissibility is not a new legal proposition.⁴ What is rather different about the recent California decisions are directives such as the following: "Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. The rule must therefore be based on the credibility of the evidence. One such standard, adopted by section 240(1)(b) of the Restatement of Contracts, permits proof of a collateral agreement if it is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."⁵ "The

1. *Masterson v. Sine*, 68 Cal.2d 222, 65 Cal. Rptr. 545, 436 P.2d 561 (1968).

2. *Masterson v. Sine*, 68 Cal.2d 222, 65 Cal. Rptr. 545, 436 P.2d 561 (1968); *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Company*, 69 Cal.2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (1968).

3. *Estate of Russell*, 69 Cal.2d 200, 70 Cal. Rptr. 561; 444 P.2d 353 (1968); *Delta Dynamics, Inc. v. Arioto*, 69 Cal. 2d 525, 72 Cal. Rptr. 785, 446 P.2d 785 (1968).

4. See, for example, Restatement of Contracts § 240(1)(b).

5. *Masterson v. Sine*, 68 Cal.2d 222,

227. The fiction that the parol evidence rule rests on the presumed intent of the parties to omit from the writing certain terms discussed during prior negotiations seems to have been displaced. The *Masterson* fiction seems to hold that the exclusion of parol evidence is predicated on the lack of credibility of the parties' recollections concerning oral, as distinguished from simply extrinsic, terms. A prior or contemporaneous extrinsic term need not have been oral. Whether it was oral or written would appear to have little or no bearing on the question whether the parties might naturally have left it in a collateral form. Yet the written extrinsic term

test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.”⁶

An analysis of *Delta Dynamics, Inc. v. Arioto*⁷ may offer some guidance to the future direction of the law in this area. If nothing else, the case certainly indicates that the issues are not settled. The plaintiff developed a safety device for firearms and contracted with the defendants for distribution and sale throughout the United States. Defendants expressly promised to sell a certain number each year, and the contract provided that should it fail to do so, the agreement would be subject to termination by plaintiff. Defendant did not meet his quota, and plaintiff terminated the agreement and sued for damages for defendant’s failure to purchase the first year’s quota. Defendant contended that termination was intended to be plaintiff’s sole remedy. During the trial, defendant’s counsel asked one of his clients: “During the negotiations that culminated in the execution of this contract between your company and Delta Dynamics, was there any conversion or discussion as to what would happen as far as (defendant) is concerned if they failed to meet the minimum quota set up in that contract?”⁸ An objection on the basis of the parol evidence rule was sustained, and no offer of proof was made. The trial court gave judgment for the plaintiff. It was reversed.

As in the above-quoted cases, the majority opinion was written by Chief Justice Traynor. The opinion finds that defendant’s express promise to sell a given quota clearly implied a promise to purchase that number from plaintiff and that

would presumably be the more credible and the less likely of the two to “mislead the fact finder.” The *Masterson* opinion treats credibility and what might naturally have been left out of the written contract as analogous approaches. It does not appear to this writer that they are.

6. *Pacific Gas & Electric Co. v. G.*

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W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (1968).

7. 69 Cal.2d 525, 72 Cal. Rptr. 785, 446 P.2d 785 (1968); modified 69 AC 859.

8. 69 Cal.2d 525, 527, 529, 72 Cal. Rptr. 785, 787, 446 P.2d 785, 786, 787.

“[n]ormally the breach of such a promise would give rise to an action for damages.”⁹ The Court found, however, that the termination clause could have been intended to spell out with specificity the condition on which Delta could terminate the contract or could have been intended to set forth the exclusive remedy which was to be available to Delta. Since the language was “fairly susceptible of either one of the two interpretations contended for”¹⁰ the trial court was held to have committed reversible error in sustaining the objection to the defendant’s question.

