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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER DISTRICT,

Plaintiff,

v.

CITY OF CHINO, ET AL.,

Defendants.

Case No. RCVRS 51010

Judgment Entered On January 27, 1978, as Amended

COPIES OF OPINIONS CITED IN REPLY MEMORANDUM OF NON-AGRICULTURAL (OVERLYING) POOL COMMITTEE

Filed Concurrently With Reply Memorandum of Non-Agricultural (Overlying) Pool Committee

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Assigned for All Purposes to the Honorable STANFORD E. REICHERT

Exhibit 1

94 Cal.App.4th 1270, 114 Cal.Rptr.2d 898, 02 Cal. Daily Op. Serv. 34, 2002 Daily Journal D.A.R. 43
(Cite as: 94 Cal.App.4th 1270, 114 Cal.Rptr.2d 898)

Court of Appeal, Fourth District, Division 1, California.
Barbara ALLEN, Plaintiff and Appellant,
v.
Frank L. SMITH et al., Defendants and Respondents.
No. D036608.

Jan. 2, 2002.
As Modified on Denial of Rehearing Jan. 23, 2002.

Prospective purchaser of home brought action against vendors for breach of contract and money had and received, alleging their failure to return a portion of her deposit. The Superior Court, San Diego County, No. N082335, Thomas P. Nugent, J., granted summary judgment for vendors. Purchaser appealed. The Court of Appeal, Haller, J., held that: (1) the contract was an agreement of sale rather than an option, and thus, purchaser's additional deposit represented liquidated damages rather than a nonrefundable option fee, and (2) liquidated damages clause substantially complied with statutory requirements.

Reversed and remanded with instructions.

West Headnotes

[1] 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 must be interpreted to give effect to the mutual, expressed intention of the parties.

[2] Contracts 95 ⚿147(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases
Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone.

[3] 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
Contract formation is governed by objective manifestations, not the subjective intent of any individual involved; the test is what the outward manifestations of consent would lead a reasonable person to believe.

[4] Evidence 157 ⚿448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases
Parol evidence may be admitted to construe ambiguous contract terms.

[5] Damages 115 ⚿74

115 Damages
115IV Liquidated Damages and Penalties
115k74 k. Nature as Compensation for Actual Damage. Most Cited Cases
To avoid uncertainty and litigation if a default occurs, the parties to a contract may use a liquidated damages clause to determine the measure of damages in advance.

[6] Damages 115 ⚿80(1)

115 Damages
115IV Liquidated Damages and Penalties
115k75 Construction of Stipulations
115k80 Proportion of Sum Stipulated to

94 Cal.App.4th 1270, 114 Cal.Rptr.2d 898, 02 Cal. Daily Op. Serv. 34, 2002 Daily Journal D.A.R. 43
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Actual Debt or Damage
115k80(1) k. In General. Most Cited Cases
In the absence of a reasonable relationship between the liquidated damages and the actual damages the parties could have contemplated for breach, a contractual clause purporting to predetermine damages must be construed as a penalty. West's Ann.Cal.Civ.Code § 1671(b).

[7] Specific Performance 358 ⚿58

358 Specific Performance
358II Contracts Enforceable
358k58 k. Effect of Stipulations for Liquidated Damages or Penalty. Most Cited Cases
When a real estate purchase and sale agreement contains a liquidated damages provision, the vendor may nonetheless elect to sue for specific performance. West's Ann.Cal.Civ.Code §§ 1680, 3387, 3389.

[8] Vendor and Purchaser 400 ⚿18(.5)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(.5) k. In General. Most Cited Cases
An "option" to purchase real property is a unilateral contract by which the owner of property invests another with the exclusive right to purchase it at a stipulated price within a limited or reasonable time without imposing any obligation upon the party to whom it is given.

[9] Vendor and Purchaser 400 ⚿18(4)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(4) k. Revocation, Rescission, or Other Termination. Most Cited Cases
An option given for a consideration may not be terminated without the consent of the optionee during the time specified therein for exercising the option.

[10] Vendor and Purchaser 400 ⚿18(.5)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(.5) k. In General. Most Cited Cases
An option contract relating to the sale of land is not a sale of the property, but is a sale of the right to purchase.

[11] Damages 115 ⚿78(1)

115 Damages
115IV Liquidated Damages and Penalties
115k75 Construction of Stipulations
115k78 Form and Language of Instrument
115k78(1) k. In General. Most Cited Cases
A consideration paid for a freely negotiated option does not constitute "liquidated damages" or a "penalty" for breach of contract, because the payment obligation does not arise on a breach of contract by the optionee, but as an alternative to performance. West's Ann.Cal.Civ.Code § 1671(b).

[12] Damages 115 ⚿78(2)

115 Damages
115IV Liquidated Damages and Penalties
115k75 Construction of Stipulations
115k78 Form and Language of Instrument
115k78(2) k. Express Declaration as to Nature of Provision. Most Cited Cases

Vendor and Purchaser 400 ⚿57

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k57 k. Options. Most Cited Cases
Express terms such as "option" and "liquidated damages" are not dispositive in the interpretation of a real estate contract.

[13] Vendor and Purchaser 400 ⚿3(4)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k3 Sale Distinguished from Other Transactions
400k3(4) k. Option or Executory Contract. Most Cited Cases
Whether any particular document is an "option" or an

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"agreement of sale" for real estate depends on the nature and terms of the document and the obligation of the parties, regardless of how the parties may label or identify the document, and the test is whether there is a mutuality of obligation; if both parties are obligated to perform, it is an agreement of sale, but if only one party, the optionor-offeror, is obligated to perform, it is merely an option.

[14] Contracts 95 ⚿143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) k. In General. Most Cited Cases
When deciding whether a particular contract is bilateral or unilateral, the courts favor an interpretation that makes the contract bilateral, because a bilateral contract immediately and fully protects both parties by binding each to its terms on its execution.

[15] Damages 115 ⚿78(6)

115 Damages
115IV Liquidated Damages and Penalties
115k75 Construction of Stipulations
115k78 Form and Language of Instrument
115k78(6) k. Breach of Contract of Sale or Lease. Most Cited Cases

Vendor and Purchaser 400 ⚿3(4)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k3 Sale Distinguished from Other Transactions
400k3(4) k. Option or Executory Contract. Most Cited Cases
Contract relating to sale of home was an "agreement of sale" rather than an "option," and thus, the additional $80,000 that prospective purchaser agreed to deposit represented liquidated damages rather than a nonrefundable option fee; contract had mutuality of obligation, it did not specify time period or method for exercising an option, and it contained 'time is of the essence' clause, though vendors' counteroffer referred to the $80,000 additional deposit as 'nonrefundable purchase option monies.' West's Ann.Cal.Civ.Code §§ 1675(c, d), 1678.

[16] Vendor and Purchaser 400 ⚿21

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k20 Written Contracts
400k21 k. Form and Contents. Most Cited Cases
A standard-form deposit receipt and counteroffer ordinarily constitute a binding and enforceable contract for the purchase and sale of the described real property.

[17] Vendor and Purchaser 400 ⚿18(1)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(1) k. Requisites and Validity. Most Cited Cases
A legitimate option to purchase real estate ordinarily consists of an agreement to grant an irrevocable right to purchase for independent consideration, and a separate purchase and sale agreement attached as an exhibit thereto.

[18] Vendor and Purchaser 400 ⚿334(1)

400 Vendor and Purchaser
400VII Remedies of Purchaser
400VII(A) Recovery of Purchase Money Paid
400k334 Grounds for Recovery of Payments
400k334(1) k. In General. Most Cited Cases
In the usual real estate purchase agreement, the deposit is part of the consideration, so that when a condition of the agreement fails, each party is entitled to the return of what was deposited into escrow.

[19] Contracts 95 ⚿16.5

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16.5 k. Options; Rights of First Refusal. Most Cited Cases
(Formerly 95k16)

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An "option" is a right acquired by contract to accept or reject a present offer within a limited time in the future.

[20] Contracts 95 ⚷16.5

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16.5 k. Options; Rights of First Refusal. Most Cited Cases
(Formerly 95k16)
The length of time within which an option may be exercised is an essential term to an option contract.

[21] Contracts 95 ⚷16.5

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16.5 k. Options; Rights of First Refusal. Most Cited Cases
(Formerly 95k16)
An option contract may prescribe the method for the exercise of the option.

[22] Contracts 95 ⚷16.5

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16.5 k. Options; Rights of First Refusal. Most Cited Cases
(Formerly 95k16)
A reasonable option period and mode of acceptance may be implied where none are specified in the option.

[23] Appeal and Error 30 ⚷756

30 Appeal and Error
30XII Briefs
30k756 k. Form and Requisites in General. Most Cited Cases
Where a point is merely asserted by appellate counsel without any authority for its proposition, it is deemed to be without foundation and requires no discussion by the appellate court.

[24] Damages 115 ⚷78(6)

115 Damages
115IV Liquidated Damages and Penalties
115k75 Construction of Stipulations
115k78 Form and Language of Instrument
115k78(6) k. Breach of Contract of Sale or Lease. Most Cited Cases
Provision of vendors' counteroffer, requiring purchaser to make an additional deposit, substantially complied with statutory requirements for liquidated damages clause in agreement to sell real property, though the clause did not refer to "liquidated damages"; the provision was signed by the parties at same time they signed deposit receipt, and purchaser's real estate agent had handwritten the provision into vendors' counteroffer. West's Ann.Cal.Civ.Code §§ 1677, 1678.

[25] Appeal and Error 30 ⚷1207(3)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1207 Rendition and Entry of Judgment or Order as Directed
30k1207(3) k. Allowance of Damages, Interest, and Costs. Most Cited Cases
Vendors were not entitled to costs and attorney fees as prevailing parties on the contract after appellate court reversed judgment for vendors, although prospective purchaser had not separately appealed post-judgment order awarding attorney fess; although appellate court could not reverse order granting costs and fees, the trial court could do so on remand. West's Ann.Cal.C.C.P. § 904.1, subd. (a)(2).

[26] Appeal and Error 30 ⚷420

30 Appeal and Error
30VII Transfer of Cause
30VII(D) Writ of Error, Citation, or Notice
30k416 Form and Requisites of Notice
30k420 k. Specification of Interlocutory or Intermediate Judgments or Orders. Most Cited Cases
Appellate court has no jurisdiction to review an award of attorney fees made after entry of judgment, unless the order is separately appealed.

[27] Appeal and Error 30 ⚷420

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30 Appeal and Error
30VII Transfer of Cause
30VII(D) Writ of Error, Citation, or Notice
30k416 Form and Requisites of Notice
30k420 k. Specification of Interlocutory or Intermediate Judgments or Orders. Most Cited Cases
Where several judgments or orders occurring close in time are separately appealable, each appealable order must be expressly specified, in either single notice of appeal or multiple notices of appeal, in order to be reviewable on appeal.

[28] Appeal and Error 30 ⚿1180(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(2) k. Effect on Dependent Judgments or Proceedings. Most Cited Cases
Order awarding costs falls with a reversal of the judgment on which it is based.

[29] Costs 102 ⚿32(1)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k32 Prevailing or Successful Party in General
102k32(1) k. In General. Most Cited Cases
Successful party is never required to pay the costs incurred by the unsuccessful party.

[30] Appeal and Error 30 ⚿1180(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(2) k. Effect on Dependent Judgments or Proceedings. Most Cited Cases
After reversal of a judgment the matter of trial costs is set at large.

****901 *1274** Stephen V. McCue, for plaintiff and appellant.

Ross, Dixon & Bell and James Dalessio, San Diego, for defendants and respondents.

***1275** HALLER, J.

In this breach of contract action, plaintiff Barbara Allen appeals a summary judgment in favor of defendants Frank L. Smith and Jeri R. Schwartz Smith. The court found the parties' agreement gave Allen an option to purchase the Smiths' residential property, and after declining to exercise the option she was not entitled to a refund of any portion of her $100,000 deposit because it was a nonrefundable option fee. Allen persuasively contends the contract was actually a purchase and sale agreement and the court's misinterpretation of it as an option and the $100,000 deposit as consideration for an option requires reversal. We also conclude the court should have granted Allen's motion for summary adjudication on her breach of contract cause of action. Accordingly, we reverse the judgment and instruct the court to enter an order granting Allen summary adjudication on that claim.

FACTUAL AND PROCEDURAL BACKGROUND

On March 10, 1999, Allen submitted an offer to purchase the Smiths' Rancho Santa Fe home for $1,775,000. The offer was on a standard form published by the California Association of Realtors entitled "Residential Purchase Agreement (and Receipt for Deposit)." Under the offer, Allen was required to deposit 3 percent of the purchase price into escrow, consisting of an initial deposit of $20,000 and an additional deposit of $33,250 after the removal of contingencies related to an inspection of the property. The offer contained the following liquidated damages clause:

> ****902** "If Buyer fails to complete this purchase by reason of any default of Buyer, Seller shall retain, as liquidated damages for breach of contract, the deposit actually paid. However, if the Property is a dwelling with no more than four units, one of which Buyer intends to occupy, then *the amount retained shall be no more than 3% of the purchase price. Any excess shall be returned to Buyer.* Buyer and Seller shall also sign a separate liquidated damages provision for any increased deposit...." (Italics added.)

The same day, the Smiths presented Allen with a California Association of Realtors form entitled "Counter Offer No.... 1." Allen's real estate agent had

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written the following on the form: "1.) All contingencies to be removed 21 days from acceptance. Buyer's increased deposit to be $80,000-total deposit of $100,000 to be released to seller as a *non refundable purchase option monies.* [¶] 2.) Seller will pay up to $5,000 ... for any and all repairs suggested by inspection." (Italics added.) Allen accepted the counteroffer ***1276** and she and the Smiths signed it and the original offer. They also initialed the liquidated damages clause and the page of the offer setting forth the deposit amounts of $20,000 and $33,250. Escrow was scheduled to close June 20, 1999.

Allen paid the initial deposit of $20,000 into escrow. In late March 1999 she released all contingencies and paid the additional $80,000 deposit into escrow. The escrow company immediately released the $100,000 to the Smiths.

In late May 1999 Allen notified the Smiths she would not complete the purchase. Allen conceded the Smiths were entitled to retain her initial $20,000 as liquidated damages, but demanded that they refund the $80,000 additional deposit on the ground the parties had not signed a separate liquidated damages provision covering the increased deposit as required by statute. (See Civ.Code, § 1678.) [FN1] The Smiths refused to give Allen a refund.[FN2]

> FN1. Statutory references are to the Civil Code except when otherwise specified.
>
> FN2. The Smiths were able to sell their home to another buyer for $1,740,000.

Allen sued the Smiths for breach of contract, money had and received, conversion, fraud and specific performance. Allen alleged that by retaining the additional $80,000 deposit, the Smiths "sought to circumvent the policy of the law concerning liquidated damages in residential sales contracts through a sham mechanism in which [they] labeled the deposit monies falsely as option monies."

Allen moved for summary adjudication of her breach of contract and money had and received causes of action. The Smiths moved for summary judgment. In a telephonic ruling the court denied Allen's motion and granted the Smiths' motion. The court determined "[t]here is no ambiguity as to the meaning of an 'option.' Accordingly, ... as a matter of law ... the provision in the counteroffer was not liquidated damages and instead was a separate option agreement. Therefore, the provision was not required to comply with [statutory liquidated damages provisions]."

After a hearing, the court took the matter under submission. The court then confirmed its telephonic ruling and entered judgment for the Smiths. The court later awarded the Smiths costs of suit and $25,000 in attorney fees.

*1277 DISCUSSION

I

Standard of Review

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of ****903** law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.) A defendant satisfies this burden by showing " 'one or more elements of' the 'cause of action' ... 'cannot be established,' or that 'there is a complete defense' " to that cause of action. (*Ibid.*) " 'Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*Id.* at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.) But "if the showing by the defendant does not support judgment in his favor, the burden does not shift to the plaintiff and the motion must be denied without regard to the plaintiff's showing." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534, 80 Cal.Rptr.2d 94.) In determining whether those burdens have been met, we review the record de novo. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143, 97 Cal.Rptr.2d 707.)

II

Purchase and Sale Agreement or Option?

[1][2][3] "A contract must be interpreted to give effect to the mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing

alone." (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 473, 47 Cal.Rptr.2d 12; §§ 1636, 1638, 1639.) "Contract formation is governed by objective manifestations, not the subjective intent of any individual involved. [Citations.] The test is 'what the outward manifestations of consent would lead a reasonable person to believe.' [Citation.]" (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557, 79 Cal.Rptr.2d 226.)

[4] Parol evidence may be admitted to construe ambiguous contract terms (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, 6 Cal.Rptr.2d 554), but here the parties agree the contract is unambiguous and contains their entire agreement. Allen contends the contract shows on its face that it is a purchase and sale agreement with a liquidated damages clause, in contrast to ***1278** an option to purchase for which $100,000 was the nonrefundable consideration. She asserts the use of the term "option" in the counteroffer was designed to circumvent statutory liquidated damages provisions and a nonrefundable deposit of $100,000 is an illegal penalty for breach of contract.

The measure of damages for the buyer's breach of an agreement to purchase real property is "the amount which would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest." (§ 3307.) In practice, however, the seller's damages may be limited because he or she cannot recover " 'loss of bargain' damages if the property is worth more than the sale price when the buyer breaches, or if the value exceeds the sale price at or before the time of the trial." (1 Cal. Real Property Sales Transactions (Cont.Ed.Bar 3d ed. 1998) The Purchase and Sale Agreement, § 4.128, p. 381; *Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 664, 220 Cal.Rptr. 195.)

[5][6] To avoid uncertainty and litigation if a default occurs, the parties to a contract may use a liquidated damages clause to determine the measure of damages in advance. (See *Hong v. Somerset Associates* (1984) 161 Cal.App.3d 111, 114, 207 Cal.Rptr. 597.) A liquidated damages clause is generally valid unless the party challenging it shows it was unreasonable under the circumstances existing at the time the parties entered into the contract. (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977, 73 Cal.Rptr.2d 378, 953 P.2d 484; § 1671, subd. (b).) In the absence of a reasonable relationship between the liquidated damages and the actual damages the parties could have contemplated****904** for breach, "a contractual clause purporting to predetermine damages 'must be construed as a penalty.' [Citation.]" (*Ridgley v. Topa Thrift & Loan Assn., supra,* 17 Cal.4th at p. 977, 73 Cal.Rptr.2d 378, 953 P.2d 484.) " 'A contractual provision imposing a "penalty" is ineffective, and the wronged party can collect only the actual damages sustained.' [Citations.]" (*Ibid.;* § 3275.)

[7] When the contract is for the purchase and sale of residential property the buyer intends to occupy, liquidated damages may not exceed the amount the buyer actually paid as a deposit. A liquidated damages provision is presumed valid if the deposit does not exceed 3 percent of the purchase price, unless the buyer establishes that amount is unreasonable. If the deposit exceeds 3 percent of the purchase price, the liquidated damages provision is presumed ***1279** invalid, unless the party seeking to uphold the provision establishes its reasonableness. (§ 1675, subds.(c) and (d).) [FN3]

> FN3. When a purchase and sale agreement contains a liquidated damages provision, the seller may nonetheless elect to sue for specific performance. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 535, p. 475; §§ 1680, 3387, 3389.)

[8][9][10] In contrast to a bilateral purchase and sale agreement, an option is a unilateral contract "by which the owner of property invests another with the exclusive right to purchase it at a stipulated price within a limited or reasonable time without imposing any obligation upon the party to whom it is given [citation].... [A]n option given for a consideration may not be terminated without the consent of the optionee during the time specified therein." (*Prather v. Vasquez* (1958) 162 Cal.App.2d 198, 204, 327 P.2d 963.) "An option contract relating to the sale of land is ... not a sale of the property but is a sale of the right to purchase." (*Beran v. Harris* (1949) 91 Cal.App.2d 562, 564, 205 P.2d 107; 1 Cal. Real Property Sales Transactions, *supra,* Options, § 7.3, p. 586.)

[11] A consideration paid for a freely negotiated option does not constitute liquidated damages or a penalty because the payment obligation does not arise on a breach of contract by the optionee, but as an alternative to performance. (*Blank v. Borden* (1974) 11 Cal.3d 963, 969-971, 115 Cal.Rptr. 31, 524 P.2d 127.) "Payment of the option price avoids any issue for the

seller of whether retention of the deposit is enforceable as liquidated damages," and thus "[m]any sophisticated sellers insist on structuring a sale agreement as an option for that reason alone." (1 Cal. Real Property Sales Transactions, *supra,* Options, § 7.34, p. 603.)

[12][13][14] It is established that express terms such as "option" and "liquidated damages" are not dispositive in the interpretation of a real estate contract. (*Welk v. Fainbarg* (1967) 255 Cal.App.2d 269, 273, 63 Cal.Rptr. 127.) "Whether any particular document is ... an 'option' or 'an agreement of sale' depends on the nature and terms of the document and the obligation of the parties, regardless of how the parties may label or identify the document. The test is whether ... there is a mutuality of obligation. If both parties are obligated to perform, it is an agreement of sale; if only one party (the optionor-offeror) is obligated to perform, it is merely an option." (1 Miller & Starr, Cal. Real Estate (3d ed. 2000) Specific Contracts, § 2:8, pp. 26-27, fn. omitted.) "When deciding whether a particular contract is bilateral or unilateral, the courts favor an interpretation that makes the contract bilateral. A bilateral contract immediately and fully protects both parties by binding each to its terms *on its execution.*" (*Id.*, Contracts, § 1:2, p. 7.)

****905** [15][16][17] We conclude that the parties intended to enter into a purchase and sale agreement and not an option. The contract consists of a California ***1280** Association of Realtors standard form deposit receipt and counteroffer. These forms ordinarily constitute a binding and enforceable contract for the purchase and sale of the described property. (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944, 127 Cal.Rptr. 846; *Mattei v. Hopper* (1958) 51 Cal.2d 119, 122, 330 P.2d 625; 1 Miller & Starr, *supra,* Specific Contracts, § 2:2, pp. 2-4.) A legitimate option ordinarily consists of an agreement to grant an irrevocable right to purchase for independent consideration, and a separate purchase and sale agreement attached as an exhibit thereto. (*Torlai v. Lee* (1969) 270 Cal.App.2d 854, 858, 76 Cal.Rptr. 239; 1 Cal. Real Property Sales Transactions, *supra,* Options, §§ 7.2, p. 586, 7.4, p. 587.)

Notably, the contract contains no provision giving Allen the complete discretion to decide whether to proceed with the purchase. Rather, there is mutuality of obligation. The contract includes inspection contingencies and required Allen to complete inspections and remove all contingencies within 21 days of acceptance. The contract provides that on Allen's removal of contingencies she "shall conclusively be deemed to have ... [e]lected to proceed with the transaction." A chief advantage of a true option is that it allows the optionee to inspect the property without meeting contingency requirements. "Because the optionee has complete discretion to decide whether to exercise an option and proceed with the purchase, questions of good faith and satisfaction of conditions do not arise." (1 Cal. Real Property Sales Transactions, *supra,* Options, § 7.27, p. 601.)

[18] Moreover, the Smiths concede that if inspection contingencies were unsatisfied, Allen was entitled to a return of her initial $20,000 deposit. Accordingly, the deposit cannot be considered independent consideration for an option. "In the usual *purchase agreement,* ... the deposit is part of the consideration, so that when a condition of the agreement fails, each party is entitled to the return of what was deposited into escrow." (Cal. Real Property Remedies Practice (Cont.Ed.Bar 1982) § 4.33, pp. 128-129, italics added.)

[19][20][21][22] Additionally, the contract does not specify the period within which an option must be exercised. An option "is a *right* acquired by contract to accept or reject a present offer within a *limited time in the future.*" (*County of San Diego v. Miller* (1975) 13 Cal.3d 684, 688, 119 Cal.Rptr. 491, 532 P.2d 139, second italics added.) "The length of time within which an option may be exercised is an essential term to an option contract." (1 Cal. Real Property Sales Transactions, *supra,* Options, § 7.10, p. 591.) Moreover, an option contract may prescribe the method for the exercise of the option. (*Jenkins v. Tuneup Masters* (1987) 190 Cal.App.3d 1, 7, 235 Cal.Rptr. 214.) ***1281** The contract here does not prescribe a mode of acceptance. A reasonable option period and mode of acceptance may be implied where none are specified in the contract (*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 499, 113 Cal.Rptr. 705, 521 P.2d 1097; *Santa Clara Properties Co. v. R.L. C., Inc.* (1963) 217 Cal.App.2d 840, 854, 32 Cal.Rptr. 333), but the absence of these terms in the contract here are additional indicia the parties did not intend to create an option.

Further, the contract contains a "[t]ime is of the essence" clause, and "[s]uch considerations have noth-

ing to do with options." (*Auslen v. Johnson* (1953) 118 Cal.App.2d 319, 322, 257 P.2d 664; *Wilson v. Ward* (1957) 155 Cal.App.2d 390, 394, 317 P.2d 1018.) Rather, on the lapse of the option period the "matter is completely ended and the offer is withdrawn." (*Auslen v. Johnson, supra,* 118 Cal.App.2d at p. 322, 257 P.2d 664.)

****906** The Smiths claim that under rules of contract interpretation, the counteroffer language "nonrefundable purchase option monies" prevails because it is handwritten. (See *Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co.* (1998) 66 Cal.App.4th 1080, 1087, 78 Cal.Rptr.2d 429; § 1651 [terms in a preprinted form that are repugnant to written terms must be disregarded].) However, Allen and the Smiths also initialed the liquidated damages provisions of the contract, and such damages would not be available if the agreement were an option.

[23] At oral argument, the Smiths asserted the option did not materialize until Allen released the contingencies and paid the additional $80,000 deposit. However, "[w]here a point is merely asserted by counsel without any ... authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, 86 Cal.Rptr. 906, disapproved of on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3, 98 Cal.Rptr. 217, 490 P.2d 537; *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2, 44 Cal.Rptr.2d 575.) In any event, the Smiths' assertion lacks merit. Allen could not have received an option when she paid the additional $80,000 deposit, because at the same time she released all contingencies and became bound to proceed with the purchase.

Because the parties entered into a purchase and sale agreement, and not an option, the Smiths were not entitled to summary judgment.

III

Amount of Liquidated Damages

The Smiths assert that even if the contract were interpreted to be a purchase and sale agreement, they are entitled to retain Allen's total ***1282** $100,000 deposit as reasonable liquidated damages. They cite section 1675, subdivision (d), which provides: "If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid *unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.*" (Italics added.)

The Smiths did not meet their burden of persuasion. Their separate statement does not include the reasonableness of the $100,000 deposit as liquidated damages as an undisputed issue. "[*A*]*ll* material facts must be set forth in the separate statement. '... Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement.*' [Citations.]" (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, 282 Cal.Rptr. 368; Code Civ. Proc., § 437c, subd. (b); Cal. Rules of Court, rule 342(d).) Further, the Smiths did not submit evidence establishing as a matter of law that $100,000 is reasonable as liquidated damages. Notably, there is no evidence that amount bears a rational relationship to the range of harm the Smiths may suffer on breach or that the parties anticipated that proving of actual damages may be onerous. (See Cal. Law Revision Com. com., 9 West's Ann. Civ.Code (1985 ed.) foll. § 1671, p. 497.)

In any event, as Allen points out, the liquidated damages provision of the contract states "the amount retained shall be no more than 3% of the purchase price. Any excess shall be returned to Buyer." The purchase price was $1,775,000, 3 percent of which is $53,250.

Allen also contends the Smiths may retain only her initial $20,000 deposit, because the counteroffer increasing the additional****907** deposit from $33,250 to $80,000 does not comply with section 1678, which provides: "If more than one payment made by the buyer is to constitute liquidated damages under Section 1675, the amount of any payment after the first payment is valid as liquidated damages only if ... a separate liquidated damages provision satisfying the requirements of Section 1677 is separately signed or initialed by each party to the contract for each such subsequent payment." [FN4]

> FN4. Section 1677 provides: "A provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is invalid unless: [¶] (a) The provi-

> sion is separately signed or initialed by each party to the contract; and [¶] (b) If the provision is included in a printed contract, it is set out either in at least 10 point bold type or in contrasting red print in at least eight-point bold type."

[24] It is true that the counteroffer does not refer to the increased deposit of $80,000 as "liquidated damages." However, we conclude it substantially ***1283** complies with sections 1677 and 1678, in that it was signed by the parties, and at the same time they signed the deposit receipt. Moreover, Allen's real estate agent wrote the language in the counteroffer. (See *Guthman v. Moss* (1984) 150 Cal.App.3d 501, 512, 198 Cal.Rptr. 54 [substantial compliance with section 1677 when liquidated damages clause not initialed but appeared on same page as parties' signatures and party objecting to the clause drafted it as amendment to escrow instructions].) Sections 1677 and 1678 are intended to "make it more likely that the parties will appreciate the consequences" of entering into a liquidated damages provision. (Cal. Law Revision Com. com., 9 West's Ann. Civ.Code (1985 ed.) foll. § 1677, pp. 537-538.) When read together, the deposit receipt and counteroffer show the parties' awareness that the increased deposit was subject to the liquidated damages clause. The total deposit amount is valid, of course, only to the extent it does not exceed 3 percent of the purchase price.

Allen's contention that the Smiths are entitled to retain only her initial $20,000 deposit is further belied by the provision of the deposit receipt providing for total liquidated damages of $53,250. Allen does not assert that the provision violates section 1677 or 1678, or that $53,250 is an unreasonable amount of liquidated damages. (See § 1675, subd. (c) [liquidated damages of 3 percent of purchase price presumed valid unless buyer proves otherwise].) Notwithstanding any arguable infirmity in the counteroffer, the parties plainly intended that the Smiths would be entitled to at least 3 percent of the purchase price as liquidated damages.

We agree with Allen that the court should have granted her motion for summary adjudication on her breach of contract action, in that the parties entered into a purchase and sale agreement and not an option, and the Smiths breached the agreement by not refunding the amount of her deposit exceeding $53,250, 3 percent of the purchase price. We conclude that Allen is entitled to a refund of $46,750 from the Smiths.[FN5]

> FN5. In response to our questioning at oral argument, the Smiths' counsel stated that if we interpreted the contract as a purchase and sale agreement, they were only entitled to retain Allen's initial $20,000 deposit as liquidated damages. We do not deem this a concession as counsel was merely trying to remain consistent with his argument the agreement was an option that arose on Allen's payment of the additional $80,000 deposit.

Given our holding, we need not determine whether Allen could also have recovered against the Smiths on a money had and received theory.

****908** IV

Attorney Fees Award

[25] After entry of judgment, the court awarded the Smiths costs and $25,000 in attorney fees as the prevailing parties on the contract. (Code Civ.Proc., § 1717.) The ***1284** Smiths suggest that notwithstanding a reversal of the judgment, they remain entitled to attorney fees because a post-judgment order awarding attorney fees is separately appealable (Code Civ.Proc., § 904.1, subd. (a)(2)) and Allen did not appeal the order.

[26][27] An appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed. (*DeZeraga v. Meggs* (2000) 83 Cal.App.4th 28, 43, 99 Cal.Rptr.2d 366.) " '[W]here several judgments and/or orders occurring close in time are separately appealable ..., each appealable judgment and order must be expressly specified-in either a single notice of appeal or multiple notices of appeal-in order to be reviewable on appeal.' [Citation.]" (*Ibid.*; *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 147-148, 15 Cal.Rptr.2d 329.)

[28][29][30] However, this does not mean that an award of attorney fees to the party prevailing stands after reversal of the judgment. "An order awarding

costs falls with a reversal of the judgment on which it is based." (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402, 267 Cal.Rptr. 62; *Purdy v. Johnson* (1929) 100 Cal.App. 416, 421, 280 P. 181.) "[T]he successful party is never required to pay the costs incurred by the unsuccessful party." (*Ibid.*) After reversal of a judgment "the matter of trial costs [is] set at large." (*Id.* at p. 420, 280 P. 181.) Although we cannot reverse the order granting costs and fees, the trial court should do so on remand.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for its entry of an order granting Allen summary adjudication on the breach of contract action and awarding her damages of $46,750. Allen is awarded costs on appeal.

WE CONCUR: BENKE, Acting P.J., McDONALD, J.

Cal.App. 4 Dist.,2002.
Allen v. Smith
94 Cal.App.4th 1270, 114 Cal.Rptr.2d 898, 02 Cal. Daily Op. Serv. 34, 2002 Daily Journal D.A.R. 43

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EXHIBIT 2

CHARRY AUSLEN, Appellant,
v.
ELWOOD CHRIS JOHNSON et al., Respondents.
Civ. No. 8268.

District Court of Appeal, Third District, California.
June 3, 1953.

HEADNOTES

(1a, 1b) Vendor and Purchaser § 51--Options--Evidence.
A determination that an option to purchase realty expired before the optionee purported to accept the optionor's offer is sustained by evidence that the purported acceptance was made more than 30 days after expiration of the last extension, that the last extension was for a reasonable time and that the considerations paid for prior extensions, none of which exceeded 30 days, approximated one-half of that paid for the final extension, thus justifying an implied finding that 30 days was a reasonable time.

(2) Vendor and Purchaser § 32--Options--Definition.
An option is a unilateral agreement under which the optionor offers to sell the subject property at a specified price or on specified terms and agrees, in view of payment received, that he will hold the offer open for the time fixed.
See **Cal.Jur.**, Vendor and Purchaser, § 35; **Am.Jur.**, § 27.

(3) Vendor and Purchaser § 44--Options--Termination.
On expiration of the time named in an option, the optionor's offer is considered withdrawn and the matter is completely ended.

(4) Specific Performance § 60--Options.
If an optionor's offer is accepted on the terms and in the time specified, a bilateral contract arises which may become the subject of a suit to compel specific performance if performance by either party is thereafter refused.

(5) Trial § 361--Findings--Construction.
A finding will be construed in support of the judgment if that may reasonably be done.

(6) Vendor and Purchaser § 44--Options--Termination.
Pursuant to Civ. Code, § 1587, on expiration of a reasonable time without communication of acceptance of an option specifying no time or a reasonable time, the option expires without notification to the optionee.

(7) Specific Performance § 141(4)--Evidence--Adequacy of Consideration.
Testimony that the price specified in an option to purchase realty is less than one-half its value would sustain a conclusion that the price was not adequate, fair or reasonable

(8) Vendor and Purchaser § 41--Options--Rights and Duties of Parties.
Until an optionee exercises his option to purchase land, the optionor need not, in the absence of an agreement to the contrary, perform any duty he may have to furnish good title.

SUMMARY

APPEAL from a judgment of the Superior Court of El Dorado County. Thomas Maul, Judge. Affirmed.

Action for specific performance of contract to convey realty. Judgment for defendants affirmed.

COUNSEL

Milham & Baer and Russell F. Milham for Appellant.

Lewis & Lewis and Clifford R. Lewis for Respondents.

VAN DYKE, P. J.

This is an action for specific performance of an alleged contract to convey real property. One Armstrong, the assignor of appellant Auslen, had for several years been engaged in business with Elwood Chris Johnson, hereinafter called respondent, in the subdivision and sale of real property near Lake Tahoe. On October 1, 1949, their association was terminated and respondent

agreed with Armstrong that with regard to certain real property which respondent still owned he would give to Armstrong what was called "a right of first refusal." On August 1, 1950, respondent wrote Armstrong, saying he had received an offer for some of the real property involved in his agreement with Armstrong and as a result of a discussion which thereafter occurred respondent gave to Armstrong a written option for 30 days to purchase certain described property. (1a) He received $250 in consideration of this option. The 30 days elapsed and on December 14, 1950, Armstrong paid Johnson an additional sum of $300 and obtained a written "extension" of the original option agreement for a period stated as lasting until a preliminary title report which Armstrong had already ordered should be completed by a title company. On December 19th a third sum of $200 was given to Johnson by Armstrong. The preliminary title report was received by Armstrong December 22, 1950, but he did not then exercise his option. However, on December 30th Armstrong paid a further sum of $200 to respondent who then orally agreed with Armstrong to "extend" the option to February 1, 1951. On January 26th Armstrong paid respondent a further sum of $100. Concerning this last sum respondent testified that he gave no extension on the option beyond the date of February 1st and *321 Armstrong testified that the option was for that consideration extended for a reasonable period of time. On March 15th following Armstrong advised respondent he would be unable to exercise the option and offered to release respondent from the agreement giving him a "right of first refusal" for the sum of $10,000. On April 2, 1951, Armstrong assigned his rights under the option agreement to appellant and appellant deposited with the title company who had made the preliminary report a sum more than sufficient to meet the purchase price named in the option agreement. Appellant demanded conveyance and upon its being refused brought this action. There is conflict in the testimony concerning the foregoing, but under the settled rule we must disregard it.

The trial court found that the option had been extended to February 1st, as above recited, and that during that period and on January 26th for the sum of $100 the time was further extended for a period of 30 days; that it expired on February 26th, prior to the date of the assignment from Armstrong to appellant and that the option had not been exercised during its life. While the complaint did not contain an allegation that the consideration was adequate, fair and reasonable, leave was given appellant during the trial to amend his complaint in that regard and testimony was received upon the issue. The amendment was not filed, but in that connection the court found that the consideration was neither fair, reasonable nor adequate. The court concluded from all the findings that appellant should take nothing and, accordingly, gave judgment in favor of respondent, from which judgment appellant appeals.

Although appellant has made a number of specific contentions in his briefs they really add up to a contention that the evidence is insufficient to support the trial court's findings. Additionally, appellant claims that there were errors committed in the rulings upon testimony, which errors were prejudicial to him.

The contention that the evidence is insufficient cannot be sustained. It is undisputed that the original written document executed between Armstrong and respondent was nothing more than an option to purchase the subject property at a specified price and within a specified time. The nature of such an option is too well settled to require much discussion. (2) It is a unilateral agreement. The optionor offers to sell the subject property at a specified price or upon specified *322 terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time. (3) Upon the lapse of that time the matter is completely ended and the offer is withdrawn. (4) If the offer be accepted upon the terms and in the time specified, then a bilateral contract arises which may become the subject of a suit to compel specific performance, if performance by either party thereafter be refused. It is futile to discuss, as appellant does discuss, the question as to whether or not the written option contained anything indicating that time was of the essence thereof. Such considerations have nothing to do with options. Concerning the option given Armstrong by respondent it is not contended other than that the first attempted acceptance occurred not earlier than April 4, 1951. It was incumbent upon appellant to prove that the option under which he claims was alive at the time of his attempt to exercise it. (1b) There was ample evidence, which has been hereinbefore stated, from which the court could conclude that the option had been extended from time to time up to February 1st, and that on January 26th, for a consideration received, it was further extended for a reasonable time. The court found this reasonable time to be 30 days. This finding is supported by the history of the transactions

concerning time and the extensions thereof that preceded the extension of January 26th. The first period of time was fixed at 30 days for a consideration of $250. The sums thereafter paid were comparable. No extension thereafter exceeded 30 days, although the one which depended upon the furnishing of a title report might have. In fact, however, it did not. The definite extension thereafter was within that time and hence the court, from the way in which the parties had dealt with the matter, was justified in finding that the last extension, for a reasonable time, did not exceed 30 days. (5) The finding made by the court was not expressed in terms of reasonable time, but it is apparent from the record that such was the meaning of the finding, and the finding will, of course, be construed in support of the judgment if that may reasonably be done. (*City of Napa v. Navoni*, 56 Cal.App.2d 289 [132 P.2d 566].) No attempt to accept was made until more than 30 days after the expiration of the last extension as determined by the trial court's findings. The ultimate finding of the trial court that the option expired before acceptance is well supported.

(6) Appellant says that since the last extension was for a reasonable time it was incumbent upon the optionor to notify *323 the optionee of the expiration of that time. The contention is unsound for "A proposal is revoked: ... 2. By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance; ...." (Civ. Code, § 1587.)

Since the foregoing disposes of the appeal it is unnecessary to discuss at any length the finding of the court that the price was inadequate since this issue does not properly arise until and unless the unilateral option contract ripens through acceptance into a bilateral contract of purchase and sale. (7) It may be said, however, that there was testimony that the option price was less than half the value of the land. Such evidence would sustain the conclusion that the price was not adequate, fair or reasonable.

(8) A good deal is said in appellant's brief, based upon a claim that the option placed upon respondent the duty of furnishing a good title and other obligations which he had never been in a position to perform. However, these obligations would not become due for performance until and unless the offer was accepted. The parties clearly must have realized this. Notwithstanding there was something said in the option concerning such matters, yet the parties dealt in terms of definite limits of time for acceptance of the proposal of respondent to sell. We find nothing further in the briefs that requires extended discussion.

The judgment appealed from is affirmed.

Peek, J., and Schottky, J., concurred. *324

Cal.App.3.Dist.
Auslen v. Johnson
118 Cal.App.2d 319, 257 P.2d 664

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EXHIBIT 3

EDWARD BOURDIEU, Plaintiff and Appellant,
v.
R. C. BAKER et al., Respondents; MARIE BOURDIEU, Intervener and Appellant.
Civ. No. 1377.

District Court of Appeal, Fourth District, California.
April 12, 1935.

HEADNOTES

(1) Quieting Title--Contracts--Vendor and Vendee--Options--Offer and Acceptance.
In this action to quiet title to real property, where defendants claimed under an agreement which specified the purchase price of the property and provided that a certain amount should be paid in thirty days and the balance within six months, and that if said amount were not paid in thirty days the contract should be of no effect and the $10 paid to plaintiff should be retained as liquidated damages, the agreement constituted only an option to purchase and was in effect an offer to sell which would become a binding contract when the offer was accepted by payment or tender of the money within the time limit, but until so accepted it was not an agreement which could be specifically enforced.
Instrument for purchase of land as contract or option, note, 87 **A. L. R.** 563. See, also, 25 **Cal. Jur.** 506; 27 **R. C. L.** 334 (8 **Perm. Supp.**, p. 5964).
(2) Quieting Title--Offer and Acceptance--Counter-offer.
The acceptance of such an offer must be unconditional and must be in accordance with the terms of the offer, and an acceptance based upon terms varying from those offered constitutes a rejection of the offer.

(3) Quieting Title--Contracts--Escrow--Evidence--Tender--Notice.
In said action, where the agreement called for an unconditional payment to plaintiff within thirty days and did not provide for an escrow, and there was no evidence that plaintiff could not be found or that any effort was made to find him or make him any tender or offer of performance other than by placing the money in escrow in a bank, even if notice thereof was given to plaintiff within the time, it did not constitute a tender or offer of performance; and there was no extinguishment of the obligation under section 1500 of the Civil Code where not only was there no obligation until one was created by an acceptance of the offer and a sufficient tender, but no money was ever deposited in the bank in the name of plaintiff nor was he ever notified that such a thing had been done.

(4) Quieting Title--Tender--Deposit in Bank--Counter-offer.
In said action, where the only deposit made in the bank was held in escrow under instructions not to deliver the money until it had ordered a preliminary report on the title and ascertained the amount due as interest on the mortgage, and then not until after it had received a deed, which the agreement provided was to be furnished four months later, and the bank was also to deduct from the payment one-half of the escrow fees, which plaintiff had not agreed to pay, there being no provision for any escrow, the escrow instructions entirely changed the terms of the contract, and the evidence failed to show any tender or sufficient offer to perform.

(5) Quieting Title--Options--Offer and Acceptance--Notice.
In said action, the burden rested upon defendants, if they desired to exercise the option, to pay the money to plaintiff, as provided therein, or make an unconditional tender in the manner provided by law; and there was no acceptance where the only thing received by plaintiff which indicated that any attempt was being made to comply with the agreement was a letter stating that the money had been deposited in escrow at the bank, which, at best, could only inform plaintiff that the money had been placed in escrow upon some unauthorized and uncommunicated conditions; and although he was notified by the bank of the deposit of the money, no obligation rested upon him to go to that bank or to make a demand for the money, even if he had been notified that such a demand might be honored.

(6) Quieting Title--Tender--Offer of Performance--Waiver.
In said action, the burden was upon defendants to make a sufficient tender or offer of performance and to make this within the time named; and where the only attempt at performance was a deposit of money with a

bank as agent of the depositors, to be paid to plaintiff only on unauthorized conditions, which attempt did not comply with the terms of the option agreement and was not a sufficient tender or offer of performance, and no tender was made and no sufficient offer of performance was brought to the attention of plaintiff, his failure to object to the improper conditions did not constitute a waiver of all objections thereto.