One of the more significant aspects of the dissent in this case is the identity of its author. In *Masterson v. Sine*¹¹ and *Pacific Gas & Elec. Company v. G. W. Thomas Drayage & Rigging Company*,¹² Justice Mosk joined in the majority of the five-to-two decision. He authored the dissent in the four-to-three decision of *Delta Dynamics* which contains the following: “Although I had misgivings at the time, I must confess to joining the majority in both of those cases. [*Masterson* and *Pacific Gas & Electric Co.*]. Now, however, that the majority deem negotiations leading to execution of contracts admissible, the trend has become so mistakenly ominous that I must urge a halt.”¹³ In light of the prospective change in membership of the court,¹⁴ it seems fair to speculate that additional words may yet be forthcoming on the subject.

The differences in the positions of the Traynor and Mosk opinions on the extrinsic evidence issue in *Delta Dynamics* may not be as great as they appear on the surface. The Mosk opinion emphasizes the point that the question that the trial court found to be objectionable specified “*during the negotiations . . .*”¹⁵ (Emphasis by the Court). The majority opinion notes that the pretrial conference order raised the is-

9. 69 Cal.2d 525, 529, 72 Cal. Rptr. 785, 787, 446 P.2d 785, 788.

10. 69 Cal.2d 525, 528, 72 Cal. Rptr. 785, 787, 446 P.2d 785, 787.

11. 68 Cal.2d 222, 65 Cal. Rptr. 545, 436 P.2d 561 (1968).

12. 69 Cal.2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (1968).

13. 69 Cal.2d 525, 531, 72 Cal. Rptr. 785, 789, 446 P.2d 785, 789.

14. The Retirement of Chief Justice Traynor.

15. 69 Cal.2d 525, 529, 72 Cal. Rptr. 785, 787, 446 P.2d 785, 787.

sue of the meaning of the cancellation clause and contends that “. . . [T]he substance, purpose and relevance of the offered evidence was known to the court, and no more complete offer or proof was required.”¹⁶ From this, it would appear that *Delta Dynamics* need not be interpreted as authorizing introduction of all negotiations that led to a written contract, as the dissenting opinion suggests. It may have merely repeated the *Pacific Gas & Electric Co.* position that extrinsic agreements or understandings can be considered where the language of the writing is justly susceptible to either of the two interpretations for which the parties contend.

There were a number of decisions from the Courts of Appeal in this area. What would formerly have been a proper exclusion of parol evidence was found to be error;¹⁷ what might have appeared to be unwarranted reliance on parol evidence was found to be proper.¹⁸ And where separate consideration existed to support a finding that a true collateral agreement or contract existed, that agreement was enforceable in its own right.¹⁹

II. Illegality

The defense of illegality was raised in a variety of fact settings in recent cases. The results were mixed.

The Third District Court of Appeal decided two cases involving debts allegedly arising in connection with gambling activities. In *Lane & Pyron, Inc. v. Gibbs*,²⁰ the assignee of the owners of duly licensed Nevada gambling casinos sought to enforce payment of checks which the casinos had honored and which had been returned for lack of sufficient funds. Prior Nevada cases have denied enforcement of gambling

^{16.} 69 Cal.2d 525, 527, fn.1, 72 Cal. Rptr. 786, fn.1, 446 P.2d 786, fn.1.

^{17.} *Connell v. Zaid*, 268 Cal. App.2d 788, 74 Cal. Rptr. 371 (1969); *Estrada v. Darling-Croze Machine Co.*, 275 Cal. App. —, 80 Cal. Rptr. 266 (1969).

^{18.} *Davidson v. Welch*, 270 Cal. App. 2d 220, 75 Cal. Rptr. 676 (1969). For

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further discussion of this case, see Moreau, TORTS, in this volume.

^{19.} *Wright v. Title Ins. & Trust Co.*, 274 Cal. App. —, 79 Cal. Rptr. 12 (1969).

^{20.} 266 Cal. App. 2d 61, 71 Cal. Rptr. 817 (1968).

debts¹ and a prior California decision denied recovery on a check cashed by the owner of a casino at the gaming tables.² The *Lane* case, however, involved checks cashed at cashier's cages in gambling casinos. The casinos offered food, liquor, entertainment, and hotel rooms in addition to gambling opportunities, and the defendant was admittedly free to "walk out" with the money. However, the uncontradicted evidence produced by the defense was that the defendant lost all of the funds gambling at the particular casino that cashed each check. The judgment for the plaintiff was reversed.