(7) Quieting Title--Waiver--Offer and Acceptance--Counter-offer.
There can be no waiver as to a right that has been lost; and in said action, although plaintiff suggested a change in the terms and allowed defendants to endeavor to secure his wife's signature to a deed after the expiration of the time of payment, he did not thereby recognize the continued existence of the contract and waive his right to the unconditional payment of the money within the time named where the contract was at an end when the money was not paid or a sufficient tender made within the time specified and the evidence indicated nothing more than further but uncompleted negotiations in an effort to make a different contract.

SUMMARY

APPEALS from a judgment of the Superior Court of Fresno County. C. E. Beaumont, Judge. Reversed with directions.

The facts are stated in the opinion of the court.

COUNSEL

William H. Metson and J. W. Coleberd for Plaintiff and Appellant.

A. H. Ricketts and David E. Peckinpah for Intervener and Appellant.

Everts, Ewing, Wild & Everts, L. N. Barber and Fred Eugene Butler for Respondents.

Barnard, P. J.

The plaintiff brought this action to quiet title to approximately 820 acres of land in Fresno County. The defendants set up a claim to the land under an option to purchase the same, which reads as follows:

"Coalinga, California,

"October first, A. D. 1928.

"Received of Hans R. Sumpf the sum of ten dollars, as part payment for the following described real property situate County of Fresno, State of California (description). ***153** The entire price to be paid for said above described real property is $25,000.-(twenty-five thousand dollars), and to be paid as follows:

"$3000.-on or before thirty days from date hereof, the balance to be paid on or before six months from date hereof, or purchaser to assume mortgage of $22,000.- and clear other property also included in said mortgage.

"Title to be perfect; good and sufficient deed to the executed and delivered by the said Ed Bourdieu to Hans R. Sumpf or his assigns on or before the first day of March, A. D. 1929, together with an abstract showing a merchantable title.

"Provided, however, that the payment of $3,000.- is paid at said date, but if not paid on or before the said first day of November A. D. 1928, then this contract to be of no effect and in that event the said $10.-to be retained by Ed. Bourdieu as liquidated damages.

"Time is of the essence of this contract.

"Ed. Bourdieu,

"Hans R. Sumpf.

"Witnessed by

"Sophie M. Sumpf."

It is alleged that this agreement had been assigned by Sumpf to a partnership composed of the four individual defendants. It is further alleged that on or about October 29, 1928, the defendants caused the sum of $3,000 to be placed with the Coalinga branch of the Security-First National Bank of Los Angeles with instructions to deliver the same to Ed Bourdieu upon demand. Another allegation is that the defendants had performed all acts necessary to be performed in ac-

cordance with the terms and conditions of the contract referred to and "still stand ready, able and willing to perform any further and additional terms thereof". The wife of the plaintiff filed a complaint in intervention based upon the fact that the real property in question was the community property of herself and the plaintiff and that she had not consented to the execution of the option agreement.

While the court found in favor of the defendants it found that the land was community property and that the plaintiff had acquired title to an undivided two-thirds interest therein after July, 1917. As a conclusion of law, ***154** it was found that the agreement in question was binding with respect to an undivided one-third interest in said land but that the same was not binding with respect to an undivided two-thirds interest. Judgment was entered quieting title in the plaintiff, as such community property, with respect to an undivided two-thirds interest in the land and ordering the plaintiff to convey to the defendants an undivided one-third interest therein upon the payment to him of the sum of $1,000 and upon the payment to the party holding a mortgage on the land of the sum of $7,333.33. From the judgment in favor of the defendants both the plaintiff and the intervener have appealed.

The main point urged in support of the appeal is that the evidence is insufficient to support a portion of the findings wherein the court found "that within the time provided by the said agreement the said R. C. Baker, J. Zwang, Adolph Kreyenhagen and Hans R. Sumpf tendered and offered to pay to the plaintiff the sums specified in said agreement to be paid on account of the purchase price therein provided, and have truly kept and performed all the covenants and conditions of the said agreement on their part to be kept and performed; that plaintiff refused said tender and offer of payment, has at all times refused, and does now refuse said tender and offer". While the respondents concede that the sum of $3,000 was not paid to the plaintiff within the time named in the option agreement and that the same has never been paid to him, it is their contention that they made a timely offer of performance "in substantial conformity with the provisions of the contract".

The evidence relied upon to show an offer of performance in substantial conformity to the option agreement is as follows: On October 29, 1928, the defendant Sumpf wrote a letter to the plaintiff reading as follows:

"October 29, 1928.

"Mr. Ed Bourdieu

"Coalinga, California

"Dear Sir:

"Please be advised that in pursuance of that certain Contract of Purchase dated October 1st, 1928, covering your Poloadero Ranch, consisting of approximately 820 acres of land; there has been, this day, placed in escrow at the ***155** Coalinga Branch Los Angeles First National Trust & Savings Bank, the sum of three thousand dollars ($3000.00).

"I suggest that you see me as early as possible in order that we may complete arrangements for closing the transaction.

"Yours very truly,

"Hans R. Sumpf.

"P. S. I am leaving this afternoon for Los Angeles, but will return to Coalinga, and can see you Saturday, November 3rd, and if it is convenient for you I suggest that you see me on that day so we may close the entire transaction."

This letter was received by the plaintiff on November 1, 1928. On October 29, 1928, the manager of the bank in Coalinga received from Sumpf and two of the other defendants, the following instructions:

"We hand you herewith:

"(a) Three thousand dollars ($3000.00).

"(b) Copy of Contract, Receipt and Option, between Ed. Bourdieu and Hans R. Sumpf dated October 1st, 1928.

"(c) Copy of assignment of Option between Hans R. Sumpf and Sophie M. Sumpf, and R. C. Baker, J. Zwang, and Adolph Kreyenhagen, a copartnership.

"You are hereby instructed:

"First. To order preliminary report on the title of the property described as follows: (description).

"Second. To ascertain from the Bank of South San Francisco the amount due said bank as interest on any mortgage or mortgages existing against the above described property, up to the first day of November, 1928.

"Third. When you have in your possession a good and sufficient deed conveying the above described property from Ed. Bourdieu and Mary Bourdieu, husband and wife, to R. C. Baker, J. Zwang, and Adolph Kreyenhagen, and Hans R. Sumpf, a copartnership, and the preliminary report above, which are first to be approved by us, then and in that event you are to deliver to Ed. Bourdieu or order any amount out of said three thousand dollars ($3000.00) which may remain, after payment of interest due to November 1st, 1928, on a mortgage or mortgages which we understand now exists against said property, and now held by the Bank of South San Francisco, and any taxes or other lien which may be against the said property, the preliminary report *156 of title and also one-half of your fees in connection with this escrow.

"Fourth. The copy of Contract, receipt, and Option and Assignment of Option handed you herewith are for your information only and upon fulfillment of instructions under paragraph Third above, you are to deliver these two documents to Hans R. Sumpf.

"Fifth. Upon satisfactory proof to you that the above requirements as to the payment of the balance of twenty-two thousand dollars (as per the Option Agreement) or the assumption or clearing of said mortgage have been satisfactorily complied with, then and in that event you are to deliver said deed to Hans R. Sumpf, et al.

"Yours very truly,

"Hans R. Sumpf,

"A. Kreyenhagen,

"J. Zwang."

This manager testified that after receiving these instructions he wrote to the plaintiff as follows:

"This is to notify you that there has been deposited in this office the sum of $3000.00 for payment to you on the contract which you signed with Hans R. Sumpf and Sophie M. Sumpf, on the first day of October, 1928. The said contract covering (description of the property).

"Will you kindly call at your earliest convenience and greatly oblige."

He testified that this letter was mailed on October 29, 1928, but does not say who mailed it, and the plaintiff denied that he ever received it. Another letter is in evidence, reading as follows:

"We hand you herewith three thousand dollars ($3,000.00), also copy of contract dated October 1st, 1928, and entered into between Ed. Bourdieu and Hans R. Sumpf.

"Said three thousand dollars ($3,000.00) is the payment due on or before November 1st, 1928, and you are therefore instructed to turn said amount over to Ed Bourdieu, or order, upon demand.

"Yours very truly,

"Hans R. Sumpf."

This was handed to the manager of the bank on October 29, 1928, but whether before or after he had written the letter to the plaintiff, above set forth, does not appear. In any *157 event, nothing in relation to its contents was ever communicated to the plaintiff.

There is evidence that the defendants deposited $3,000 in their own account in this bank on October 29, 1928. On October 30, 1928, the bank issued a cashier's check for $3,000 payable to the plaintiff but kept this check in the escrow in the bank. On November 3, 1928, Sumpf met the plaintiff on the street and asked him if he had received his letter. The plaintiff replied that he had received the letter, and said: "It is not in accordance with our agreement, Mr. Sumpf. You agreed to give me $3000 in cash if you took my place-if you bought my place, I mean, and you failed to do so, so I

call the option void."

Some time in November or December of that year the plaintiff told the defendants that his wife would not sign a deed. At the suggestion of the defendants, some time later, some of the parties went to see Mrs. Bourdieu at San Jose and endeavored to get her to sign a deed, which she refused to do. There is evidence that at the conversation when the plaintiff told the defendants that his wife would not sign a deed he asked them whether he could retain twenty acres of the land which surrounded his sheep camp and the defendants told him that if he would place this deed in escrow, in accordance with the escrow instructions, they would give him a deed for that twenty acres. On January 4, 1929, the defendants executed and delivered to the bank a note for $22,000, in which the date of the note and the time of payment were left blank, whereupon the manager of the bank wrote to the plaintiff advising him that $22,000 had been deposited in that office for payment to him in connection with the contract of October 1, 1928. On April 4, 1929, the defendants were allowed by the bank to indorse the cashier's check which had been placed in the escrow in the bank and to withdraw the $3,000 represented thereby, at which time the defendants substituted and left with the bank a note for that amount without date and in which the time of payment was left blank. The manager of the bank testified that the bank has ever since held this note under the escrow instructions relative to the Bourdieu property and at all times has been ready to turn over the money upon presentation of the deed by the plaintiff. ***158**

(1) It is conceded by both parties, as it must be, that the agreement here in question constituted only an option to purchase the land referred to therein. (*Johnson v. Clark*, 174 Cal. 582 [163 Pac. 1004].) In effect, it was an offer to sell the land which would become a binding contract when the offer was accepted by the payment or tender of the money on or before November 1, 1928, in accordance with the time limit contained therein. Until so accepted it was not an agreement which could be specifically enforced. (*California Land Security Co. v. Ritchie*, 40 Cal. App. 246 [180 Pac. 625].) (2) Under well-settled principles, the acceptance of such an offer must be unconditional, must be in accordance with the terms of the offer, and an acceptance based upon terms varying from those offered constitutes a rejection of the offer. (*Lambert v. Gerner*, 142 Cal. 399 [76 Pac. 63]; *Four Oil Co. v. United Oil Producers*, 145 Cal. 623 [79 Pac. 366, 68 L. R. A. 226]; Civ. Code, sec. 1585.)

(3) No money was paid to the plaintiff within the time limit prescribed by the contract and the only question remaining is whether a tender or offer of payment was made within the time which was a sufficient compliance with the agreement, which was unconditional or which the plaintiff was bound to accept.

Section 1489 of the Civil Code provides where an offer of performance may be made in the event the person to whom the offer is to be made cannot be found with reasonable diligence. There is no evidence in the record before us that the plaintiff could not be found, that any effort whatever was made to find him or to make to him any tender or offer of performance other than by placing the money in escrow in this bank. The agreement made no provision for any such escrow and even if notice thereof was given to the plaintiff within the time it did not constitute a tender or an offer of performance. Section 1500 of the Civil Code provides that an obligation for the payment of money may be extinguished by due offer of payment if the amount is immediately deposited in the name of the creditor in some bank and notice thereof is given to the creditor. Not only was there no obligation here until one was created by an acceptance of the offer and a sufficient tender, but no money was deposited in the bank in the name of the plaintiff nor was he ever notified that such a thing had been done. The ***159** only money deposited in this bank was in the name of the defendants and while a cashier's check was issued the next day, it was placed in escrow in the bank and the plaintiff was never even notified that it had been issued.

(4) While the agreement called for the unconditional payment to the plaintiff of $3,000 on or before November 1, 1928, the only deposit which was made in the bank even after the cashier's check was issued was held in escrow and the bank was instructed not to deliver any of the money to the plaintiff until it had ordered a preliminary report on the title and ascertained the amount due as interest on the mortgage on the property, and then not until after it had received a deed conveying the property and the defendants had approved the preliminary report on the title. Even at that time the bank was not to turn over the full sum of $3,000 but was to deduct not only the amount of any interest and outstanding liens but also the cost of the preliminary report on the title and one-half of the

bank's fees in connection with the escrow. The last item, at least, the plaintiff had never agreed to pay. While the agreement provided that the plaintiff was to receive $ 3,000 not later than November 1, 1928, and that he was to have until March 1, 1929, to furnish a deed and title, the terms under which the bank held the money required him to furnish a deed before he received such part of the $3,000 as might remain after the payments named. These instructions entirely changed the terms of the contract and the evidence entirely fails to show any tender or sufficient offer to perform.

(5) A further consideration is that even these changed terms were not communicated to the plaintiff within the time allowed. On the last day on which the performance could be made the plaintiff received a letter from one of the defendants, the one with whom he had made the agreement, advising him that $3,000 had been placed in escrow at the bank and suggesting that he see this defendant as early as possible in order that they might complete arrangements for closing the transaction, but advising him that he could not do this until November 3d. So far as is shown by the evidence, this was the only thing received by the plaintiff which even indicated that any attempt was being made to comply with the agreement. This was far from a tender ***160** or offer of performance and, at best, could only inform the plaintiff that the amount which was to be unconditionally paid on that date had been placed in escrow in the bank. The only possible effect of this was to advise the plaintiff that the money had been placed there upon some condition when no condition was authorized by the agreement. In effect, the plaintiff was thus told by the only party interested, so far as he knew, that the money had been deposited upon some condition the nature of which was not disclosed, that it would not be paid to him before November 3d, and not then unless something else was done. If it be assumed that the letter which the manager of the bank says was mailed on October 29th was also received by the plaintiff, it could not be presumed that it was received before November 1st, the date on which the plaintiff received the letter from Sumpf, since the only testimony is that both letters were mailed at Coalinga on the same day. If this letter from the bank was received by the plaintiff, and no matter when it was received, it merely advised him that the sum of $3,000 had been deposited in the bank for payment to him on the contract and asked him to call at his earliest convenience. It did not purport to advise him that the money had been deposited to his account or that the money would be paid to him if he did call. It adds nothing to the letter he did receive from the defendant Sumpf and the plaintiff would be fully justified, if he considered the letter at all, in considering it as a confirmation of Sumpf's statement that the money had been placed in the bank in escrow. The letter handed to the bank by Sumpf on October 29, 1928, stating that $3,000 was inclosed therewith together with a copy of the contract, that the same was the payment due on the contract on or before November 1, 1928, and that the bank was instructed to turn said amount over to the plaintiff upon demand, was never called to the plaintiff's attention and if it be considered as changing instructions to the bank, which was acting as the agent of the defendants, it certainly had no effect in so far as making the money available to the plaintiff is concerned and, regardless of any instructions to the defendants' agent, no tender or offer of performance is shown to have been made to the plaintiff. The bank was unknown to the plaintiff, so far as this transaction is concerned, and no obligation rested ***161** upon him to go to that bank or to make a demand for the money even if he had been notified that such a demand might be honored. The burden rested upon the defendants, if they desired to exercise the option, to pay the money to the plaintiff, or to make an unconditional tender in the manner provided by law.

(6) The respondents seek to bring this case within the rule laid down in *Kofoed v. Gordon*, 122 Cal. 314 [54 Pac. 1115], in which it was held that the provisions of section 1501 of the Civil Code are broad enough to include within their scope not only the thing offered but also the conditions upon which the offer of performance is made to depend and that if it is accompanied by improper conditions, which the creditor is not bound to perform, and no objection is made thereto by the creditor, all objections to the improper conditions are waived. This case has no application here. The burden was upon the defendants to make a sufficient tender or offer of performance and to make this to the plaintiff within the time named. The one attempt at performance of this obligation did not constitute a tender or offer of performance but the money was placed in escrow with a third party upon conditions which the defendants had no right to make, and the plaintiff was not even informed what the conditions were or given any opportunity to object to the same.

The deposit of this money with the bank as agent of

the depositors, to be paid to the plaintiff only on unauthorized conditions, did not comply with the terms of the option agreement and is not a sufficient tender or offer of performance. (*Segno v. Segno*, 175 Cal. 743 [167 Pac. 285rsqb;; *Righetti v. Righetti*, 5 Cal. App. 249 [90 Pac. 50].) No tender was made, no sufficient offer of performance was brought to the attention of the plaintiff, and we think the evidence entirely fails to sustain that portion of the findings which is here attacked.

(7) It is further urged that the plaintiff, by suggesting a change in the terms and in allowing the defendants to endeavor to secure his wife's signature to a deed some time during November or December, recognized the continued existence of the contract and waived his right to an unconditional payment of the $3,000 within the time named. There can be no waiver as to a right that has been lost. ***162** (*San Bernardino I. Co. v. Merrill*, 108 Cal. 490 [41 Pac. 487]; *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527 [99 Pac. 994].) The contract was at an end when the money was not paid or a sufficient tender made on or before November 1st. The evidence indicates nothing other than further negotiations in an effort to make a different contract, which were never completed.

Under the view we take of the main issue presented, the other points raised by both appellants require no consideration.

The finding essential thereto being unsupported by the evidence, that portion of the judgment which is in favor of the defendants is reversed with instructions to the trial court to make findings is accordance with the view herein expressed and to enter a judgment in favor of the plaintiff.

Marks, J., and Jennings, J., concurred.
A petition for a rehearing of this cause was denied by the District Court of Appeal on May 11, 1935, and an application by respondents 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 10, 1935.

Cal.App.4.Dist.
Bourdieu v. Baker
6 Cal.App.2d 150, 44 P.2d 587

END OF DOCUMENT

EXHIBIT 4

GEORGE E. CALLISCH, Respondent,
v.
G. V. FARNHAM, Appellant.
Civ. No. 7400.

District Court of Appeal, Third District, California.
Jan. 29, 1948.

HEADNOTES

(1) Vendor and Purchaser § 46--Options--Exercise or Acceptance.
The act or acts which constitute an acceptance of an offer tendered in an option agreement for the sale of real property are determined by the terms of the contract itself, and where the acceptance or the "election" or the "exercise" of the option is by the terms of the contract to be made in a particular manner, it must be strictly so made in order to constitute a valid acceptance.
See 25 **Cal.Jur.** 522; 55 **Am.Jur.** 506.
(2) Vendor and Purchaser § 46--Options--Exercise or Acceptance.
Where an option agreement for the sale of real property required the optionor to "hold" the property until a designated date and the optionee to pay a designated sum upon the "exercise" of the option, a letter in which the optionee informed the optionor that he had "elected to go through with and complete their deal," without tender of the sum mentioned in the agreement, did not constitute strict compliance with and therefore was not due exercise of the option by the optionee.

(3) Vendor and Purchaser § 46--Options--Exercise or Acceptance.
One may contract to sell property which he does not own, and while at the time of an option contract or the contact of sale he may be unable to furnish a good title, such infirmity does not necessarily mean that when the time for performance has arrived he still would not be able to furnish a good title, nor excuse the optionee from the performance of acts or payment necessary in order to exercise his right of purchase under the purchase. Where the optionee is required to exercise the option within a designated time, a provision giving the optionor additional time after the "election to exercise" the option within which to perfect title does not excuse the optionee from making the payment required of him at the time of exercising the option.

SUMMARY

APPEAL from a judgment of the Superior Court of Siskiyou County. James M. Allen, Judge. Affirmed.

Action for declaratory relief and to quiet title. Judgment for plaintiff affirmed.

COUNSEL

Floyd Merrill for Appellant.

Roy A. Weaver for Respondent. ***428**

PEEK, J.

The present controversy arises out of a written option agreement for the sale of certain real property by plaintiff to defendant. The pertinent portions of the agreement provide as follows:

"Witnesseth: That for and in consideration of the sum of Two Hundred Fifty Dollars ($250.00) to him in hand paid, the receipt whereof is hereby acknowledged, the party of the first part hereby agrees to hold until the 18th day of January, A.D. 1946 (time being of the essence of this option) subject exclusively to the order of the party of the second part the following described real property to-wit:

(Describing it)

"Or to transfer and convey said property to the party of the second part by grant deed free from all encumbrances not hereinafter set forth at any time within the above prescribed time to the said party of the second part at and for the price of Nineteen Thousand Five Hundred Dollars ($19,500.00) lawful money of the United States, payable on the following terms:

"a. Six Thousand Dollars ($6,000.00) upon the *exercise* of this option by the party of the second part.

. . . . . .

"If the party of the second part of this option shall duly *elect to exercise* this option, then, and in that event, the amount paid as consideration for this option shall be credited upon the said purchase price; but if the party of the second part of this option shall fail duly to *exercise* this option within the time prescribed therefor, then, and in that event, the amount paid as consideration for this option shall be retained by the said party of the first part in full satisfaction for the aforesaid time.

"The party of the first part shall have ninety (90) days after the *election to exercise* this option by the party of the second part within which to perfect title." [Italics ours.]

On January 16, 1946, plaintiff received a letter from defendant, optionee, dated January 14, 1946, which reads in part as follows:

"The purpose of this letter is to give you formal notice that I intend and I have elected to go through with and complete our pending deal on the Camp Lowe property. ... I shall expect you to let me know when you have your title to both the real and personal property perfected, so that I may have the title examined before the completion of the deal." ***429**

In response to this letter plaintiff wrote to defendant on January 17, 1946:

"In reply to your letter of January 14th, this is to advise you that I will live up to my obligations under the option and that it will be necessary for you to do likewise.

"This letter is written to forestall any possible impression of waiver of any of my rights by reason of anything contained in your letter of January, 14th."

The defendant, however, made no tender of the above mentioned sum of $6,000 on or prior to January 18, 1946. Plaintiff thereafter instituted an action for declaratory relief and to quiet title to the property in question. The defendant answered and by way of cross-complaint sought specific performance of the alleged contract of sale.

The trial court found in favor of plaintiff and cross-defendant that the option terminated by reason of the failure of the defendant and cross-complainant to pay the $6,000 to plaintiff on or before January 18, 1946, and entered judgment quieting title in the plaintiff. From this judgment the defendant has appealed.

The primary issue on this appeal is whether or not the defendant's act of writing and mailing the above letter to the plaintiff was a sufficient acceptance of the offer according to the terms of the option contract so as to create an executory contract for the sale of the property.

Appellant in his argument attempts to distinguish the terms "election to exercise" and "exercise" as used in said contract. It is defendant's contention that his letter dated January 14th to plaintiff was his "election to exercise" his right under the agreement; and having so informed plaintiff that he had elected to exercise the right given him under the agreement to buy the property, it then became incumbent upon plaintiff to clear the title thereto during the 90-day period therein agreed upon to enable plaintiff to transfer the same to defendant by a good and sufficient deed free and clear of any cloud upon the title, and that not until such time did it become necessary for defendant to "exercise" the option by paying the $6,000 to plaintiff and accepting the deed.

However, from our examination of the contract it does not appear that the use of the terms "exercise" and "election to exercise" can be distinguished. Rather it would appear that such terms are used interchangeably therein and with the same intent and meaning. Particularly does this conclusion ***430** appear to be correct by reason of the fact that in the paragraph previously quoted these two terms are used with reference to the same act.

(1) The act or acts which constitute an acceptance of an offer tendered in an option agreement are determined by the terms of the contract itself, and where, as here, the acceptance or the "election" or the "exercise" of the option is by the terms of the contract to be made in a particular manner, it must be strictly so made in order to constitute a valid acceptance. (*Flickinger v. Heck*, 187 Cal. 111, 113- 114 [200 P. 1045].)

(2) If, as contended by appellant, he could "elect to exercise" the option on or before January 18th, by

merely giving notice of his so doing, but need not "exercise" the option until some future indefinite time, then the clause by which plaintiff agreed to "hold until the 18th day of January, A.D. ... subject exclusively to the order of" the appellant, becomes meaningless, since by merely giving notice of his "election" to exercise the option, or his intention to accept as that phrase is interpreted by him, the appellant might extend the obligation of the plaintiff to hold the property beyond January 18th, at which later time appellant might "exercise" the option. On the other hand, if it were intended, and we conclude it was, that the option would have to ripen into a binding contract of sale and purchase prior to the expiration of the period ending January 18th, then, obviously the appellant would have to "exercise" his right within that time. And, concurrent with that exercise is the obligation to pay the sum of $6,000. In *Bourdieu v. Baker*, 6 Cal.App.2d 150 [44 P.2d 587], under facts and circumstances not wholly unlike those presented herein, it was held that the burden was upon the optionee to show strict compliance with the terms of the option agreement-including payment or tender of the amount specified within the time stated. It necessarily follows from the rule as stated that the letter of January 14th, wherein appellant merely informed plaintiff he had "elected to go through with and complete" their deal, without the tender of the $6,000, did not constitute strict compliance with and therefore was not due exercise of the option by appellant.

(3) The second contention of appellant is that since plaintiff was unable to give a deed to the property free and clear of any cloud upon the title on January 18th, defendant was *431 not obligated to tender the $6,000 in order to exercise his option to purchase.

In amplification of such contention defendant argues that the payment of the $6,000 and the execution of the note and trust deed by him were conditions concurrent with the delivery of the deed by plaintiff and therefore it was not necessary for him to make the actual tender of the $6,000 on January 18th, at which time plaintiff was unable to give a clear title.

It is well settled that one may contract to sell property which he does not own (*Hanson v. Fox*, 155 Cal. 106 [99 P. 489, 132 Am.St.Rep. 72, 20 L.R.A.N.S. 338]; *Brimmer v. Salisbury*, 167 Cal. 522 [140 P. 30]), and while at the time of execution of the option contract or the contract of sale he may be unable to furnish a good title, such infirmity does not necessarily mean that when the time for performance has arrived he still would not be able to furnish a good title, nor excuse the optionee from the performance of acts or payment necessary in order to exercise his right of purchase under the option. (*Seeburg v. El Royale Corp.*, 54 Cal.App.2d 1 [128 P.2d 362].) The 90-day period given to the plaintiff in which to perfect his title indicates that delivery of the deed was not a condition concurrent with the defendant's acceptance of the offer and the formation of the sale contract. The trial court correctly concluded that the option terminated on January 18, 1946.

The judgment is affirmed.

Thompson, J., concurred.

Cal.App.3.Dist.
Callisch v. Farnham
83 Cal.App.2d 427, 188 P.2d 775

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EXHIBIT 5

C

District Court of Appeal, Second District, Division 3, California.

COMMERCIAL CASUALTY INS. CO. et al.
v.
INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 19242.

March 25, 1953.
Rehearing Denied April 14, 1953.
Hearing Denied May 21, 1953.

Proceeding by corporations and their insurer to review award of Industrial Accident Commission to compensation claimant. The District Court of Appeal, Wood, J., held that evidence sustained finding that contract by which claimant, a resident of Oklahoma, was employed, was a California contract, vesting jurisdiction in Commission to make award.

Award affirmed.

West Headnotes

[1] Workers' Compensation 413 ⚿1424

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)1 In General
413k1424 k. Place of contract or injury and what law governs. Most Cited Cases
In compensation proceeding, evidence sustained finding that contract of employment between California corporation, employed by contractor to engage workmen to work for contractor in Saudi Arabia, and claimant, who at the time was a resident of Oklahoma, was entered into in California, vesting California Industrial Accident Commission with jurisdiction to make award. West's Ann.Labor Code, § 5305.

[2] Workers' Compensation 413 ⚿1182

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(A) In General
413k1176 Jurisdiction of Boards and Commissions
413k1182 k. By consent or conduct of parties. Most Cited Cases
Provision in employment agreement between California corporation, employed by contractor to engage workmen to work for contractor in Saudi Arabia, and claimant, a resident of Oklahoma, to effect that California compensation laws should be applicable if claimant sustained injury was insufficient to give California Industrial Accident Commission jurisdiction but such provision could be considered in determining whether parties intended that the contract should be one entered into in California. West's Ann.Labor Code, § 5305.

[3] Contracts 95 ⚿22(1)

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k22 Acceptance of Offer and Communication Thereof
95k22(1) k. In general. Most Cited Cases
To effectuate contract, it was not necessary that acceptance of offer be written upon same document upon which offer was made, but offer and acceptance was sufficient where document upon which offer was accepted was in printed form identical with document upon which offer was made.

[4] Contracts 95 ⚿22(3)

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k22 Acceptance of Offer and Communication Thereof
95k22(3) k. Necessity of communicating acceptance. Most Cited Cases
In order to constitute a contract, acceptance of an offer must be communicated to the offeror. West's Ann.Civ.Code, §§ 1582, 1583.

[5] Labor and Employment 231H ⚿34(2)

231H Labor and Employment
231HI In General
231Hk31 Contracts
231Hk34 Formation; Requisites and Validity
231Hk34(2) k. Particular cases. Most Cited Cases
(Formerly 255k3(1) Master and Servant)
Where applicant for employment, a resident of Oklahoma, sent his application to California corporation, and corporation subsequently directed applicant by telegram to pick up airplane tickets, depart for New York, and see its representative there who would have corporation's acceptance, filing of telegram in California was in effect a communication of acceptance of applicant's offer, as was presentation in New York, by corporation's agent, of corporation's written acceptance. Civ.Code, §§ 1582, 1583.

[6] Workers' Compensation 413 1544.6(5)

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)7 Accident or Injury and Consequences Thereof
413k1544.1 Aggravation of Previously Impaired Condition
413k1544.6 Aggravation of Particular Condition or Disease
413k1544.6(5) k. Heart and cardiovascular conditions. Most Cited Cases
(Formerly 413k1547)
In compensation proceeding, evidence sustained finding that claimant sustained injury arising out of and occurring in course of his employment in Saudi Arabia, consisting of aggravation of a pre-existing coronary artery disease as a result of arduous living conditions.
**954 *902 Tipton, Weingand & Tipton, Los Angeles, for petitioners.

**955 Edmund J. Thomas, Jr., and T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

PARKER WOOD, Justice.

Petition to review an award of the Industrial Accident Commission. Bechtel International Corporation, a corporation, whose main office is in San Francisco, California, had entered into a written agreement with International Bechtel, Inc., a corporation, to engage persons in the United States to work for International Bechtel in Saudi Arabia. The corporation first above mentioned will be referred to as Bechtel, and the other one will be referred to as International. It was stipulated at the hearing before the referee that the applicant, Josph R. Crawford, was employed by one or both of said corporations and that both corporations were insured by the Commercial Casualty Insurance Company. The insurance company and said two corporations are petitioners herein.

Petitioners contend that the Industrial Accident Commission did not have jurisdiction to make the award. Their argument is that applicant has not been a resident of California and that the contract of employment was not made in California. Section 5305 of the Labor Codes provides that the Industrial Accident Commission 'has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State.' The provision in said section requiring that the employee be a resident of this state has been held to be unconstitutional. Quong Ham Wah Co. v. Industrial Accident Comm., 184 Cal. 26, 38, 192 P. 1021, 1026-1027, 12 A.L.R. 1190; Commercial Casualty Ins. Co. v. Industrial Accident Comm., 110 Cal.App.2d 83, 89, 242 P.2d 13, 17. The question remaining, with respect to jurisdiction, is whether the contract was made in California.

On November 7, 1947, the applicant, Mr. Crawford, who then resided in Oklahoma, wrote to the office of Bechtel at Houston, Texas, stating: 'I am returning application which I have completed for your consideration. * * * May I state my reason for requesting Foreign Service. * * *' He enclosed *903 in that letter an application for employment which consisted of four pages of a filled-in, completed, and signed printed form of application at the top of which were the words: 'Employment Application Bechtel International Corporation.' A question on said form was, 'Are you available for Foreign Service?' His answer thereto was 'Yes.' The application also contained a detailed statement of his employment record from 1923 to the date of the application, November 7, 1947.

On December 16, 1947, Bechtel, in San Francisco, wrote a letter to Mr. Crawford stating: 'Your application for assignment as a Clerk on one of our foreign projects has been forwarded to this Department. Since you are being considered for possible assignment we wish to determine whether or not you will be available at such time as a requisition for your classification may be received from the jobsite. Will you therefore kindly fill in the questions appearing below and return this letter at your earliest convenience. Upon receipt of confirmation regarding your availability, we will initiate our verification procedure. * * *' The 'questions' referred to, as appearing below, were: 'I am available for future assignment' and 'I have certified proof of citizenship in my possession.' On December 26, 1947, Mr. Crawford wrote the word 'Yes' as an answer to each of those questions and affixed his signature thereto, and mailed the document to Bechtel at San Francisco.

On January 6, 1948, Bechtel, from San Francisco, sent a telegram to Mr. Crawford in Oklahoma, as follows: 'Please advise collect wire within 24 hours if you are eligible and available possible assignment as section supervisor time and payroll at $500 month no overtime plus board, lodging, medical care. * * * Also advise if birth certificate or proof of citizenship in your possession.'

**956 On January 8, 1948, Mr. Crawford, from Oklahoma, sent a telegram to Bechtel at San Francisco, as follows: 'Eligible and available for assignment. Birth certificate in my possession.'

On January 9, 1948, Mr. Crawford, in Oklahoma, received a telegram sent by Bechtel from Houston asking him to telephone to Bechtel at Houston. He telephoned as requested and was informed by Bechtel that all processing documents had been sent from the Houston office of Bechtel to Mr. Crawford in Oklahoma. Thereafter and before January 16th, *904 Bechtel, at Houston, mailed to Mr. Crawford in Oklahoma a document entitled 'General Instructions for Processing.' Sixteen other documents were enclosed with those instructions. The instructions stated in part, at the beginning thereof: 'We acknowledge receipt of notice of your availability and intent to prepare yourself to go forward to Saudi Arabia as Sec Supv Time & Payroll at $500.00 per month plus extras. We are enclosing documents which must be completed, dated, and signed. * * *' At the end of those instructions it was stated: '*No definite departure time will be given until all papers have been received by the San Francisco office.*'

One of the documents enclosed with the instructions was a printed blank form (Exhibit H. herein) entitled 'Bechtel International Corporation Memorandum of Agreement.' On January 17, 1948, Mr. Crawford, in Oklahoma, signed the memorandum of agreement and mailed it to Bechtel at San Francisco. Also on said date, he filled in the blanks on several of the other documents which were enclosed with the instructions, and he signed, and mailed those documents to Bechtel at San Francisco. Those additional documents pertained to his travel expenses, his fingerprints, his understanding that he would live in temporary quarters at the jobsite, and his possession of an Oklahoma license to drive a motor vehicle.

About February 2, 1948, he signed and mailed to Bechtel at San Francisco a form, furnished by Bechtel, wherein he directed that certain of his earnings be sent to a bank in Oklahoma.

On February 17, 1948, he signed and mailed to Bechtel at San Francisco a printed form entitled 'Baggage Statement.'

On February 20, 1948, Bechtel at San Francisco telegraphed him at Oklahoma as follows: 'You scheduled embark New York February 27. You scheduled depart Tulsa via American Airlines Flight No. 6 at 5:40 p m February 24 arriving New York at 1:25. Ticket paid for this end. Please pickup at Tulsa AAL Office Soonest. Necessary you wire collect when ticket obtained. Upon arrival New York contact Harry Heap. * * * He will have passport, processing documents and foreign transportation. * * *'

On February 21, 1948, Mr. Crawford, from Oklahoma, telegraphed Bechtel at San Francisco: 'Flight reservation ticket picked up today Depart 24th.'

On February 24th, he left by airplane from Oklahoma and *905 arrived in New York City on February 25th. On the date of his arrival there, he contacted Mr. Coughlin, a representative in New York of Bechtel, and then signed a document entitled 'Applicant's Acknowledgment.' At the top of the front page of that document there were the words 'Bechtel International Corporation Personnel Department * * * San Fran-

cisco 5, California.' The document contained several specifications regarding his understanding as to the terms and conditions of his employment. He also signed a document entitled 'Check Sheet on Papers Accompanying Employee,' which listed several documents he was required to have while traveling and which he was to deliver to the manager at the jobsite. Also on said February 25th, in New York City, he signed a 'Memorandum of Agreement,' which was identical with the 'Memorandum of Agreement' (Exhibit H.), which he had signed on January 17th in Oklahoma and mailed to Bechtel at San Francisco. This document states:

'To: Bechtel International Corporation, * * * San Francisco 11, California**957 You have entered into a written agreement with International Bechtel, Inc., which latter Company is hereinafter referred to as the 'Contractor,' to engage persons in the United States of America who will render service for the Contractor on construction or other work in Saudi Arabia. * * * I understand that in signing below I am offering to enter into an Employment Agreement with the Contractor to perform services in Saudi Arabia * * * in accordance with the terms and conditions set forth in the attached form of Employment Agreement. * * * I understand that upon this Memorandum of Agreement being signed by me and in writing accepted by you at San Francisco, California, it shall become a binding State of California, United States of America Agreement and that the Workmen's Compensation Insurance provisions of the California Labor Code shall constitute the exclusive remedy for any injury * * * that I may sustain while this Memorandum of Agreement is in force and effect. * * * This Agreement shall not become effective until it is accepted by you and salary shall not commence until the date inserted in said acceptance._____

Signature of Applicant.'

The last paragraph of that memorandum, which is immediately below the line for signature of the applicant, is as follows:

'The services of the applicant whose signature appears *906 above are hereby accepted pursuant to the terms and conditions above set forth and it is agreed that the salary shall commence on the *21st* day of *February*, 1948; it is further agreed that subsistence Per Diem shall commence on the *24th* day of *February*, 1948;

Dated *February 25th*, 1948

At *San Francisco*, California.

BECHTEL INTERNATIONAL CORPORATION

By

George M. Wood

Read and Accepted:_____

Signature of Employee.'

The three dates appearing in said last paragraph, the word 'San Francisco,' and the signature 'George M. Wood,' had been placed thereon by said Wood at San Francisco. While in New York City, on February 25th, Crawford affixed his signature in the two blank spaces, provided for his signature, on said memorandum of agreement.

Mr. Crawford left New York by airplane on February 25th and arrived in Saudi Arabia on February 29th. On said last mentioned date he signed the 'Employment Agreement' which was attached to said 'Memorandum of Agreement.' At that time, the controller for International Bechtel also signed the 'Employment Agreement.'

[1][2][3][4][5] The commission found that the contract of employment was entered into in California. The evidence supports that finding. Crawford, while in Oklahoma, signed the Memorandum of Agreement, which was an offer by him to accept employment, and sent it and his employment application to Bechtel at San Francisco. Bechtel acknowledged receipt of those documents. Later, Bechtel asked him by telegram if he was available for assignment and if he had a birth certificate. He replied by telegram in the affirmative. Later, Bechtel, in Houston, sent the 'General Instructions for Processing,' and many other documents regarding processing, to him. One of the instructions was that no definite departure time would be given until all papers had been received by the *San Francisco* office. Bechtel in San Francisco telegraphed him regarding schedule and transportation for the trip, and told him in that telegram to contact a certain person in New York *907 who would have 'processing docu-

ments.' One of those documents was the 'Memorandum of Agreement,' which had been signed by Bechtel in San Francisco. That particular agreement was not the one which Crawford had signed in Oklahoma and sent to Bechtel at San Francisco, but in printed form it was identical with the one he had signed and sent. Crawford, in New York in the presence of a representative of Bechtel, signed that particular agreement. The agreement **958 states that it was understood that upon its being signed by Crawford and in writing accepted by Bechtel at San Francisco it would become a binding California agreement. The agreement shows that it was signed by Bechtel at San Francisco. It also states: 'The services of the applicant * * * are hereby accepted. * * *' Of course, the parties could not confer jurisdiction upon the Industrial Accident Commission by their agreement. The provision in the agreement to the effect that the Workmen's Compensation laws of California should be applicable if Crawford sustained an injury did not give the commission jurisdiction. That provision, however, may be considered in determining whether the parties intended that the contract should be one entered into in California. It was not necessary that the acceptance of Crawford's offer be written upon the same document upon which he made the offer. See Twining v. Thompson, 68 Cal.App.2d 104, 110, 156 P.2d 29. The document upon which the offer was accepted was in printed form identical with the document upon which the offer was made. An offer and acceptance under such circumstances may constitute a contract. See Twining v. Thompson, supra, 68 Cal.App.2d at page 110, 156 P.2d at pages 32, 33. It does not appear that Bechtel's acceptance in San Francisco was conditional upon Crawford's signing again in New York. The signature of Crawford, affixed in New York under the words 'Read and Accepted,' did not mean that he was then accepting an offer by Bechtel to employ him. His offer to become employed by Bechtel had been accepted theretofore in San Francisco. His additional signature under the words 'Read and Accepted' pertain to his approval of the dates fixed by Bechtel for commencement of salary and subsistence payments. In order to constitute a contract, the acceptance of an offer must be communicated to the offeror. '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, sec. 1582. Crawford's offer *908 did not prescribe any condition concerning the communication of its acceptance. 'Consent is deemed to be fully communicated between 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.' Civ.Code, sec. 1583. In the present case, after Crawford had sent to Bechtel at San Francisco his offer, his application for employment, his previous employment record, his list of references, reports of medical examinations, and various other documents relative to the proposed employment, Bechtel directed him by telegram to pick up airplane tickets, depart for New York, and see its representative there who would have the 'processing documents' (which included its acceptance). When the telegram was filed in the telegraph office in San Francisco it constituted in effect a communication of acceptance of Crawford's offer. Also the presentation in New York, by Bechtel's agent, of Bechtel's written acceptance was a communication of the acceptance. Those methods of communicating acceptance, adopted by Bechtel, were reasonable and usual modes of communication. The case of Commercial Casualty Ins. Co. v. Industrial Accident Comm., supra, 110 Cal.App.2d 83, 242 P.2d 13, is similar to the present case. Bechtel also was the employer therein and the employee was a resident of Georgia, who sustained a disability while performing services in Arabia. The 'Memorandum of Agreement' therein was the same printed form as the one involved here. The factual situation therein, with reference to jurisdiction, is practically the same as that involved here. A difference is that in that case communication of acceptance was by letter mailed from San Francisco to the applicant in Georgia. That difference, however, is not significant. It was said therein, 110 Cal.App.2d at page 88, 242 P.2d at page 17, 'The offer and the terms were definite and certain. They were accepted by International's duly authorized agent and the contract then was complete. On its return to Atlanta Porter signed 'Read and Accepted'-'Signature of Employee.' This fact does not change the situation **959 as the employer's acceptance at San Francisco was not conditional on Porter's again signing. This signature merely confined Porter's understanding of the date fixed for the commencement of his salary, even though it was contemplated that the formal Employment Agreement was to be later executed in Arabia.' The discussions therein relative to the question of jurisdiction are applicable here. The commission had jurisdiction to make the award herein.

Petitioners also contend that the commission's finding*909 that the injury was compensable is not sup-

ported by the evidence. The finding was that Mr. Crawford 'sustained injury arising out of and occurring in the course of his employment consisting of aggravation of a pre-existing coronary artery disease as a result of arduous living conditions during the period February 29, 1948 to and including June 5, 1949.' Petitioners argue that the heart condition occurred irrespective of, and unrelated to, the simple non-arduous duties of his clerical job. The referee's report states: 'From this record it would appear that although applicant did not have the exertion in his work that we usually connect with the bringing on of an anginal syndrome, that the other working conditions including the heat, inferior food which in turn caused bloody diarrhea, were sufficient to aggravate the existent heart condition.'