In the *Lane* case there were no findings of fact. The Court of Appeal noted, however, that under the new Evidence Code the presumption of legality is not evidence,³ and concluded that there was no substantial evidence from which the trial court could have avoided finding that the checks were cashed for the purpose of providing funds to gamble with the "donor."⁴

*Bristow v. Morelli*⁵ involved a plaintiff who was a patron at a licensed card room and a defendant who owned and operated the establishment. Defendant acted as banker and sold chips but did not participate in the draw poker game. At defendant's request, plaintiff "cashed in" a quantity of chips during the course of an evening in exchange for defendant's note. At the conclusion of the evening, plaintiff received defendant's oral promise to pay the value of plaintiff's remaining chips.

The Court affirmed a judgment in favor of plaintiff on these obligations, noting that these obligations were not gaming debts, they were not loans made for the purpose of enabling either party to gamble, and the defendant was not a participant in the gambling activities which were being conducted.

1. *Wolpert v. Knight*, 74 Nev. 322, 330 P.2d 1023 (1958).

2. *Hamilton v. Abadjian*, 30 Cal.2d 49, 179 P.2d 804 (1947).

3. Evid. Code § 600(a); *Lane & Pyron, Inc. v. Gibbs*, 266 Cal. App.2d 61, 65, 71 Cal. Rptr. 817, 819.

4. The location of the cashier's cage,

the fact that the defendant had been flown to Nevada on a so-called gambler's flight, the fact that the defendant had just left the gambling tables and returned directly to them, and other facts peculiar to this case no doubt influenced the Court's determination.

5. 270 Cal. App.2d 894, 76 Cal. Rptr. 203 (1969).

These factors were held to distinguish *Bristow* from the *Lane* case.

It would appear that advancing cash in the form of loans or cashing checks under circumstances where it is apparent that the funds are likely to be used for gambling may result in an unenforceable obligation. *Lane* involved the additional element that the party cashing the checks was the party with whom the check writer intended to gamble. It is not clear whether this is a necessary element for denying enforceability of the obligation.

Section 7031 of the Business & Professional Code requires a contractor to plead and prove the fact that he was licensed in order to enforce a construction contract. In *Pickens v. American Mortgage Exchange*⁶ an unlicensed contractor brought action for the tort of fraud, alleging, inter alia, that the defendants fraudulently induced plaintiffs to enter the construction contracts and fraudulently induced them to perform work thereon. The Court held that, while section 7031 barred recovery in contract because of the implied illegality of plaintiffs' performance as an unlicensed contractor, it did not bar recovery for tort, and the summary judgment for defendants was reversed.

While one must agree that there is a distinction between contract and tort theories of recovery, it would seem fair to note that the apparent purpose of section 7031 is neatly avoided. However, the case was not without precedent.⁷

The right to receive restitution for benefits conferred pursuant to an illegal contract was again raised in *Griffis v. Squire*.⁸ Quoting from *Norwood v. Judd*, a 1949 case,⁹ the Griffis Court noted that restitution has been granted where: (1) the transaction is complete; (2) no serious moral turpitude is involved; (3) the defendant bears the greater moral fault, and (4) unjust enrichment would result from denial of restitution.

6. 269 Cal. App.2d 299, 74 Cal. Rptr. 788 (1969). 154 (1968). For further discussion of this case, see York, REMEDIES in this

7. *Grant v. Weatherholt*, 123 Cal. App.2d 34, 266 P.2d 185 (1954).

volume. 9. 93 Cal. App.2d 276, 209 P.2d 24

8. 267 Cal. App.2d 461, 73 Cal. Rptr. (1949).

In *Griffis*, however, the Court expressly conceded that there was no finding that defendant was guilty of the greater moral fault, and it was quite evident from the facts that this was not the case. Despite this factor, the Court concluded that restitution was a proper remedy, citing *Hainey v. Narigon*.¹⁰ The apparent test to be applied is simply whether the forfeiture resulting from nonenforcement of the contract is disproportionately harsh, considering the nature of the illegality involved.

An unreported decision of the Third District Court of Appeal¹¹ would sharply restrict the application of the Subdivision Lands Act.¹² Plaintiff vendor had engaged in more than five transactions over a period of years with respect to a single parcel of property by selling and encumbering various parts of it. Defendant vendee had contracted to purchase approximately 10 acres, which constituted a substantial portion of the remaining property. That vendor had given no notice to the Real Estate Commissioner and had obtained no public report was advanced by the defendant as an illegal act within the meaning of the act.

In affirming a trial court holding that the contract was enforceable, the Court stated: “[Vendor] never subdivided his property into lots or homes for sale to the public and [vendee], as a buyer of the major part of [vendor’s] remaining land, was not a member of the buying public whom the subdivision law aimed to protect. The isolated and disconnected transactions by [vendor] did not make him a subdivider or subject any of his transactions, . . . to the subdivision law.”¹³

III. Statute of Frauds

Detrimental reliance on an oral contact within the statute of frauds has been recognized in some fact situations as a basis

10. 247 Cal. App.2d 528, 55 Cal. Rptr. 638 (1966).

11. *Tougerousse v. Koshell*, 3 Civ. No. 12,093 and 12,094; Hearing denied. See generally Rule 976 (b)(c) California Rules of Court (standard of publica-

tion). See also 39 S. Cal. L. Rev. 608 (1966).

12. Bus. & Prof. Code §§ 11000 et. seq.

13. Opinion, 3 Civ. No. 12,093, dated October 31, 1969, p. 11.

for enforcing the oral contract,¹⁴ but the problem remains as to what reliance must be shown. In *Carlson v. Richardson*,¹⁵ vendee in an action for specific performance of an oral contract to sell a coastal homesite relied on vendor's assurance of performance over a period of three years, and in doing so "passed up opportunities" to buy other land. The Court rejected the contention that loss of the bargain and loss of opportunities to buy other property in a rising market were the type of detrimental reliance that would suffice to remove the agreement from the shelter of the statute. However, purchase of a nearby property contemplated for use as a temporary residence while a house was to be built on the disputed property might constitute such a detriment. The Court held that the issue should have been submitted to the trier of fact.

*Fellom v. Adams*¹⁶ involved an action to enforce a note given to a real estate agent for the balance of the commission promised under an oral broker's contract. The Court affirmed the holding that the moral obligation arising from a promise unenforceable due to the statute of frauds furnishes adequate consideration for a promissory note or other written promise to pay.

IV. Assignments

The 1957 case of *Fricker v. Uddo & Taormina Co.*¹⁷ involved a tomato grower who had assigned to the plaintiff a right to receive moneys due to the grower from the defendant canning company. Here it was held that the general rule that rights of an assignee cannot be destroyed by payments made by the debtor to the assignor after notice of assignment will not be applied where such payments are necessary to secure assignor's performance. The defendant canner in *Fricker* was allowed to make advances to the grower in order to insure pro-

14. See, for example, *Monarco v. Lo Greco*, 35 Cal.2d 621, 220 P.2d 737 (1950); *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88 (1909).

15. 267 Cal. App.2d 204, 72 Cal. Rptr. 769 (1968). For further discus-

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sion of this case, see York, REMEDIES, in this volume.

16. 274 Cal. App.2d —, 79 Cal. Rptr. 633 (1969).

17. 48 Cal.2d 696, 312 P.2d 1085 (1957).

duction of the crop even after assignee asserted his right to receive payment. In *Hoover v. Agriform Chemical Co.*,¹⁸ extension of the *Fricker* rule was denied. The debtor, Agriform, made periodic advances to the assignor, its local distributor, which were necessary to keep the assignor "afloat." As a result of these advances, the distributor was constantly in debt to Agriform and no moneys were ever paid to Mr. Hoover, the assignee of a portion of the commissions that the distributor earned.