[6] It was in October, 1948, after applicant had been in Arabia about 8 months, that he, for the first time, noticed anything wrong with his physical condition. He could not eat. He had gas on his stomach and a form of dysentery. He was confined to his living quarters about 5 days. About 2 months later, he had a similar attack which lasted about 3 days; he had a more severe attack in May, 1949, which lasted about 3 weeks. On June 7, 1949, he left Arabia and returned to Oklahoma. While he was in Arabia, the temperature in the shade was as follows: in May, 110 to 118 degrees; in October, 105 to 110 degrees; in December, about 34 degrees. During a few days in September and March, when it rained, the atmospheric condition was very humid. Most of their food was sent from the United States. Sometimes the shipments were delayed about 6 weeks on account of the Palestine war. Sometimes when the food arrived, some of it was discarded because it had deteriorated. Sometimes rats chewed the quarters of beef which were kept in underground compartments. Ferrets were brought in to kill the rats. The company cautioned the employees to not eat outside the mess halls. It is not disputed that applicant had arteriosclerosis before he was employed by petitioners. Dr. Goen of Tulsa, Oklahoma, who examined applicant in July, 1949, reported that his diagnosis of applicant's condition 'is angina pectoris due to coronary artery sclerosis.' He also reported that 'It is highly inadvisable for you to attempt to return to Arabia or other overseas jobs because of the climate, heat and arduous living conditions. These ***910** factors undoubtedly have contributed toward your present illness.' Dr. Rosenburg of Beverly Hills, California, reported that the most likely diagnosis would seem to be an anginal syndrome secondary to coronary artery disease; that he does not feel that applicant's service overseas caused him to develop coronary artery disease; that once this condition does exist, however, strain on the heart, such as exertion, excitement, emotion, overeating, may cause the development of anginal pain which would not have occurred if the exertion had not occurred. The evidence was sufficient to support the commission's said finding that the injury was compensable.

The award is affirmed.

SHINN, Presiding Justice, and VALLEE, Justice (concurring).

We concur in the foregoing opinion and judgment. We feel that we are bound by the decision of the Supreme Court in Quong Ham Wah Co. v. Industrial Accident Comm., 184 Cal. 26, 192 P. 1021, holding invalid the requirement for California residence of an employee injured without the territorial limits of the state. In view of the criticism that opinion has received, see 12 A.L.R. 1207; ****960**Tedars v. Savannah River Veneer Co., 202 S.C. 363, 25 S.E.2d 235, 147 A.L.R. 914; Liggett & Meyers Tobacco Co. v. Goslin, 163 Md. 74, 160 A. 804, 807, and the further fact that for more than 30 years after the Quong Ham Wah decision the Legislature has retained the residential requirement, it seems to us that the point should be reexamined by the Supreme Court or the requirement should be deleted from the law by legislative action.

Cal.App. 2 Dist. 1953
Commercial Cas. Ins. Co. v. Industrial Acc. Commission
116 Cal.App.2d 901, 254 P.2d 954, 18 Cal. Comp. Cases 65

END OF DOCUMENT

EXHIBIT 6

Supreme Court of California,
In Bank.
COUNTY OF SAN DIEGO, Plaintiff and Respondent,
v.
John M. MILLER, Defendant and Appellant.
L.A. 30371.

March 6, 1975.

The owner of an unexercised option to purchase real property appealed from a ruling of the Superior Court, San Diego County, Charles W. Froehlich, J., denying compensation in a condemnation action involving the optioned property. The Supreme Court, Clark, J., disapproving of prior California decision, held that the owner of an unexercised option to purchase land possesses a property right which, if taken by government, is compensable to the extent that the award exceeds the optioned purchase price.

Reversed.

West Headnotes

[1] Eminent Domain 148 ⚿153

148 Eminent Domain
148II Compensation
148II(D) Persons Entitled and Payment
148k151 Persons Entitled
148k153 k. Vendor or Purchaser. Most Cited Cases
Where holder of unexercised option to purchase real property which was subject to proceedings in eminent domain attempted to exercise option after summons issued, attempt was of no material legal effect and optionee's interest in land continued to be solely that of holder of unexercised option. West's Ann.Code Civ.Proc. § 1249.

[2] Vendor and Purchaser 400 ⚿18(.5)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(.5) k. In General. Most Cited Cases
(Formerly 400k18)
An "option," when supported by consideration, is a contract by which an owner gives another the exclusive right to purchase his property for a stipulated price within a specified time; it is a right acquired by contract to accept or reject a present offer within a limited time in the future.

[3] Vendor and Purchaser 400 ⚿18(4)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(4) k. Revocation, Rescission, or Other Termination. Most Cited Cases
Option is irrevocable by optionor and may be exercised against his successor following his death

[4] Vendor and Purchaser 400 ⚿129(1)

400 Vendor and Purchaser
400IV Performance of Contract
400IV(A) Title and Estate of Vendor
400k129 Sufficiency of Title in General
400k129(1) k. In General. Most Cited Cases
When recorded, option to purchase real estate creates cloud on optionor's title for one year following expiration. West's Ann.Civ.Code, § 1213.5.

[5] Vendor and Purchaser 400 ⚿214(2)

400 Vendor and Purchaser
400V Rights and Liabilities of Parties
400V(B) As to Third Persons in General
400k214 Assignees of Contract or Bond for Title
400k214(2) k. Right to Assign Contract or Bond. Most Cited Cases
Unless agreement provides to contrary, option to purchase real estate is generally assignable.

[6] Internal Revenue 220 ⚿3183

220 Internal Revenue
220V Income Taxes
220V(G) Gains and Losses from Sales and Exchanges in General
220k3183 k. Options. Most Cited Cases
(Formerly 220k436)
For income tax purposes, assignment of option to purchase real estate is treated as sale of land by optionee. 26 U.S.C.A. (I.R.C.1954) § 1234(a).

[7] Vendor and Purchaser 400 ⚷57

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k57 k. Options. Most Cited Cases
Under traditional common-law concepts of property, option to purchase real estate creates in optionee no estate as such in land.

[8] Constitutional Law 92 ⚷4076

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4075 Eminent Domain
92k4076 k. In General. Most Cited Cases
(Formerly 92k280)
Property contract labelling process is not necessarily determinative in questions of due process compensation; instead, compensation issues should be decided on considerations of fairness and public policy. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 14.

[9] Eminent Domain 148 ⚷153

148 Eminent Domain
148II Compensation
148II(D) Persons Entitled and Payment
148k151 Persons Entitled
148k153 k. Vendor or Purchaser. Most Cited Cases
Owner of unexercised option to purchase land possesses property right which, if taken by government, is compensable under California Constitution; disapproving East Bay Municipal Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476; People v. Ocean Shore R. R. Co., 90 Cal.App.2d 464, 203 P.2d 579; Shaeffer v. State of California, 22 Cal.App.3d 1017, 99 Cal.Rptr. 861. West's Ann.Code Civ.Proc. § 1246; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 14.

[10] Eminent Domain 148 ⚷147

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k147 k. Limited Estates or Interests in Property. Most Cited Cases
Measure of damage to holder of unexercised option to land taken by eminent domain is excess, if any, of total award above optioned purchase price.
***686 ***492 **140** James E. Miller, San Francisco, Crake, Ward, Whittemore, Aguirre & Seidenwurm, San Diego, and Gideon Kanner, Beverly Hills, for defendant and appellant.

Robert G. Berrey, County Counsel, and William C. George, Deputy County Counsel, San Diego, for plaintiff and respondent.

CLARK, Justice.

We determine whether the owner of an unexercised option to purchase real property has a right to compensation when the optioned property is taken through the power of eminent domain.

[1] For valuable consideration, appellant acquired an option to purchase property. However, before the option had been exercised, respondent county filed a condemnation action to acquire the land. (Code Civ.Proc., s 1237 et seq.)[FN1] Appellant filed an answer in the action (***687**Code Civ.Proc., s 1246), alleging the existence of his option and seeking compensation to the extent the land's fair market value exceeds the option exercise price.

> FN1. After summons issued, appellant attempted to exercise his option, giving notice to the optionor. However, his attempt was of no material legal effect. Section 1249 of the Code of Civil Procedure provides in pertinent part: 'For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons . . ..' Because appellant's attempted exercise followed the issu-

> ance of summons in this action, his interest in the property must be deemed solely that of a holder of an unexercised option. (Compare, State v. New Jersey Zinc Co. (1963) 40 N.J. 560, 193 A.2d 244.)

Respondent's motion for summary judgment was granted on the ground appellant had no compensable interest in the property. In reaching this decision Judge Froehlich thoughtfully declared: '(I) am having a little trouble here because we all know that people who obtain options on property think they have an interest in the property. As a matter of fact, sometimes the acquisition of an option to acquire real property can be an alternative way of purchasing it.'

'I think an option should be a compensable interest in land, but that doesn't appear to be the law of the State . . ..

'Motion for summary judgment will be granted.'

I

Eminent domain is the power of government to take private property for public use. While it is a power inherent in the state as sovereign (Bauer v. County of Ventura (1955) 45 Cal.2d 276, 282, 289 P.2d 1), its exercise is not without restrictions in both the California and United States Constitutions. 'Private property may be taken or damaged for public use only when just compensation . . . has first been paid . . ..' (Cal.Const., art. I, s 19.) In its original form this prohibition was included in the sentence enumerating***493 **141 man's other personal rights.[FN2] Similarly, the Fourteenth Amendment to the United States Constitution mandates that the state shall not take property without due process of law, including the requirement the state make just compensation to the owner of property taken. (People ex rel. Dept. Pub. Wks. v. Lynbar, Inc. (1967) 253 Cal.App.2d 870, 880, 62 Cal.Rptr. 320.)

> FN2. 'No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.' (Cal.Const. of 1849, art. 1, s 8; see also Lynch v. Household Finance Corp. (1972) 405 U.S. 538, 552, 92 S.Ct. 1113, 31 L.Ed.2d 424.)

To the constitutionally entitled to compensation, the claimant customarily must show he owned a property interest taken by the state. ***688** Interests held to constitute property for condemnation compensation purposes include: Fee interests (Brick v. Cazaux (1937) 9 Cal.2d 549, 71 P.2d 588); Leaseholds (San Francisco Bay Area Rapid Transit Dist. v. McKeegan (1968) 265 Cal.App.2d 263, 71 Cal.Rptr. 204); Easements (People ex rel. Dept. Pub. Wks. v. L.A. County Flood, etc., Dist. (1967) 254 Cal.App.2d 470, 62 Cal.Rptr. 287); Rights-of-way (City of Long Beach v. Pacific Elec. Ry. Co. (1955) 44 Cal.2d 599, 283 P.2d 1036); and, most recently, Building restrictions (Southern California Edison Company v. Bourgerie (1973) 9 Cal.3d 169, 107 Cal.Rptr. 76, 507 P.2d 964).

[2] An option, when supported by consideration, is a contract by which an owner gives another the exclusive right to purchase his property for a stipulated price within a specified time. (Caras v. Parker (1957) 149 Cal.App.2d 621, 626, 309 P.2d 104.) It is a Right acquired by contract to accept or reject a present offer within a limited time in the future. (Brickell v. Atlas Assur. Co., Ltd. (1909) 10 Cal.App. 17, 22, 101 P. 16.)

[3][4][5][6] This right to purchase created by an option is a substantial one. It is irrevocable by the optionor (Adams v. Williams Resorts, Inc. (1962) 210 Cal.App.2d 456, 462, 26 Cal.Rptr. 656), and may be exercised against his successors following his death (Bard v. Kent (1942) 19 Cal.2d 449, 452, 122 P.2d 8, 139 A.L.R. 1032). Further, when recorded, the option creates a cloud on the optionor's title for one year following expiration. (Civ.Code, s 1213.5.) Finally, unless the agreement provides to the contrary, an option is generally assignable (Mott v. Cline (1927) 200 Cal. 434, 459, 253 P. 718; see generally, Cal. Real Estate Sales Transactions (Cont.Ed.Bar 1967) s 7.16, p. 263, and cases cited therein); and for tax purposes, the assignment is treated as a sale of the land by the optionee. (See, I.R.C., s 1234(a); and Fed. Tax Reg. s 1.1234-1.)

II

Historically, courts have taken the position that com-

pensation shall not be granted the holder of an unexercised option to purchase. Thus, in Taggarts Paper Co. v. State of New York (1919) 187 App.Div. 843, 847-849, 176 N.Y.S. 97, the court held that the holder of a bare option to purchase 'had no interest in the land itself and no claim against the state for its condemnation.' (Id. at p. 848, 176 N.Y.S. at p. 100; see also, Carroll v. City of Louisville (Ky.1942) 354 S.W.2d 291; Cravero v. Florida State Turnpike Authority (Fla.1956) 91 So.2d 312.) Similarly, in Cornell-Andrews Smelting Co. v. Boston & P.R.R. (1911) 209 Mass. 298, 95 N.E. 887, where the ***689** option to purchase was created in conjunction with the optionee's lease of the property, the court concluded the option created no compensable property interest in the lessee-optionee. '(A)lthough the insertion in a lease of an option giving to the lessee at his option a right to buy the fee adds to the value of the lessee's rights under the lease, it is no part of the lessee's estate in the land. It is a contract right *****494 **142** and nothing more . . ..' (Id. at pp. 306-307, 95 N.E. at p. 890.)

California Courts of Appeal have followed this early view denying compensation for an option to purchase. Thus, in East Bay Municipal Utility Dist. v. Kieffer (1929) 99 Cal.App. 240, 278 P. 476, it was stated that the holder of a mere option to purchase land being condemned was not entitled to any part of the award. (See also, People v. Ocean Shore R.R. Co. (1949) 90 Cal.App.2d 464, 203 P.2d 579.)[FN3] Similarly, dicta in Shaeffer v. State of California (1972) 22 Cal.App.3d 1017, 1021-1022, 99 Cal.Rptr. 861, suggests the lessee-optionee should be denied compensation.

> FN3. In Kieffer, the defendant was the owner of the condemned land and the holder of an unexercised option to purchase land adjacent to it. In addition to the award for the condemned land, defendant sought severance damages for the optioned property. The Court of Appeal concluded he was not entitled, as an optionee, to any part of the condemnation award when the optioned property was taken. (99 Cal.App. at p. 246, 278 P. 476.) This broad conclusion was followed with little discussion in People v. Ocean Shore R.R. Co., Supra, 90 Cal.App.2d 464, 469, 203 P.2d 579.

Despite this early view throughout the country denying compensation, substantial exceptions allowing compensation have been recognized in recent years. A majority of courts has departed from the rule enunciated in Cornell-Andrews Smelting Co., now awarding damages to the holder of an option to purchase when the option was created in conjunction with a leasehold estate. (See, e.g., Sholom, Inc. v. State Roads Commission (1967) 246 Md. 688, 229 A.2d 576; Nicholson v. Weaver (9th Cir. 1952) 194 F.2d 804; 23 Tracts of Land v. United States (6th Cir. 1949) 177 F.2d 967; Cullen & V. Co. v. Bender Co. (1930) 122 Ohio St. 82, 170 N.E. 633; cf.: City of Ashland v. Kittle (Ky.1961) 347 S.W.2d 522; Phillips Petroleum Co. v. City of Omaha (1960) 171 Neb. 457, 106 N.W.2d 727.)

Similarly, courts now allow compensation to the holder of an option to renew a lease. (See, e.g., Canterbury Realty Co. v. Ives (1966) 153 Conn. 377, 216 A.2d 426; Land Clearance for Redevelop. Corp. v. Doernhoefer (Mo.1965) 389 S.W.2d 780; United States v. Certain Land (M.D.Ala.1963) 214 F.Supp. 148; ***690**State v. Carlson (1958) 80 Ariz. 363, 321 P.2d 1025; United States v. 70.39 Acres of Land (S.D.Cal.1958) 164 F.Supp. 451.)

In at least one state the holder of a bare option to purchase land has been held entitled to share in the condemnation proceeds. (See Synes Appeal (In re Petition of Governor Mifflin Joint School Authority) (1960) 401 Pa. 387, 164 A.2d 221.)

Recent California cases have also demonstrated increased recognition of certain option holder's rights to compensation. Thus, in State of California v. Whitlow (1966) 243 Cal.App.2d 490, 52 Cal.Rptr. 336, it was held that compensation should be awarded to a lessee for his unexercised option to renew his lease (see also People ex rel. Dept. of Water Resources v. Gianni (1972) 29 Cal.App.3d 151, 105 Cal.Rptr. 248; San Francisco Bay Area Rapid Transit Dist. v. McKeegan, Supra, 265 Cal.App.2d 263, 272, 71 Cal.Rptr. 204); and in Cinmark Investment Co. v. Reichard (1966) 246 Cal.App.2d 498, 54 Cal.Rptr. 810, it was decided that when a portion of land subject to an unexercised option was condemned, the optionee was entitled to offset the award against the purchase price.

III

Important changes have occurred in eminent domain

law weakening the legal foundation of the Court of Appeal cases denying recovery to the optionee and eroding their authority. The decision in Kieffer-consistent with decisions of other jurisdictions at that time-turned on application of the so-called 'property interest-contractual right' test which in turn depended on common law concepts of property. (Humphries, Compensability in Eminent Domain of Lessee's Option to Purchase (1968) 25 Wash. & Lee L.Rev. 102; Waldman, ***495 **143 Rights of Optionee to Compensation in a Condemnation Proceeding When Option is Exercised After the Taking (1968) 14 Wayne L.Rev. 660, 666.) Because the Kieffer court concluded an option created no traditional property interest in the land-only contractual rights-it held there could be no compensation. (99 Cal.App. at pp. 246-247, 278 P. 476.)[FN4]

FN4. Similarly, the Ocean Shore decision depends on application of this property-contract labelling test: "The primary question here is the nature and extent of Middleton's interest in the property at the time of the taking by the state. If the agreements here constituted merely an option to purchase, then the exact date of the taking by the state becomes unimportant, as 'The holder of an option to purchase land being condemned has no interest in the land which will entitle him to compensation . . .'. (Citations.)" (90 Cal.App.2d at p. 469, 203 P.2d at p. 582.)

*691 [7] We do not dispute the technical correctness of the Kieffer court's conclusion that-applying traditional common law concepts of property-the option creates in the optionee no estate as such in the land. (Cf. Leslie v. Federal Finance Co., Inc. (1939) 14 Cal.2d 73, 80, 92 P.2d 906.) However, this test is no longer conclusive.

[8] Recent decisions, both of this and of the federal courts, have held the property-contract labelling process is not necessarily determinative in questions of due process compensation. Instead, compensation issues should be decided on considerations of fairness and public policy. 'The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness of property law.' (United States v. Fuller (1973) 409 U.S. 488, 490, 93 S.Ct. 801, 803, 35 L.Ed.2d 16.) '(T)he right to compensation is to be determined by whether the Condemnation has deprived the claimant of a valuable right rather than by whether . . . as it does from technical concepts his right can technically be called an 'estate' or 'interest' in the land.' (United States v. 53 1/4 Acres of Land (2d Cir. 1943) 139 F.2d 244, 247, italics added.)

In 1973, following the lead of the federal courts, this court expressly rejected the much criticized[FN5] property-contract labelling process, concluding that compensability depends instead on considerations of fairness and public policy. (Southern California Edison Company v. Bourgerie, Supra, 9 Cal.3d 169, 173-175, 107 Cal.Rptr. 76, 507 P.2d 964; cf. Dillon v. Legg (1968) 68 Cal.2d 728, 734, 69 Cal.Rptr. 72, 441 P.2d 912.)

FN5. See, e.g., Waldman, Supra, 14 Wayne L.Rev. 660, 666; Stoebuck, Condemnation of Rights the Condemnee Holds in Lands of Another (1970) 56 Iowa L.Rev. 293, 306.

We must therefore analyze the respective positions of the government, the optionor and the optionee in the condemnation setting to determine if appellant has been deprived of a property right compensable by article I, section 19.

CONDEMNOR

There is no discernible detriment to the condemnor-whatever our holding-because appellant seeks only that portion of the total award exceeding his optioned purchase price. Because this excess otherwise goes to the optionor, no increase in the total condemnation award will result from allocating compensation to the optionee. This decision will *692 affect only the apportionment of the eventual award for the total taking among those incurring loss. Similarly, while in some instances concern may be justified from fear the condemnees may increase the eventual condemnation award by collusive action, the limited scope of the relief sought in this case precludes such concern.

OPTIONOR

During the life of the option, the optionor can have no reasonable expectation of receiving a purchase price

exceeding that specified in the option. His sale of the option-freezing the maximum sale price of the land to the optioned price-has extinguished any such expectation.

***496 **144 OPTIONEE

The optionee, pursuant to his acquired right, clearly expects to realize any value in excess of the optioned price and often-as here-will expend considerable time and expense in furthering this expectation.[FN6] To deny the optionee participation in the condemnation award under such circumstances provides the optionor an inequitable and unjustifiable windfall. It strips the optionee of the expected benefit of his bargained right, while relieving the optionor of his bargained duty at a profit. A paramount purpose of eminent domain law is to do substantial justice. (United States v. Miller (1943) 317 U.S. 369, 375, 63 S.Ct. 276, 87 L.Ed. 336.) Because considerations of fairness with respect to the competing interests of the optionor and optionee fall heavily in favor of compensating the optionee, denying compensation to the optionee would defeat this purpose.

> FN6. Appellant alleges he has spent in excess of $30,000 seeking governmental approval of construction of a planned unit development on the optioned property.

Finally, considerations of public policy dictate the optionee share in the condemnation award. Although the option has long been recognized in the marketplace, increased complexity and severity of land use laws and procedures have substantially enhanced the importance of its use. The option has become a prevalent method for securing to a potential land buyer the ability to ultimately purchase the land-while affording him the opportunity to undertake and complete the often expensive and lengthy process of determining whether his intended use of the land will be permitted. (Cal. Real Estate Sales Transactions (Cont.Ed.Bar 1967) s 7.1, p. 253.) Such efforts by the optionee frequently increase the value of *693 the optioned property, although legal title remains in the optionor. Given this increased importance of the option in the marketplace, frustration of the process appears unwise.

CONCLUSION

[9][10] We conclude that the owner of an unexercised option to purchase land possesses a property right which-if taken by government-is compensable under article I, section 19. The measure of damage to the optionee shall be the excess-if any-of the total award above the optioned purchase price.

To the degree they are contrary to this opinion, the following cases are disapproved: East Bay Municipal Utility Dist. v. Kieffer, Supra, 99 Cal.App. 240, 278 P. 476; People v. Ocean Shore R.R. Co., Supra, 90 Cal.App.2d 464, 203 P.2d 579; Shaeffer v. State of California, Supra, 22 Cal.App.3d 1017, 99 Cal.Rptr. 861.

The judgment is reversed.