The Court held that the *Fricker* case rule would apply only where the advances to the assignor are necessary to perform a particular contract that is to produce the right to the funds that were assigned. "It does not encompass subsequent advances of a general nature to a going business engaged in many transactions over a period of years . . ."¹⁹

In *St. Paul Fire & Marine Ins. Co. v. James I. Barnes Constr. Co.*,²⁰ the *Fricker* case and others were cited as authority for the statement: ". . . when the existence of the assigned fund is dependent upon performance by the assignor of an executory contract, the anticipatory debtor may do whatever reasonably appears to be necessary to enable the assignor to perform the contract."²¹

V. Damages

In a matter of first impression in California, *Lemat Corp. v. Barry*² dealt with the remedy of the owner of the San Francisco Warriors, a professional basketball team franchised by the National Basketball Association, in an action against one of its players for breach of his employment contract. The contract was a standard form agreement in which Rick Barry agreed to play exclusively for the Warriors for the 1966-67 season, and also granted to Lemat the option to renew for

18. 268 Cal. App.2d 818, 74 Cal. Rptr. 325 (1969).

19. 268 Cal. App.2d 818, 822, 74 Cal. Rptr. 325, 328.

20. 267 Cal. App.2d 931, 73 Cal. Rptr. 618 (1968).

1. 267 Cal. App.2d 931, 937, 73 Cal. Rptr. 618, 622.

2. 275 Cal. App.2d —, 80 Cal. Rptr. 240 (1969). For further discussion of this case, see York, REMEDIES, in this volume.

the 1967–68 season. Lemat exercised its option, but Barry entered into an agreement with the owner of the Oakland Oaks, franchised by the American Basketball Association, to play for the Oaks during the 1967–68 season. The Oaks' owners agreed to indemnify Barry against any liabilities incurred by him as a result of his contract with the Oaks.

In Lemat's pleadings and the pretrial order, it was clear that the prayer was for an injunction to prevent Barry from playing for the Oaks or *in the alternative* damages for loss of gate receipts. However, during the trial, Lemat asked for an injunction to protect Lemat from further damage which would result if Barry were allowed to play for the Oaks, and for damages for loss of gate receipts resulting from its loss of the right to display Barry, a player of "special, unique, unusual and extraordinary character." The trial court found the matter of damages properly before it and made a finding as to the amount of damages but granted relief only in the form of an injunction against Barry's playing for the Oaks during the 1967–68 season.

The reviewing Court struck the finding of damages as surplusage and affirmed the trial court's position that Lemat was not entitled to both injunctive relief and damages.³ The opinion appears to take the position that damages in addition to an injunction would give duplicate relief. While this may well be true in some situations⁴ it appears to be a nonsequitur in the case of an athlete or performer. An injunction might minimize the loss, but it does not eliminate it unless the effect is to induce the individual to fulfill his contract. The force of the Court's position on this issue is weakened by the fact the

3. But see *Harvey v. White*, 213 Cal. App.2d 275, 28 Cal. Rptr. 601 (1963), which involved the sale of an accounting services business in which the seller covenanted to refrain from competing in that area for 5 years. On breach, the Court held: "If, without excuse, appellants violated the covenant not to compete, respondents were entitled to the injunction they sued for and were further entitled to such damages as they

might have suffered by reason of that violation. . . . [I]t was incumbent upon the trial court to proceed further, to find the damages suffered by the breach of the covenant not to compete, and to enter judgment accordingly."

4. In the typical situation of a breach or threatened breach of a negative covenant, e.g., a covenant not to compete, the granting of injunctive relief would normally be a complete remedy.

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opinion gives two alternative bases for the result. It states: "Lemat's claim for damages could acquire significance only if its request for injunctive relief was denied or was found to be inappropriate under the circumstances."⁵ The Court also stated, citing *Central New York Basketball, Inc. v. Barnett*⁶ as authority, that "damages in a situation of this kind are speculative and uncertain and practically impossible to ascertain."⁷

The case does not appear to have brought any measurable degree of understanding or clarification to a difficult area of law.

VI. Measure of Damages

A salaried individual quits his job to buy a franchise and go into business. When the franchisor breaches the contract, there is no basis for proving loss of profits as an element of damages because the operation is not yet an established business with a history of earnings. Prospective profits are too speculative to be compensable.⁸ In *Runyan v. Pacific Air Industries, Inc.*,⁹ the trial court included as an item of damages the amount of wages which the plaintiff would have earned at his former job which he quit to obtain a photogrammetric franchise from defendants. The Court of Appeal held this to be improper noting that the franchise was not an employment contract, and that the parties in no way contemplated that plaintiff would receive any compensation in the nature of a salary. "The two considerations are entirely separate,

5. *Lemat Corp. v. Barry*, 275 Cal. App.2d —, 80 Cal. Rptr. 240 (1969). But compare Code of Civ. Proc. § 580. "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

6. 88 Ohio L. Abs. 40, 19 Ohio Ops. 2d 130, 181 N.E.2d 506 (1961).

7. *Lemat Corp. v. Barry*, 275 Cal. App.2d —, 80 Cal. Rptr. 240.

8. *Overstreet v. Merritt*, 186 Cal. 494, 200 P. 11 (1921).

9. 271 Cal. App.2d —, 76 Cal. Rptr. 701 (1969). This case was granted a hearing before the California Supreme Court. As this volume goes to press, the result of the appeal based on the issue of lost wages is still being awaited. For further discussion of this case, see York, REMEDIES, in this volume.

salary on the one hand and entrepreneurial activity on the other, and there is nothing to justify an award of the equivalent of salary to plaintiff."¹⁰

The reversal appears to have been arbitrary. Where a contract breach involves a new enterprise, the profits of which cannot be shown with adequate certainty, California cases have allowed plaintiffs to recover the cost of preparing to carry out the contract. This has been held to include the earnings which plaintiff would have received from his former business had he continued to pursue it.¹¹ It would not appear improper to have held that it also includes the earnings which plaintiff would have received in his former employment.

VII. Implied Contracts—Unordered Goods

The addition of sections 1584.5 and 1584.6 to the Civil Code brings relief to recipients of unwanted merchandise.¹²

10. *Runyan v. Pacific Air Industries, Inc.*, 271 Cal. App.2d —, —, 76 Cal. Rptr. 703.

11. *Overstreet v. Merritt*, 186 Cal. 494, 200 P. 11 (1921).

12. Section 1584.5, added to the Civil Code in 1969, reads: "1584.5. No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares, or merchandise, where the offer includes the voluntary and unsolicited sending of such goods, wares, or merchandise not actually ordered or requested by the recipient, either orally or in writing. The receipt of any such goods, wares, or merchandise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of such goods, wares, or merchandise in any manner he sees fit without any obligation on his part to the sender.

"If after any such receipt deemed to be an unconditional gift under this section, the sender continues to send bill statements or requests for payment

with respect thereto, an action may be brought by the recipient to enjoin such conduct, *in which action there may also be awarded reasonable attorneys' fees and costs to the prevailing party.*" (Emphasis added)

"Section 2. Section 1584.6 is added to the Civ. Code, to read:

"1584.6. If a person is a member of an organization which makes retail sales of any goods, wares, or merchandise to its members, and the person notifies the organization of his termination of membership by certified mail, return receipt requested, any unordered goods, wares, or merchandise which are sent to the person after 30 days following execution of the return receipt for the certified letter by the organization, shall for all purposes be deemed unconditional gifts to the person, who may use or dispose of the goods, wares, or merchandise in any manner he sees fit without any obligation on his part to the organization.

"If the termination of a person's membership in such organization breaches any agreement with the organization,

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It is apparent that the scope of section 1584.5 is not so broad as to include all unordered goods, but will apply where the sending is done voluntarily and for the purpose of offering them for sale to the recipient. The provision for attorneys' fees and costs to the prevailing party should be welcomed by the harassed consumer, but it is far short of the earlier statute¹³ on the same subject, which would have provided for "exemplary damages and costs incurred by the recipient" but which was apparently superseded by the later enactment of Chapter 400.