WRIGHT, C.J., and McCOMB, TOBRINER, MOSK, SULLIVAN and RICHARDSON, JJ., concur.
Cal. 1975.
County of San Diego v. Miller
13 Cal.3d 684, 532 P.2d 139, 119 Cal.Rptr. 491

END OF DOCUMENT

EXHIBIT 7

367 F.2d 182
(Cite as: 367 F.2d 182)

C

United States Court of Appeals Ninth Circuit.
Veigh CUMMINGS, Appellant,
v.
Larry R. BULLOCK et al., Appellees.
No. 20188.

Oct. 7, 1966.

Diversity action by optionee against optionors fro specific performance of a contract to sell land. The United States District Court for the Northern District of California, Southern Division, Sherrill Halbert, J., rendered judgment in favor of the optionors, and optionee appealed. The Court of Appeals, Duniway, Circuit Judge, held that under California and Wyoming law, where clear agreement was that specified sum would be paid as condition to optionor's execution of agreement of sale but optionee attempted to make execution of agreement and deed conditions precedent to payment of specified sum, optionee's delivery of letter of instructions, cashier's check, deed and agreement to bank as escrow agent was ineffective as exercise of option.

Affirmed.

West Headnotes

[1] Federal Courts 170B 412.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases
(Formerly 170Bk412, 106k359)
Where optionee's action for specific performance of contract to sell land was brought in California federal district court, law of California, including its choice of law rules, would be applicable.

[2] Property 315 6

315 Property
315k6 k. What Law Governs. Most Cited Cases
Under California law, questions affecting title to real property raised in optionee's action for specific performance of contract to sell land would be governed by law of Wyoming where property in question was located.

[3] Evidence 157 80(1)

157 Evidence
157II Presumptions
157k80 Laws of Other States
157k80(1) k. In General. Most Cited Cases
Where, under law of California relating to questions affecting title to real property, law of Wyoming, site of property in question, would be applicable in optionee's action for specific performance of contract to sell land, court would look to California law for guiding principles of decision, if law of Wyoming was not shown to differ from that of California.

[4] Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Under law of Wyoming, exercise of an option must be strictly complied with by optionee.

[5] Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Under California and Wyoming law, options are to be strictly construed, and where option is to be exercised within stated time and in particular manner, that must be done exactly as prescribed unless there is some intervening circumstance which law recognizes as one of the impossibilities which make failure of compliance an exception to the rule.

[6] Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Under California and Wyoming law, time is of the essence in exercising an option unless the agreement is expressly to the contrary.

[7] Landlord and Tenant 233 92(1)

233 Landlord and Tenant
233IV Terms for Years
233IV(E) Options to Purchase or Sell
233k92 Option to Purchase Premises
233k92(1) k. In General. Most Cited Cases
Under California and Wyoming law, where time was of the essence and lease with option to purchase did not provide for exercise of option by mail and optionee's letter to optionors was not received until after expiration date of option, letter to optionors was not an effective exercise of the option.

[8] Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Under California and Wyoming law, where agreement was that specified sum would be paid as condition to optioners' execution of agreement of sale, but optionee attempted to make execution of agreement and deed conditions precedent to payment of specified sum, optionee's delivery of letter of instructions, cashier's check, deed and agreement to bank as escrow agent was ineffective as exercise of option.

[9] Landlord and Tenant 233 92(1)

233 Landlord and Tenant
233IV Terms for Years
233IV(E) Options to Purchase or Sell
233k92 Option to Purchase Premises
233k92(1) k. In General. Most Cited Cases
Ambiguity in lease with option to purchase as to whether initial payment in exercise of option was to be paid at bank would be construed against optionee on ground that agreement was an option and that lease was prepared by optionee.

[10] Vendor and Purchaser 400 44

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k44 k. Evidence. Most Cited Cases
Finding that option had lapsed because optionee had failed to pay specified sum that was condition precedent to exercise of option within time provided by option was not clearly erroneous. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

[11] Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Under California and Wyoming law, an option, given for consideration, binds the optionor, but does not bind the optionee who may, if he chooses, walk away from the deal.
***183** John R. Saldine, Sacramento, Cal., Dwight L. King, Salt Lake City, Utah, for appellant.

Howard A. Potts, Sacramento, Cal., for appellees.

Before HAMLEY, HAMLIN and DUNIWAY, Circuit Judges.

DUNIWAY, Circuit Judge:

This is an action for specific performance of a contract to sell land. Jurisdiction rests on diversity of citizenship. The court found against the plaintiff and he appeals. We affirm. The sole question presented is whether the court erred in holding that plaintiff had failed to exercise an option to purchase contained in a lease of land located in Wyoming. A brief statement of the law may make its application to the facts more readily apparent.

[1][2][3] 1. The action was filed in the Northern District of California. The trial court was therefore required to look to the substantive law of California,[FN1] including its choice of law rules.[FN2] Under that law,

questions affecting the title to real property are determined by the law of the jurisdiction where the property is located, here Wyoming.[FN3] If the law of Wyoming is not shown to differ from that of California, then the court will look to California law for guiding principles of decision.[FN4] Here the plaintiff argued below that 'the law of Wyoming and California is the same with respect to the interpretation of the Contract and its performance,' and we do not understand him to take a different position on appeal.

FN1. Erie R.R. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

FN2. Klaxon Co. v. Stentor Elec. Mfg. Co., 1941, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477.

FN3. See Estate of Patmore, 1956, 141 Cal.App.2d 416, 424, 296 P.2d 863, 868.

FN4. Gagnon Co. v. Nevada Desert Inn, Inc., 1955, 45 Cal.2d 448, 454, 289 P.2d 466, 471; Aldabe v. Aldabe, 1962, 209 Cal.App.2d 453, 471, 26 Cal.Rptr. 208, 219.

[4][5][6] 2. Under the law of Wyoming, 'the exercise of an option must be strictly complied with,'[FN5] and 'options are to be strictly construed and where the option is to be exercised within a stated time and in a particular manner, that must be done exactly as prescribed unless, perhaps, there is some intervening circumstance which the law recognizes as one of the impossibilities which make failure of compliance an exception to the ***184** rule.'[FN6] The law of California is the same.[FN7] Time is of the essence in exercising an option, unless the agreement is expressly to the contrary.[FN8]

FN5. Covey v. Covey's Little America, Inc., Wyo., 1963, 378 P.2d 506, 513.

FN6. Id. at 378 P.2d 517, citing Callisch v. Farnham, 1948, 83 Cal.App.2d 427, 430, 188 P.2d 775, 777.

FN7. Pruitt v. Fontana, 1956, 143 Cal.App.2d 675, 685, 300 P.2d 371, 378; Hayward Lbr. & Inv. Co. v. Construction Prod. Corp., 1953, 117 Cal.App.2d 221, 229, 255 P.2d 473, 477; Callisch v. Farnham, supra n. 6.

FN8. Wightman v. Hall, 1923, 62 Cal.App. 632, 217 P. 580.

We now consider the application of these principles to the facts, which are not disputed.

On September 2, 1958, appellant Cummings and the Bullocks executed a 'Lease with Option to Purchase' in which the Bullocks, as lessors, leased the property to Cummings for a period of two years beginning on December 1, 1958. This document, all in typewritten form, provides in pertinent part:

'4. Lessee is granted on Option to Purchase the aforesaid described premises for the sum of $40,000.00, said option to be exercised on or before the 1st day of December, 1960 by payment to Lessors of the sum of $4,000.00 which said $4,000.00 shall be applied on the purchases price of $40.000.00. '5. If Lessee shall exercise his Option to Purchase the leased premises, then and in that event Lessors agree to sign an agreement of sale in accordance with the Uniform Real Estate Contract attached to this Lease and Option, which said Uniform Real Estate Contract shall embody the terms of sale which shall govern between lessors and lessees if and when lessee exercises his option to purchase.'

The attached 'Uniform Real Estate Contract,' a printed form particularized here by the insertion of typed matter (which is italicized in the following quote) and by strike-outs as indicated, provides in part:

'Sellers and Buyer agree that sellers will execute a Warranty Deed to the Whipple Ranch premises covering said real property and the personal property leased by sellers to buyer under the terms of that certain lease and option agreement dated September 2, 1958. The Warranty Deed to the real property shall be placed in escrow with the First National Bank of Evanston, Wyoming, to be delivered by said bank to buyer upon receipt in full by the Bank of the payments required under this contract. Bill of Sale to personal property to be delivered upon receipt of payment due December 1, 1960. '3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of FORTY THOUSAND AND

NO/100 Dollars ($40,000.00) payable at the First National Bank, Evanston, Wyoming strictly within the following times, to-wit: Four Thousand and no/100 ($4,000.00) cash, the receipt of which is hereby acknowledged, and the balance of $36,000.00 shall be paid as follows: $4,000.00 on the 1st day of December, 1961, and a like sum on the 1st day of December each year thereafter until the balance owing is paid in full.'

On July 27, 1960, Cummings' attorney advised the Bullocks by letter that he had 'received Notice from Mr. Veigh Cummings that he is planning on exercising his Option to Purchase * * * (and) As a consequence, Mr. Cummings is anxious to have Uniform Real Estate Contracts which were prepared and attached to the Lease with Option to Purchase, executed and placed in the Bank with the Warranty Deed at Evanston, Wyoming. As soon as the Warranty Deed and the executed Contract are in the hands of the Bank Mr. Cummings informs me that he will be able to pay the Option payment of $4000.00 which is due on the 1st day of December, 1960.' This letter was clearly ***185** not an exercise of the option. The Bullocks did not reply.

On November 28, 1960, the same attorney, on behalf of Cummings, sent a cashier's check payable to the Bullocks in the amount of $4,000, to First National Bank, Evanston, Wyoming, by mail, together with a warranty deed to the property, a copy of the lease, and a covering letter which instructed the bank to surrender the check to appellees only upon receipt of the deed and the contract, executed by the Bullocks. On the same date, he sent a letter to the Bullocks, advising them that the check was at the bank and would be released to them upon the bank's receipt of the completed documents. The letter to the Bullocks was mis-addressed. The Bullocks had moved, and had advised Cummings' attorney of their new address. The bank received its letter on November 30, but Mrs. Bullock received hers not earlier than December 2. She immediately forwarded it, without opening it, to appellees' Evanston attorney. Mr. Bullock, who was in Evanston during this period, did not go to the bank on November 30, or December 1, but after receipt of appellant's letter by his attorney on December 5 did go to the bank, accompanied by that attorney. At the bank he requested payment of the check; the bank refused to pay until such time as Bullock returned the completed documents demanded by the attorney's letter. Bullock, on the advice of his attorney, refused. This action followed.

[7] Because time is of the essence, because the agreement does not provide for the exercise of the option by mail, and because the letter to the Bullocks was not received by either of them until after December 1, that letter to them cannot be an effective exercise of the option.

[8] We are left with the question of whether the delivery of the other letter, the cashier's check, and the accompanying papers to the bank constituted an exercise of the option. The trial court correctly held that it did not. The option agreement is conditioned upon 'payment to the Lessors of the sum of $4,000.' It permits no conditions to the payment. On the contrary, it recites that 'if Lessee shall exercise the option, * * * then and in that event Lessors agree to sign an agreement of sale * * *.' Thus payment is made a condition precedent to the duty of the Bullocks to sign the agreement. Yet the letter makes signing the agreement, plus a warranty deed, not mentioned in the option, a condition to payment.

Cummings, however, says that a copy of the agreement was attached to the 'Lease With Option to Purchase,' that it is referred to in it, and that the agreement shows that Cummings, if he wished to exercise the option, was supposed to do just what he did. We think not, for two reasons. First, the agreement was not to be signed until the $4,000 was paid. It could not, therefore, be in effect before that time, and so it could not govern the manner in which, the place at which, or the person to whom the payment required by the option was to be made.

[9] Second, its terms are not inconsistent with those of the option. It does not require that the $4,000 be paid at the bank. It recites that receipt of the $4,000 is acknowledged. How? By signing the agreement. When is that to be done? After the money is received. Who acknowledges? The Bullocks, not the bank. Only the remaining $36,000 is to be paid at the bank. Insofar as the language '($40,000.00) payable at the First National Bank, Evanston, Wyoming,' may be claimed to create an ambiguity, it is to be construed against Cummings, both because we deal with an option and because the papers were prepared by Cummings' attorney. Moreover, the language immediately following makes it clear that only $36,000 is in fact to be paid at the Bank. And even if the $4,000 was

also to be paid 'at' the bank, nothing in the documents makes the Bullocks' right to be paid conditioned on their first signing the agreement.

***186** Further, nothing in the option or the agreement requires that a warranty deed be placed in escrow with the bank concurrently with or as a condition precedent to the payment of the $4,000. The option says nothing about a deed. The agreement says that 'sellers will execute a Warranty deed,' and that 'The Warranty deed * * * shall be placed in escrow.' This is action in futuro. The obligation relating to the deed is to arise only when the agreement becomes binding. Yet the letters of November 28 both conditioned payment upon execution by the Bullocks of both the agreement and the deed, and the delivery by them of both instruments to the Bank.

[10] Under substantially identical circumstances, the California courts have twice held that the optionee had failed to meet the conditions of the option, and that, the time for doing so having expired, the option had lapsed. [FN9] In these circumstances, we can hardly say that the trial judge's findings are 'clearly erroneous.'[FN10] or that there is substantial reason to doubt that his legal conclusions are correct.[FN11]

FN9. Fabares v. Benjamin, 1960, 180 Cal.App.2d 264, 4 Cal.Rptr. 359; Bourdieu v. Baker, 1935, 6 Cal.App.2d 150, 44 P.2d 587.

FN10. Rule 52(a), F.R.Civ.P.

FN11. Winston Research Corp. v. Minnesota Mining & Mfg. Co., 9 Cir., 1965, 350 F.2d 134, 142; Bellon v. Heinzig, 9 Cir., 1965, 347 F.2d 4, 6; Citrigno v. Williams, 9 Cir., 1958, 255 F.2d 675, 679; Bower v. Bower, 9 Cir., 1958, 255 F.2d 618, 619; People of State of California v. United States, 9 Cir., 1956, 235 F.2d 647, 654.

[11] The result may seem harsh, and the rules applied are technical. But the decisions cited make the reason clear. An option, given for consideration, binds the optionor, but it does not bind the optionee. He may, if he chooses, walk away from the deal. That is why the language of the option agreement is construed in favor of the optionor and why the courts require that the optionee comply strictly with whatever conditions the agreement imposes upon his right to exercise the option if he chooses to do so.

Affirmed.

C.A.Cal. 1966.
Cummings v. Bullock
367 F.2d 182

END OF DOCUMENT

EXHIBIT 8

109 Cal.App.3d 920, 167 Cal.Rptr. 538
(Cite as: 109 Cal.App.3d 920, 167 Cal.Rptr. 538)

C

Court of Appeal, Second District, Division 1, California.

Paul J. ERICH and Jean B. Erich, Plaintiffs and Appellants,

v.

Leon L. GRANOFF, dba Norma Investment Company, Defendant and Respondent.

Civ. 58480.

Aug. 29, 1980.

Lessees brought action for specific performance of option to purchase property. The Superior Court, Los Angeles County, Arthur Beldonado, J., entered judgment in favor of optionees but denied attorney fees and both parties appealed. The Court of Appeal, Dunn, J., held that: (1) lessees had adequately exercised option; (2) lessees were not required to tender payment prior to exercising the option; (3) lessees performed with reasonable diligence under the contract itself; (4) lessees were entitled to rents and profits from the date they were entitled to conveyance; and (5) lessees were entitled, under the terms of the option contract, to attorney fees.

Affirmed as modified.

West Headnotes

[1] Vendor and Purchaser 400 ⚿18(.5)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(.5) k. In General. Most Cited Cases
(Formerly 400k18)
"Option" is a continuing, irrevocable offer to sell property to an optionee within the time constraints of the option contract and at the price set forth therein.

[2] Vendor and Purchaser 400 ⚿18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Option is transformed into contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with terms of the option and within the time span of the option contract.

[3] Vendor and Purchaser 400 ⚿18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Where option contract was silent as to the time and mode of payment of the purchase price, and there was no provision to the effect that payment of purchase price would be prior to or coincident with the exercise of the option, the contract could not be reasonably construed to establish that it was the intent of parties to require the tender of the purchase price to the seller had to precede the exercise of the option.

[4] Vendor and Purchaser 400 ⚿57

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k57 k. Options. Most Cited Cases
Payment of the purchase price in an option contract is, unless otherwise stated in contract, an obligation to be performed by the optionee in his performance of the conditions of the bilateral contract or purchase and sale which is formed upon the exercise of the option.

[5] Contracts 95 ⚿16.5

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k16.5 k. Options; Rights of First Refusal. Most Cited Cases
(Formerly 95k16)
Option contracts are subject to the statutory provision on acceptance of an offer, so that option was effectively exercised at the time that the acceptance was deposited in the mail. West's Ann.Civ.Code, § 1583.

[6] Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Communication to optionor in writing of optionee's election to accept the offer was sufficient to create a bilateral binding contract of sale between the parties.

[7] Vendor and Purchaser 400 18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases
Where optionees gave verbal notice in June of their intent to exercise but did not receive from the seller the exact amount of the purchase price due under the formulations set forth in the option until September, where that sum was available upon demand to the optionees in late September or early October, and where demand documents mailed to optionor in October were returned to escrow company unsigned, optionees acted as diligently as was reasonably possible under the circumstances and were not precluded from exercising the option by their failure to perform the contract of sale within a reasonable time.

[8] Contracts 95 315

95 Contracts
95V Performance or Breach
95k315 k. Breach by Failure of Performance. Most Cited Cases
Unjustified failure of an obligor to perform a contract constitutes a breach of that contract.

[9] Contracts 95 303(4)

95 Contracts
95V Performance or Breach
95k303 Excuses for Nonperformance or Defects
95k303(4) k. Performance Prevented by Other Party or Third Person. Most Cited Cases
Hindrance of the other party's performance operates to excuse that party's nonperformance of contract.

[10] Damages 115 124(1)

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k124 Prevention or Obstruction of Performance
115k124(1) k. In General. Most Cited Cases
Where one party who is willing and able to perform a contract is prevented from doing so by the other party, the primary measure of damages is the amount of the obligee's loss; that loss may consist of profits which he would have derived from performance or reasonable outlay or expenditures toward performance.

[11] Specific Performance 358 129

358 Specific Performance
358IV Proceedings and Relief
358k125 Relief Awarded
358k129 k. Recovery of Damages in Addition to Specific Performance. Most Cited Cases
Lessees who had been entitled to specific performance of contract for sale under option were entitled to judgment for the rent paid after the end of the option period and a judgment for rents and profits from the date they were entitled to conveyance of the property; they were also entitled to recover the cost of an undertaking to obtain a stay of execution in unlawful detainer action.

[12] Specific Performance 358 134

358 Specific Performance
358IV Proceedings and Relief
358k134 k. Costs. Most Cited Cases
Optionees who were required to engage the services of counsel in order to enforce the rights under the contract and pursue the matter to trial, where they prevailed, were entitled to attorney fees as provided for in the option contract.
***923 **540** Daniel J. Bassett, West Covina, for plaintiffs and appellants.

Frieman, Rosenfeld & Zimmerman and Jeffrey F. Gersh, Beverly Hills, for defendant and respondent.

109 Cal.App.3d 920, 167 Cal.Rptr. 538
(Cite as: 109 Cal.App.3d 920, 167 Cal.Rptr. 538)

DUNN, Associate Justice.[FN*]

FN* Assigned by the Chairperson of the Judicial Council.

I

In January 1978, Paul and Jean Erich filed this action for specific performance of an option to purchase certain residential property located*924 in the City of San Dimas, against Leon L. Granoff, doing business as Norma Investment Company. On March 14, 1979, the superior court granted to the Erichs an interlocutory decree of specific performance ordering that respondent convey to appellants the real property and they, in turn, pay the specified purchase price. The court reserved jurisdiction regarding attorney fees, costs and damages.

Findings of fact and conclusions of law by the court and its final judgment were entered on September 20, 1979. The court ruled that "neither side is entitled to attorney fees, court costs, or damages." Appellants appeal from that portion of the judgment in favor of respondent providing that appellants are not entitled to attorney fees, costs or damages. Respondent and cross-appellant Granoff appeals from that portion of the judgment granting specific performance.

II

Appellants contend that the trial court erred in failing to award them costs, attorney fees and certain itemized expenses because the lease contract provides for award of these items to the injured party. Appellants contend the award should have been made as a matter of equity in order to put the parties in as nearly the same position as possible had the respondent timely performed under the contract.

The respondents contends first that the option was never properly exercised because the letter of June 24, 1977, was an insufficient exercise of the option. Second, the purchaser could perform the option terms only by tendering the option price prior to the expiration of the option. Respondent contends this condition was not met.

III

Jean Erich was formerly known as Jean Vangelist and was married to William S. Vangelist. In November 1967, Jean and William entered into a written lease agreement with Leon L. Granoff, doing business as Norma Investment Company. The lease agreement contained a ten year option to purchase a single family residence at 419 Rennell Avenue, in the City of San Dimas. The lease provided that the lessees had the right to assign the lease and the option to purchase. In the event of the exercise of the option to purchase the price was to be $13,000. adjusted by the following formula set forth in the lease:

"Should the Lessee, during his full and faithful performance of this Lease desire to purchase the *925 premises described herein, he has the option to purchase said premises for the sum of

"THIRTEEN THOUSAND ($13,000.00) DOLLARS in accordance with the formula described hereinafter.

". . .

"OPTION PRICE : The price to be paid for the property in the amount designated**541 on the first page of this lease as the Option Price plus accrued interest from the date hereof at the rate of 7.2% per annum together with such amounts as the lessor may be required to pay for taxes, insurance, assessments and/or for the care and/or improvement of the property . . . reduced by such amounts as the Lessee may have paid for rent and Security Deposit.

"In determining said Option Price, each payment of rent shall be presumed to apply, first to the accrued interest due from the date of the previous rental payment, second to the reimbursement, for any expenditures made as provided for herein. . . . and the balance shall be applied to the Option Price."

In August 1973, Jean Vangelist remarried and became Jean Erich. On June 24, 1977, Jean Erich and William Vangelist gave the defendant written notice by ordinary mail of their election to exercise the option to purchase the premises. No written reply to this letter was received. Jean Erich, thereupon, in June 1977, telephoned Mr. Granoff and requested the exact price of purchase. He informed her he could not state an exact price, that it was approximately $15,000 and he

would inform the escrow agent of the precise amount after an escrow was opened. Mrs. Erich informed Mr. Granoff she had remarried and was told he would sell only to Mr. & Mrs. Vangelist.

Mrs. Erich contacted an attorney who, in turn, contacted Mr. Granoff regarding the sale and purchase of the residence. During several conversations with the attorney over approximately a six week period, Mr. Granoff indicated he would deal only with Mr. & Mrs. Vangelist. By letter dated August 22, 1977, Granoff informed the attorney that the purchase price was $15,000 without stating how that figure was arrived at. The attorney, by letter of August 3, 1977, demanded an itemization of the computed purchase price; Mr. Granoff complied on September 6, 1977.

*926 Mrs. Erich assigned one-half of her interest in the lease to her husband, Paul J. Erich, and they subsequently applied for and in September 1977 obtained loan commitment approvals from Standard Mortgage Company and Occidental Mortgage Company. The sum of $13,000 was available to them upon their demand. Thereafter, the Erichs commenced an escrow, No. 37963-C, at t he South Hills Escrow Corporation. The escrow was scheduled for closing within 30 days, on or before November 6, 1977. Mr. Granoff did not become a party to the escrow advising by letter dated October 11, 1977, that he would not be a party. The letter indicated that title to the residence would be conveyed provided the purchase price was tendered on or before November 11, 1977, and Mr. Granoff returned, unsigned, the escrow demand documents which had been sent to him.

Mr. Granoff, a licensed real estate broker, was never notified by the Erichs that any loan had been approved. On or about November 11, 1977, Mr. Granoff advised the appellants that their ten year lease had terminated and they were on a month to month tenancy, and he raised their rent from $120 to $200 per month. The Erichs did not pay the rent and Mr. Granoff commenced an action in unlawful detainer, Pomona Municipal Court case No. 30388, obtaining on January 12, 1978, a judgment for possession of the premises and past due rent. The Erichs commenced an appeal. On January 16, 1978, the Pomona Court granted a stay of execution on the unlawful detainer judgment pending appeal and upon the condition that rent of $120 monthly be paid and a $5,000 undertaking be posted. These conditions were met by the Erichs.

The within action on March 14, 1979, went to trial resulting in an Interlocutory Judgment of Specific Performance ordering that Mr. Granoff convey the real property to the Erichs and that they pay the purchase price.

The lease contract of November 1967, also contained a clause entitled "Enforcement Provision" which reads as follows:

> "ENFORCEMENT PROVISION : Should it become necessary for the Lessee or the Lessor to institute any action or procedure against the other for the purpose of enforcing any of the rights provided**542 for herein, it is agreed by and between the parties hereto that the injured party shall be reimbursed by the other party for all costs sustained incident to said enforcement of rights. Said reimbursement of costs shall include, but not be limited to, investigative, court and attorney costs."

*927 The trial court, after considering points and authorities on the issue of attorney fees and costs made findings that:

> "17. Defendant was entitled to attorney fees in the unlawful detainer action and the subsequent appeal of that action, and likewise plaintiffs could be entitled to attorney fees in this action; however, to balance the equities neither side is awarded attorney fees.
>
> "18. Plaintiffs' counsel is not entitled to fees for services rendered as a broker
>
> "19. The fees requested by plaintiffs' counsel in excess of $15,000.00 are unreasonable in view of the nature of the action, the complexity of the lawsuit, and the amount at stake for both parties.
>
> "20. The attorney fee and court costs provision in the lease option agreement does not apply on these facts to the specific performance action. It was beyond the contemplation of the parties, whereas here the request exceeds the amount in controversy."

and ordered that neither side was entitled to attorney fees, court costs, or damages.

The attorney for the Erichs had submitted to the court a request for costs expended and for attorney fees in the sum of $15,006.25 based upon 88 hours for services rendered in the within action and 401/4 hours in the municipal court action, billed at the rate of seventy-five dollars per hour and two-hundred fifty dollars per court appearance. The Erichs, further, requested compensation for expenses and for the differential interest rates between November 1977, the date they allege the conveyance should have occurred, and April 1979, the date of the conveyance.

IV

[1][2] Respondent's two pronged assertion that the option was never exercised by the appellants and that even assuming it was, the terms of the option were not timely met, has no merit. This position fails to distinguish between an option and the exercise of an option which results in a contract of purchase and sale. An option may be viewed as a continuing, irrevocable offer to sell property to an optionee within the time constraints of the option contract and at the price set forth therein. It is, in other words, a unilateral contract under which the optionee, for consideration he has given, receives from the optionor the right and the power to create a contract of purchase during the life of the option. "An option is a contract, made for consideration, *928 to keep an offer open for a prescribed period" (1 Witkin, Summary of Calif.Law, 8th ed., Contracts, Œ 216). An option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract. (Cates v. McNeil (1915) 169 Cal. 697, 147 P. 944.)

A contract must be so construed to, as nearly as is possible ascertain and give effect to the intention which the parties had at the time the contract was entered into. (Cal.Civ.Code § 1636.) [FN1]

FN1. "CONTRACTS, HOW TO BE INTERPRETED. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (See also, Healy Tibbits Const. Co. v. Employers' Surplus Lines Ins. Co. (1977) 72 Cal.App.3d 741, 140 Cal.Rptr. 375; and Advance Med. Diag. Lab. v. L. A. City (1976) 58 Cal.App.3d 263, 129 Cal.Rptr. 723.)

[3][4] In this regard in the instant case the option contract is silent as to the time and mode of payment of the purchase price. There is no provision to the effect that the payment of the purchase price shall be prior to or coincident with the exercise of the option. Accordingly, the contract cannot be reasonably construed to establish that it was the intention of the parties to require that the tender of the purchase price to the seller had to precede the exercise of the option. Indeed, it is generally recognized **543 that payment of the purchase price in an option contract is, unless otherwise stated in the contract, an obligation to be performed by the optionee in his performance of the conditions of the bilateral contract of purchase and sale which is formed upon the exercise of the option. Cates v. McNeil (1915) 169 Cal. 697, 147 P. 944, is factually strikingly similar to the instant case and is illustrative of this rule. In Cates, defendant's lease granted to them a ten year option to purchase certain real property for the price of six-hundred dollars per acre. On the day prior to the expiration of the option the optionees gave notice to the optionor that they were exercising the option and were ready and willing to consummate the purchase. The sellers, as in the instant case, insisted that payment of the purchase price simultaneous with the notice of exercise of the option was an essential prerequisite to constitute an effective acceptance of the option offer. The court disagreed holding that since the clause was silent on the issue of payment of price the optionees had acquired an irrevocable right to purchase the property and the only act necessary to establish a binding contract was the giving of notice of acceptance.*929 Payment was only an essential condition to be met before the optionees would be entitled to a conveyance.[FN2]

FN2. See, Wilson v. Ward (1957) 155 Cal.App.2d 390, 317 P.2d 1018, for the rule where the contract is not silent on price. In Wilson, the option agreement expressly stated that the purchase price was to be paid on or before a specified date. The court held that this was an express condition and because not met expressly as required by the agreement the option was not exercised. (See also, Riverside Fence Co. v. Novak (1969) 273 Cal.App.2d 656, 78 Cal.Rptr. 536.)

[5][6] In the instant case the Erichs exercised their option by communicating to Granoff in writing their election to accept his offer. [FN3] Such notice was sufficient, we hold, to create a binding bilateral contract of sale between the parties. After Mr. Granoff received the notice he had only to calculate the exact sum of money due him as prescribed by the formula stipulated to in the option contract. The tender of the purchase price not being a condition precedent of the option contract and there being no other condition precedent specified in the agreement the exercise of the option validly occurred.

> FN3. Option contracts are subject to the statutory provision on acceptance of an offer, hence the option was effectively exercised at the time the acceptance was deposited in the mail. (See, Cal.Civ.Code, s 1583; and, Palo Alto Town & Country Village, Inc. v. BBIC Co. (1974) 11 Cal.3d 494, 113 Cal.Rptr. 705, and In re Crossman's Estate (1965) 231 Cal.App.2d 370, 41 Cal.Rptr. 800.)

V

[7] Respondents' second contention that the Erichs did not, under the contract of sale perform within a reasonable time after exercise of the option, is not well taken. The record reflects that any delay caused was not because of dilatory tactics by the Erichs. They gave verbal notice in June and did not receive from the seller the exact amount of the purchase price due, $13,106.77, until approximately September 7, 1977. In late September or early October, the record reflects, that sum was available upon demand from both Occidental Mortgage Company and Standard Mortgage Company. The demand documents were mailed to Norma Investment Company on October 7, 1977, and returned to the escrow company unsigned. In view of this sequence of events the optionees did act as diligently as was reasonably possible under the circumstances.

That part of the judgment of the trial court ordering specific performance is, accordingly, affirmed.

*930 VI

[8][9][10][11] The unjustified failure of an obligor to perform a contract constitutes a breach of that contract. (See Rest., Contracts, § 312; and see Witkin, 1 Summ.Calif.Law (8th Ed.) § 616, p. 525.) Moreover, hindrance of the other party's performance **544 operates to excuse that party's nonperformance. [FN4] And where one party who is willing and able to perform the contract is prevented from so doing by the other party the primary measure of damages is the amount of the obligee's loss; that loss may consist of profits which he would have derived from performance or, reasonable outlay or expenditures toward performance. (Navarro v. Jeffries (1960) 181 Cal.App.2d 454, 5 Cal.Rptr. 435; see also, Cal.Civ.Code, § 3300; Christensen v. Slawter (1959) 173 Cal.App.2d 325, 334, 343 P.2d 341.) These legal principles are applicable to the case at hand. We hold that the Erichs, as parties entitled to specific performance are entitled to judgment for the rent paid to Mr. Granoff from the end of the option period, November 11, 1977, to March 10, 1979, and to judgment for rents and profits from the date they were entitled to a conveyance. They submitted their notice of exercise of the option on June 24, 1977, and in September 1977, were in a posture to deliver the purchase price. During this period Mr. Granoff did not meet his obligation of performance. Had he timely performed by proceeding with the transaction promptly in good faith [FN5] the same would have been consumated and no rent obligation would have arisen. Similarly, there would have been no undertaking required, the cost of which was five hundred dollars, to stay the unlawful detainer action instituted by Mr. Granoff in the Pomona Municipal Court. Accordingly, reimbursement to the Erichs of the total of two-thousand four hundred and twenty dollars which they paid and interest thereon [FN6] is proper in view of the principle that performance is related back to the performance date of the contract, with the obligees *931 being entitled to the rents, issues and profits which flow from the property, albeit in the form of reasonable rental value from obligees themselves. (See, Lifton v. Harshman (1949) 90 Cal.App.2d 180, 183, 202 P.2d 858; Ellis v. Mihelis (1963) 60 Cal.2d 206, 219, 32 Cal.Rptr. 415, 384 P.2d 7; Re v. Wells Fargo Bank, 269 Cal.App.2d 783, 75 Cal.Rptr. 367.)

> FN4. California Civil Code section 1511 provides:
>
> "The want of performance of an obligation, or of an offer of performance, in whole or

in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

"1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse . . ." and see (Beverage v. Canton Placer Min. Co. (1955) 43 Cal.2d 694, 278 P.2d 694; Carson v. Brown Motel Investments, Inc. (1978) 87 Cal.App.3d 422, 151 Cal.Rptr. 385.)

FN5. Refusal to perform without good cause is sufficient to constitute lack of good faith performance. (Shaw v. Union Escrow, etc. Co. (1921) 53 Cal.App. 600, 200 P. 25; Brandolino v. Lindsay (1969) 269 Cal.App.2d 319, 325, 75 Cal.Rptr. 56; Kahn v. Lischner (1954) 128 Cal.App.2d 480, 490, 275 P.2d 539.)

FN6. See California Civil Code section 3287 and see Utemark v. Samuel (1953) 118 Cal.App.2d 313, 257 P.2d 656.

VII

[12] Appellant's contention that they are entitled to an award of attorney fees and costs has merit. It is the general rule that attorney fees are not recoverable by a prevailing party in an action either at law or in equity unless expressly provided for by contract. (California Code Civ.Proc., s 1021; Gates v. Green, 151 Cal. 65, 90 P. 189; Los Angeles Trust & Sav. Bank v. Ward, 197 Cal. 103, 239 P. 847; Stockton v. Palermo, infra, p. 355.) In the instant case the contract the parties entered into specifically provided for the payment of attorney fees under certain conditions. In our view the appellants have met these conditions. Appellants are the prevailing parties in the instant action for specific performance and, construing the language of the contract in the "ordinary and popular sense" Stockton Theatres, Inc. v. Palermo, 124 Cal.App.2d 353, 357, 268 P.2d 799, they are the "injured parties". An award of attorney fees is a matter within the sound discretion of the trial court and absent a manifest abuse of discretion the determination of the trial court will not be disturbed. (Shannon v. Northern Counties' Title Insur. Co. (1969) 270 Cal.App.2d 686, 76 Cal.Rptr. 7; Walters v. Marler (1978) 83 Cal.App.3d 1, 147 Cal.Rptr. 655; Clejan v. Reisman (1970) 5 Cal.App.3d 224, 84 Cal.Rptr. 897.) The record reflects that in this case the Erichs were ****545** required to engage the services of counsel in order to enforce their rights under the contract and to pursue the matter to trial where they prevailed. Since the contract provided for the payment of reasonable attorney fees, such fees should have been awarded. Major factors the court may consider in determining, in its sound discretion, what constitutes reasonable compensation for an attorney: ". . . the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the type of work demanded (citation); the intricacies and importance of the litigation, the labor and the necessity for skilled legal training ability in trying the cause, and the time consumed."***932** (Berry v. Chaplin (1946) 74 Cal.App.2d 669, 679, 169 P.2d 453; and see Hurst v. Hurst (1964) 227 Cal.App.2d 859, 39 Cal.Rptr. 162.) Considering these factors we hold that the failure to order an award of attorney fees was not an exercise of discriminating judgment and constituted an abuse of discretion. We find that the trial judge should have rendered an order for reasonable attorney fees to compensate appellant's attorney for services rendered to the appellants in preparation for and trial of the instant action and for the costs expended by the Erichs in the prosecution of this cause.

VIII

The ruling herein being dispositive of appellant's contentions regarding the inadequacy of the findings, they are not discussed. The contentions of appellants Erich regarding other miscellaneous damages such as increased mortgage interest rates, are rejected as being without merit.

The judgment is modified as follows: On page 2 of the Judgment, lines 17-18, are deleted in their entirety. Substituted therefor the following paragraph is added: "3. Plaintiffs shall recover from defendant as damages the sum of $2,420 and interest of $237.00 a total sum of $2,657; defendant shall not recover any damages from plaintiffs." Paragraph 4, line 19, is modified by deleting therefrom the words "Each party" appearing at the beginning of said paragraph before the word

"shall", and substituting therefor the word "Defendant".

This cause is remanded and the trial judge is directed to calculate and order the payment by respondent of the costs and reasonable attorney fees for appellant's attorney consistent with the remarks set forth in this opinion. In all other respects the judgment is affirmed. It is further ordered that defendants shall pay to plaintiffs as and for attorney fees on this appeal the sum of one-thousand five hundred dollars ($1,500) and their costs.

LILLIE, Acting P. J., and L. THAXTON HANSON, J., concur.
Cal.App., 1980.
Erich v. Granoff
109 Cal.App.3d 920, 167 Cal.Rptr. 538

END OF DOCUMENT

EXHIBIT 9

HAYWARD LUMBER AND INVESTMENT COMPANY (a Corporation), Respondent,
v.
CONSTRUCTION PRODUCTS CORPORATION (a Corporation), Appellant.
Civ. No. 18811.

District Court of Appeal, Second District, Division 2, California.
Apr. 7, 1953.

HEADNOTES

(1) Landlord and Tenant § 94--Options to Renew--Exercise of Option.
A finding of court that lessee's letter reading "We are continuing our lease in accordance with our lease contract for the year 1951 for the factory and the machinery and tools" was an attempt to renew the lease of personalty solely for one year and was "ineffectual" or an insufficient exercise of the option contained therein, which provided for a renewal on a two-year basis, is substantially supported by lessee's follow-up letter, in which he refers to the earlier letter as an exercise of "our option for the factory and machinery and tools for the coming year of 1951."

(2) Contracts § 25--Consent--Sufficiency of Acceptance.
An offer must be accepted in the terms in which it is made, and an alteration of such terms is tantamount to rejection of the original offer and the making of a counteroffer.
See **Cal.Jur.**, Contracts, § 25; **Am.Jur.**, Contracts, § 37 et seq.
(3) Landlord and Tenant § 94(1)--Options to Renew--Exercise of Option.
A notice of intention to renew in order to be binding on the lessor must state an intention to renew on such terms and for such period as are specified in the lease.

(4) Landlord and Tenant § 94(1)--Options to Renew--Exercise of Option.
To avail himself of an option of renewal given by a lease, a tenant must apprise the lessor in unequivocal terms of his unqualified intention to exercise his option in the precise terms permitted by the lease.
See **Cal.Jur.**, Landlord and Tenant, § 69; **Am.Jur.**, Landlord and Tenant, § 979.
(5) Bailments § 16--Duration and Termination--Holding Over.
The hold-over doctrine of real estate leases does not apply to the hiring of personalty, and the mere act of retaining possession of personal property will not imply a renewal of a contract in the absence of an agreement thereto by the parties.
See **Am.Jur.**, Bailments, § 334.
(6) Pleading § 124--Answer--Equitable Defenses.
A defendant wishing to raise an equitable defense must specifically plead it in the answer with some particularity.

(7) Forfeitures § 17--Relief Under Statute.
Civ. Code, § 3275, presupposes that the party seeking relief from a forfeiture is in default, and to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application.

(8) Contracts § 17--Options--Nature.
An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts on the terms and within the time designated in the option.

(9) Contracts § 17--Options--Judicial Attitude.
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.

(10) Landlord and Tenant § 90--Options to Renew--Forfeiture of Right.
Equitable principle of relief against a forfeiture under Civ. Code, § 3275, may not be invoked by a lessee who, by varying the terms of an option in his purported renewal, in effect rejected the option, which became extinguished with expiration of the term of the lease.

(11) Judgments § 367--Res Judicata--Action on Different Cause or Claim.
One of the principal requirements for application of doctrine of res judicata is that the issue decided in the previous action must be identical with the one pre-

sented in the present suit.

(12) Judgments § 399--Res Judicata--Matters not Adjudged.
Only such matters are adjudicated in a prior judgment which appear on its face to have been adjudicated or which were necessarily included therein, and when it affirmatively appears that an issue was not determined by the judgment, it is not res judicata on that issue.

(13) Judgments § 397--Res Judicata--Matters Which Might Have Been Litigated.
Res judicata rule may not be invoked merely because the rights, claims or demands arise out of a subject matter involved in a prior litigation, so long as they constitute separate or distinct causes of action which were not placed in issue in the former case.

(14) Judgments § 400--Res Judicata--Matters not in Issue.
A defendant in a claim and delivery action may not invoke the principle of res judicata where the former action was concerned solely with real estate, and the judgment settled the issue of defendant's right to renew its lease of the realty and the fact that it had given proper notice of renewal for a one- year period, while in the present proceeding the issue related to whether defendant had exercised its option to renew its lease as to the personalty, which was contained in a separate clause of the agreement between the parties and was not involved in the former action.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Wilbur C. Curtis, Judge. Affirmed.

Action in claim and delivery. Judgment for plaintiff affirmed.

COUNSEL

Larwill & Wolfe, Michael F. Shannon and Thomas A. Wood for Appellant.

Philip T. Lyons for Respondent.

FOX, J.

Defendant appeals from a judgment awarding plaintiff the possession of certain leased personal property (or its value) and for damages for the detention thereof.

Plaintiff was conducting a business under the fictitious firm name of Hayward-Hallett Equipment Company, which in 1948 had been losing substantial sums of money. In the latter part of that year, plaintiff and defendant entered into a contract whereby defendant agreed to take over and liquidate an inventory of parts used in the construction of hoists and compressors which plaintiff utilized in its business. It was agreed that to accomplish this liquidation, defendant would continue the business of Hayward-Hallett Equipment Company by manufacturing and selling compressors and hoists fabricated from the parts in the inventory. To effectuate this purpose, the agreement provided that plaintiff lease to defendant the real and personal property used in the operations of the Hayward-Hallett Equipment Company. The personal property, which is the subject of this action, consisted of machinery and specialized tools requisite to the manufacture of hoists and compressors.

On July 12, 1949, the parties entered into a new agreement containing leases on the aforementioned real and personal property which was in substitution of the earlier contract. This agreement provided that the lease of the real property was to be for a term of two years, from January 1, 1949, to December 31, 1950, defendant having an option to renew the lease "from year to year from and after December 31, 1950, for an additional five year period, to December 31, 1955." The *224 agreement further specified that the leases of the special tooling, machine tools and other tools and supplies was "for the period from January 1, 1949, to December 31, 1950," and granted defendant an option to renew these leases "*for a period of two years* from January 1, 1951, to December 31, 1952." (Italics added.) The agreement set forth that in the event of the exercise of the renewal options, the monthly rentals would be fixed by agreement of the parties, or by arbitration upon their failure to arrive at a mutual agreement. The agreement also made provision for defendant to sell an enumerated list of hoist and compressor parts belonging to plaintiff.