VIII. Performance—Sufficiency

*U.S. Industries, Inc. v. Vadnais*¹⁴ involved complex questions of burden of proof of substantial performance. Plaintiff

nothing in this section shall relieve the person from liability for damages to which he might be otherwise subjected to pursuant to law, but he shall not be subject to any damages with respect to any goods, wares, or merchandise which are deemed unconditional gifts to him under this section.

"If after any receipt deemed to be an unconditional gift under this section, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, in which action there may also be awarded reasonable attorneys' fees and costs to the prevailing party."

13. It is unclear which of the two additions of Section 1584.5 to the Civil Code, enacted in 1969, represents the intent of the legislature. Assembly Bill 77, filed July 8, 1969 calls for the remedy quoted in the last footnote.

Hereafter appears Senate Bill 323 filed June 27, 1969, also purporting to be "an act to add Section 1584.5 to the Civil Code," enacted into law.

1969 Stats. Ch. 265:

Section 1. Section 1584.5 is added to the Civil Code to read:

"1584.5. No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares or merchandise where the offer includes the voluntary and unsolicited sending of such goods, wares or merchandise not actually ordered or requested by the recipient, either orally or in writing. The receipt of any such goods, wares, or merchandise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of such goods, wares or merchandise in any manner he sees fit without any obligation on his part to the sender.

"If after any such receipt deemed to be an unconditional gift under this section, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, *in which action there may also be judgment for exemplary damages and costs incurred by the recipient.*" (Emphasis added.)

14. 270 Cal. App.2d 520, 76 Cal. Rptr. 44 (1969).

contracted to manufacture and deliver over \$400,000 worth of pipe to defendant's construction job. The pipe was all eventually delivered, but deliveries were very late, apparently due to plaintiff's efforts to obtain specification changes before commencing manufacture. Defendant buyer paid over \$300,000, but withheld approximately \$100,000 as a setoff for liabilities incurred as the result of defendant's delay.

Plaintiff sued for the balance due on the contract and defendant cross complained for damages arising from plaintiff's breach. Neither plaintiff nor defendant introduced any evidence as to the amount of damages caused by plaintiff's delay, although it was apparent from various facts that some damages had been sustained. The court gave judgment for defendant on the grounds that plaintiff had failed to substantially perform the contract and gave judgment for the plaintiff (cross defendant) on the cross complaint on the grounds that there was no proof of the amount of damages which the defendant sustained. Both judgments were appealed and both reversed.

Quoting from *Lowy v. United Pac. Ins. Co.*¹⁵ the reviewing Court in *U.S. Industries, Inc. v. Vadnais* concluded that substantial performance had occurred and the defendant became obligated to pay the contract price less damages sustained unless there was a ". . . combination of these two factors: (1) substantial omissions or deviations resulting from (2) wilful or intentional action (or inaction) on the part of the party claiming that he substantially performed."¹⁶ Since there was no evidence submitted concerning the extent of the damage caused by plaintiff's delay, the Court stated: "The question then is: Who has the burden of proving such damages?"¹⁷ It was concluded that the burden lay on the defendant.

As applied in this case, the allocation of the burden of proof does not appear objectionable. Applied to a construction contract, however, it appears to indicate that, having proved performance that roughly approximates what was agreed on, the

15. 67 Cal.2d 87, 60 Cal. Rptr. 225, 429 P.2d 577 (1967).

16. 270 Cal. App.2d 520, 530, 76 Cal. Rptr. 44, 51.

17. 270 Cal. App.2d 520, 527, 76 Cal. Rptr. 44, 48.

contractor may retire to watch the owner prove the dollar value of the breaches. Failure to develop the required certainty of damages will result in the owner's paying the full contract price. It would not appear unjust to include within the plaintiff's burden of proof of substantial performance proof of the dollar value of his derelictions.