Defendant took possession of the premises and machinery and tools pursuant to the leasing agreement and by the middle of 1950 had liquidated the major portion of the inventory parts through its manufacture

and sale of hoists and compressors. With the advent of military operations in Korea, the properties occupied and used by defendant under its leases were enhanced in value. In July of 1950, plaintiff suggested it would like to "resume possession of the leased properties." Through its president, Frank W. Wells, defendant indicated it might move out if plaintiff sold it certain equipment. Accordingly, plaintiff gave defendant an option to buy this equipment for $10,000 on condition that defendant relinquished its lease of the premises. In August, 1950, defendant informed plaintiff of its inability to accept this option because of the unavailability of other machinery it would need to continue in business. Mr. Wells testified he had never told plaintiff he was going to leave the premises and the machine tools at the expiration of the year 1950. On October 31, 1950, plaintiff served on defendant a 30-day notice of cancellation of the agreement unless defendant fulfilled its obligation to pay certain sums accruing thereunder. On November 30, 1950, Mr. Wells avoided such a cancellation by making a payment of $1,960 to Mr. Hubbard, plaintiff's secretary. On this occasion Mr. Wells testified that "Mr. Hubbard said to me 'Obviously, after going to all the trouble to wire that money to me last night, you must be intending to stay' and I said, 'Yes, obviously.' "

On December 28, 1950, Mr. Wells wrote a letter to Mr. Hubbard, the material part of which reads: "We are continuing our lease in accordance with our lease contract for the year 1951 for the factory and the machinery and tools." The letter was delivered the following day. On January 2, *225 1951, plaintiff wrote a reply to the above letter reading in part as follows:

"You are hereby notified that your attempt to 'continue' the lease of our property under the agreement of June [sic] 12, 1949, is not accepted as an exercise of the option to renew the lease provisions of said contract, for the following reasons: "I. You have failed to give timely, or any notice of your intention to exercise the option to renew the lease provisions of the Agreement of June 12, 1949. II. You have failed to perform the conditions precedent to your right to exercise the option to renew the lease provisions of the agreement III. You are now, and have been continuously since December 10th, in default in complying with the terms of said contract. ..." The letter set forth that the default consisted of delinquency in the payment of rentals, and concluded with a demand that defendant surrender the real property and restore to plaintiff possession of all the personal property owned by it.

On January 3, 1951, defendant's Mr. Wells wrote plaintiff, in part, in the following terms: "I wish to acknowledge receipt of your letter dated January 2, ... in connection with my exercising our option for the factory and machinery and tools *for the coming year of 1951.*" (Italics added.) Thereafter defendant continued to occupy the premises and retained possession and use of the machinery, offering to pay plaintiff a mutually acceptable rental. At subsequent conferences between the parties plaintiff refused to accept defendant as its tenant, reiterating the reasons previously given.

Plaintiff brought an action for unlawful detainer of the real property in January, 1951, which resulted in a judgment for defendant, subsequently affirmed on appeal. (*Hayward Lbr. & Inv. Co. v. Construction Products Co.*, 110 Cal. App.2d 1 [241 P.2d 1054].) In that action, the court found that defendant had properly exercised its option to renew the lease pertaining to the real property, and it was found not to have breached any of its obligations under the contract.

In April, 1951, plaintiff instituted the present claim and delivery action, to which defendant answered by pleading its lawful possession under its lease. By amendment to its answer, defendant further alleged that it had renewed its lease by written notice on December 29, 1950, and entered a plea in abatement by virtue of its favorable judgment in the unlawful detainer action, in which an appeal was then pending. At the outset of the trial, the trial court received evidence *226 concerning the plea in abatement and refused a continuance of the proceedings on the grounds that the adjudication of the issues in the unlawful detainer action was not determinative of the issues in the case at bar. In rendering a judgment in plaintiff's favor in this replevin action, the court found that on December 29, 1950, defendant made an ineffectual attempt to renew its lease for a period of one year from the date of its expiration and that this "attempted renewal was not in accordance with the terms of the agreement of July 12, 1949, and was promptly rejected by the plaintiff." The court further found that the agreement covering the personal property expired of its own force on December 31, 1950, and "that defendant did not validly exercise its option to renew said Agree-

ment for an additional period of two years as provided therein; that there was no termination of said Agreement by plaintiff by reason of any default upon the part of the defendant."

(1) Defendant contends that the court erred in its construction of the letter of December 28, 1950, as an attempt to renew the lease of personalty solely for the year 1951, and as such was an insufficient exercise of the option contained therein, which provided for a renewal on a two-year basis. The disputed part of the letter reads: "We are continuing our lease in accordance with our lease contract for the year 1951 for the factory and the machinery and tools." Defendant argues that the reference to the year 1951 should be interpreted only as applying to the real property, which defendant was entitled to renew on a year-to-year basis; however, since there was but one option for a renewal covering the tools and machinery, it contends this option was properly taken up in the letter stating the lease was being continued "in accordance with our lease contract." Whatever plausibility this argument might have is greatly diminished by defendant's follow-up letter of January 3, 1951, in which Mr. Wells refers to the letter of December 28, 1950, as an exercise of "our option for the factory and machinery and tools *for the coming year of 1951.* " (Italics added.) The letter of January 3d clarifies whatever uncertainty existed in defendant's notice of December 28th and confirms defendant's *proposal* to renew the lease on the personal property for only a one- year period rather than an *acceptance* of the option to extend it for two years. This later letter furnishes substantial support for the court's finding or, more accurately stated, conclusion that defendant's notice of renewal was " ineffectual." *227 Therefore we cannot agree with defendant that there is no evidentiary basis for the court's finding or that its construction of the instrument referred to is wrong. This is particularly true where, as here, there is extrinsic evidence clarifying the crucial document and the inferences are conflicting. In such case, where the finding of the court is compatible with the evidence, it will not be disturbed on appeal. (*Johnston v. Landucci,* 21 Cal.2d 63, 69 [130 P.2d 405, 148 A.L.R. 1355]; *Davis v. Stulman,* 72 Cal.App.2d 255, 269 [164 P.2d 787].)

(2) The determination that defendant's attempted exercise of the option was not in accordance with the agreement is consistent with the settled principle, "applicable to options as to other contracts, that the offer must be accepted in the terms in which it is made, and the alteration of such terms ... is tantamount to the rejection of the original offer and the making of a counter-offer; ..." (*Alexander v. Bosworth,* 26 Cal.App. 589, 597 [147 P. 607].) (3) A striking parallel is presented in the case of *Carney v. Heisch,* 67 Cal.App. 465 [227 P. 780], where the lease provided for a renewal "for a period of two years." The lessee gave notice that he was exercising his option "for an additional period of one year." In rendering a judgment for the lessee, it was there stated (p. 467): "A notice of an election to renew in order to be binding upon the lessor must state an intention to renew on such terms and for such period as are specified in the lease. If the lessee has an option to renew for a period particularly specified ... a notice by him that he will renew for a different period ... is nugatory and it may be ignored by the lessor. In fact, such a notice of an election to renew the lease on different terms is an offer, not to renew, but to make another lease, and it will be regarded by the law as an implied election not to renew the old lease. " Plaintiff was justified, therefore, upon receipt of defendant's letter, in replying that defendant had "failed to give timely, or any," notice of intention to exercise the option. Defendant cannot complain that the court resolved the doubts arising from any ambiguity in the language chosen in the letter-notice against the author of that instrument. (*Wilck v. Herbert,* 78 Cal.App.2d 392 [178 P.2d 25].)

Defendant urges that the evidence shows that at various times during 1950 it gave oral notice to plaintiff of its intention to renew the lease in question. An examination of the testimony referred to does not support this claim. (4) To avail himself of an option of renewal given by a lease, a *228 tenant must apprise the lessor in unequivocal terms of his unqualified intention to exercise his option in the precise terms permitted by the lease. (32 Am.Jur., § 979, p. 822. See *Braun v. Leo G MacLaughlin Co.,* 93 Cal.App. 116, 120-121 [269 P 191].) The evidence cited by defendant relates to generalized and amorphous conversations between the parties regarding some immediate problem under discussion; there is no affirmative, well-defined expression on the part of defendant showing a specific intention to exercise the option in the lease upon the terms available to it. Defendant failed to sustain its burden of showing an acceptance within the requirements of the rule above stated. (See *Callisch v. Farnham,* 83 Cal.App.2d 427, 430 [188

P.2d 775].) Defendant further argues that no notice of intention to exercise the option was required-that a mere holding over after December 31, 1950, constituted a valid acceptance of the offer, without more. But no authorities are cited, and we have found none, which support this proposition with respect to a lease of personal property. (5) On the contrary, the rule has been stated that the hold-over doctrine of real estate leases does not apply to the hiring of personalty (8 C.J.S., p. 323) and that the mere act of retaining possession of personal property will not imply a renewal of a contract in the absence of an agreement thereto by the parties. (6 Am.Jur., § 334, p. 433.)

Defendant contends that under the facts and circumstances here present the trial court should have applied the equitable principle of relief against a forfeiture under section 3275 of the Civil Code. To this there are several answers. (6) First, if defendant wished to raise this as an equitable defense, it should have been specially pleaded in its answer. The party relying upon an equitable defense must plead it with some particularity. (*Swasey v. Adair,* 88 Cal. 179, 182 [25 P 1119].) Defendant's answer does not ask relief under section 3275, nor does his answer contain any averments suggesting relief from a forfeiture was sought. (21 Cal.Jur., p. 137.) (7) Second, " [s]ection 3275 presupposes that the party seeking relief is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application [citing cases]." (*Barkis v. Scott,* 34 Cal.2d 116, 120 [208 P.2d 367].) The findings herein specifically declare "that there was no termination of the said Agreement by plaintiff by reason of any default on the part of the defendant." ***229** Third, there is scant analogy between the present situation and the circumstances in the two decisions cited by defendant, *Kaliterna v. Wright,* 94 Cal.App.2d 926 [212 P.2d 32], and *Title Ins. & Guar. Co. v. Hart,* 160 F.2d 961, 970.) In the Kaliterna case, the lessor contended that the lessee was not entitled to renew his lease, despite the lessor's previous waiver of minor breaches. The court held that plaintiff was not in default, and so had not forfeited his option to renew. The Hart case involved the similar problem of whether a lessee guilty of certain breaches and violations of covenants in a lease had forfeited his right to exercise an option to renew, notice of which was properly given. In both of the above cases, the court provided for relief against forfeiture by a liberal interpretation of forfeiture provisions in the lease itself, which is the sound and correct application of equitable principles. In the matter at bar, however, the judgment against defendant was based upon its failure to exercise the option as required by its particular terms. (8) 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. (9) Since the optionor 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. (See *Wightman v. Hall,* 62 Cal.App. 632, 634 [217 P. 580].) (10) By varying the terms of the option in his purported renewal, defendant in effect rejected the option, which became extinguished with the expiration of the term of the lease. Section 3275 is therefore inapplicable in these circumstances.

Defendant contends that the decision in its favor in the unlawful detainer action is res judicata of the issues in the current litigation. This is without merit. (11) One of the principal requirements for the application of the doctrine of res judicata is: Was the issue decided in the previous action identical with the one presented in the present suit? (*Bernhard v. Bank of America,* 19 Cal.2d 807, 813 [122 P.2d 892].) (12) In *Stark v. Coker,* 20 Cal.2d 839, 843 [129 P.2d 390], the court points out that only such matters are adjudicated in a prior judgment which appear upon its face to have been adjudicated or which were necessarily included therein, and that "when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue." (13) Likewise, the rule may not be invoked merely because the rights, claims or demands arise out ***230** of the subject matter involved in a prior litigation, so long as they constitute separate or distinct causes of action which were not placed in issue in the former case. (*Title Guar. & Tr. Co. v. Monson,* 11 Cal.2d 621, 631 [81 P.2d 944].)

(14) It is thus apparent that defendant cannot properly call to his aid the principle of res judicata. The former action was concerned solely with the real estate, and the judgment settled the issue of defendant's right to renew its lease of the realty and the fact that it had given proper notice of renewal for a one-year period. In the present proceeding, the issue related to whether defendant had exercised its option to renew its lease as to the personalty, which was contained in a separate clause of the agreement between the parties and was not involved in the former action. The causes of action in the two proceedings were thus separate and distinct,

although arising out of the same subject matter. Hence, a judgment in the first proceeding creates no obstacle to this proceeding for the recovery of personal property, since no issue was tendered or adjudication had thereon in the former action. (*Title Guar. & Tr. Co. v. Monson, supra*; Daugherty v. Board of Trustees, 111 Cal.App.2d 519, 522 [244 P.2d 950].)

The judgment is affirmed.

Moore, P. J., and McComb, J., concurred.
A petition for a rehearing was denied April 29, 1953, and appellant's petition for a hearing by the Supreme Court was denied June 4, 1953.

Cal.App.2.Dist.
Hayward Lumber & Inv. Co. v. Construction Products Corp.
117 Cal.App.2d 221, 255 P.2d 473

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EXHIBIT 10

HOLIDAY INNS OF AMERICA, INC., et al., Plaintiffs and Appellants,
v.
D. MANLEY KNIGHT et al., Defendants and Respondents.
L. A. No. 29598.

Supreme Court of California
Feb. 13, 1969.

HEADNOTES

(1) Forfeitures § 17(1)--Relief--Under Statute.
The proscriptions of Civ. Code, § 3275, against forfeiture apply in any case in which the party seeking relief from default has brought himself within the terms of the section by pleading and proving facts that justify its application; and in determining whether a given case falls within the statute, it is necessary to consider the nature of the contract and the specific clause in question.
Relief of purchaser against forfeiture of land contract, note, 40 A.L.R. 182. See also **Cal.Jur.2d,** Forfeitures and Penalties, § 24 et seq; **Am.Jur.,** Vendor and Purchaser (1st ed § 642).
(2) Forfeitures § 17(3)--Relief--Under Statute--Time as Essence of Condition.
In a proper case, relief will be granted under Civ. Code, § 3275, providing for relief in case of forfeiture, from a provision of a contract making time of the essence in tendering annual payments thereunder.

(3) Forfeitures § 17(1)--Relief--Under Statute.
In an action by optionee's successors to declare effective a written contract granting a five-year option to purchase real estate with the price for the option payable in five annual instalments, plaintiffs were entitled to summary judgment declaring the contract in force, by way of relief under Civ. Code, § 3275, relating to relief in case of forfeiture if the contract were terminated, where it appeared that the fourth instalment was not paid precisely on time, that on a risk allocation basis each instalment was partially for an option to buy the land during that year and partially for renewal of the option for another year, that plaintiffs would suffer a forfeiture of that part of the three instalments previously paid attributable to the right to exercise the option during the last two years by requiring payment strictly on time, that plaintiffs were willing and able to continue with performance of the contract and acted in good faith to accomplish that end, and that optionor would receive the benefit of his bargain, the full price of the option granted.

SUMMARY

APPEAL from a judgment of the Superior Court of Orange County. Herbert S. Herlands, Judge. Reversed with directions.

Action seeking a declaration that a contract was in full force and effect. Summary judgment for defendants reversed with directions.

COUNSEL

Greenberg & Glusker, Arthur N. Greenberg and Harvey R. Friedman for Plaintiffs and Appellants.

Gordon X. Richmond for Defendants and Respondents.

TRAYNOR, C. J.

Plaintiffs appeal from a judgment for defendants in an action seeking a declaration that a contract was still effective. The judgment was entered after plaintiffs' motion for a summary judgment was denied and defendants' motion for summary judgment was granted.

The pleadings and affidavits of the parties establish the following undisputed facts.

Plaintiffs are the successors in interest to the optionee under a written option contract between the optionee and the owners of the option property, defendant D. Manley Knight and his mother Mary Knight. Mary Knight is now deceased and D. Manley Knight is the sole owner of the property. Although his wife is also named a defendant herein, she has no interest in the contract or the option property. We will therefore refer to D. Manley Knight as defendant.

The contract, executed on September 30, 1963,

granted an option to purchase real property in Orange County for $198,633, the price to be subject, however, to prescribed adjustments for changes in the cost of living. Unless cancelled as provided in the agreement, the option could be exercised by giving written notice thereof no later than April 1, 1968. The contract provided for an initial payment of $10,000 and for four additional payments of $10,000 to be made directly to the optionors on July 1 of each year, commencing in 1964, unless the option was exercised or cancelled before the next such payment became due. These payments were not to be applied to the purchase price. The cancellation provision provided that "it is mutually understood that failure to make payment on or before the prescribed date will automatically cancel this option without further notice." On December 9, 1963, the parties amended the contract by executing escrow instructions that provided that the annual payments were to be deposited in escrow with the Security Title Insurance Company, and that, in "the event you [Security Title] do not receive the $10,000 annual payments [by July 1] and upon receiving notice from Optionors to cancel the option, without ***329** further instructions from Optionee you are to terminate the escrow."

The initial payment of $10,000 and the annual installments for 1964 and 1965 were paid. After the execution of the contract, plaintiffs expended "great amounts of money" to develop a major residential and commercial center on the land adjacent to the option property. These expenditures have caused the option property to increase substantially in value since the contract was executed. Plaintiffs' purpose in entering into the contract was to put themselves in a position to secure the advantage of this increase in value resulting from their development efforts.

In 1966 plaintiffs mailed a check for $10,000 to defendant. It was made out to D. Manley Knight and his wife, Lavinia Knight, and dated June 30, 1966. Defendant received the check on July 2, 1966 and returned it to plaintiffs on July 8, stating that the option contract was cancelled. On July 8 plaintiffs tendered another check directly to defendant, and he again refused it. On July 15 plaintiffs deposited a $10,000 check with Security Title payable to defendant. Security Title tendered the check to defendant, but his attorney returned it to plaintiffs on July 27 and advised them that the agreement was terminated pursuant to the cancellation provision.

Plaintiffs contend that payment of the annual installment was timely on the ground that the check became the property of defendant when mailed; that even if the payment was late, the trial court should have relieved them from forfeiture and declared the option in force under section 3275 of the Civil Code; and that, in any event, the trial court erred in excluding extrinsic evidence offered to prove that the escrow instructions modified the contract to permit payment at any time before defendant notified the title company that the option was cancelled. Since the undisputed facts establish that plaintiffs are entitled to relief from forfeiture pursuant to section 3275, it is unnecessary to consider plaintiffs' other contentions. [FN1]

> FN1 Plaintiffs' initial declaration in support of their motion for summary judgment was insufficient to support a judgment in their favor. Before entering judgment for defendants, however, the trial court agreed to reconsider its initial ruling on the motions of both plaintiffs and defendants for summary judgment, and additional declarations were filed. The undisputed facts establishing plaintiffs' right to relief from forfeiture appear from the declarations filed by both sides.

Section 3275 provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the ***330** 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, willful, or fraudulent breach of duty." The tumultuous history of this section has been recorded in a lengthy series of major decisions in the area of property and contract law. [FN2]

> FN2 *Glock v. Howard & Wilson Colony Co.* (1898) 123 Cal. 1 [55 P. 713, 69 Am.St.Rep. 17, 43 L.R.A. 199]; *Barkis v. Scott* (1949) 34 Cal.2d 116 [208 P.2d 367]; *Baffa v. Johnson* (1950) 35 Cal.2d 36 [216 P.2d 13]; *Freedman v. Rector etc. of St. Matthias Parish* (1951) 37 Cal.2d 16 [230 P.2d 629, 31 A.L.R.2d 1]; *Ward v. Union Bond & Trust Co.* (9th Cir. 1957) 243 F.2d 476; *Caplan v. Schroeder* (1961) 56 Cal.2d 515 [15 Cal.Rptr. 145, 364 P.2d 321]; Crane, *Recent Decisions on Damages in Commercial Cases*

in California (1960) 12 Hastings L.J. 109, 119-121; Hetland, *Real Property and Real Property Security: The Well-Being of the Law* (1965) 53 Cal.L.Rev. 151; Hetland, *The California Land Contract* (1960) 48 Cal.L.Rev. 729; Macaulay, *Justice Traynor and the Law of Contracts* (1961) 13 Stan.L.Rev. 812, 849-856; Smith, *Contractual Controls of Damages in Commercial Transactions* (1960) 12 Hastings L.J. 122, 134-140; Note, *Is it Possible to Contract for an Exact Performance?* (1949) 37 Cal.L.Rev. 498; Note, *Rights of the Defaulting Vendee* (1949) 37 Cal.L.Rev. 704; Comment, *Defaulting Vendee Relieved from Forfeiture* (1949) 2 Stan.L.Rev. 235; Note, *Installment Land Sale Contract: Termination of the Vendee's Rights After Default* (1956) 3 U.C.L.A. L.Rev. 264; Note, *Application of Civil Code, Section 3275 to Relieve from Forfeiture* (1949) 23 So.Cal.L.Rev. 110.

(1) Although most of the cases considering section 3275 have involved land sale contracts, its proscriptions against forfeiture apply in any case in which the party seeking relief from default has brought himself within the terms of the section by pleading and proving facts that justify its application. (*Barkis v. Scott, supra,* at pp. 118, 120.) In determining whether a given case falls within section 3275, however, it is necessary to consider the nature of the contract and the specific clause in question. Although the contract in the instant case is an option contract, the question is not whether the exercise of the option was timely, but whether the right to exercise the option in the future was forfeited by a failure to pay the consideration for that right precisely on time. Defendant's reliance on *Cummings v. Bullock* (9th Cir. 1966) 367 F.2d 182, and *Wilson v. Ward* (1957) 155 Cal.App.2d 390 [317 P.2d 1018], is therefore misplaced. Both those cases dealt with the time within which an option must be exercised and correctly held that such time cannot be extended beyond that provided in the contract. To hold otherwise would give the optionee, not the option he bargained for, but a longer and therefore more extensive option. (2) In the present case, however, plaintiffs are not seeking to extend the period during ***331** which the option can be exercised but only to secure relief from the provision making time of the essence in tendering the annual payments. (See *Scarbery v. Bill Patch Land & Water Co.* (1960) 184 Cal.App.2d 87, 102, 103 [7 Cal.Rptr. 408].) In a proper case, relief will be granted under section 3275 from such a provision. (*Barkis v. Scott, supra,* at p. 122.)

(3) The sole issue in this case is whether the plaintiffs have brought themselves within section 3275; whether there would be a loss in the nature of a forfeiture suffered by plaintiffs if the option contract were terminated. Essentially, the position of defendant is that there is no forfeiture since plaintiffs got precisely what they bargained for, namely, the exclusive right to buy the property for the three years during which they made payments. Cancellation because of the late 1966 payment amounts to nothing more than terminating a contract providing for that exclusive right during 1966. As viewed by defendant, this contract is in effect wholly executory and therefore its termination would not result in a forfeiture to either party. (*Martin v. Morgan* (1890) 87 Cal. 203 [25 P. 350, 22 Am.St.Rep. 240].)

To sustain defendant's argument, the contract would have to be viewed as a series of independent contracts, each for a one-year option. Only if this were true, could it be said that plaintiffs received their bargained for equivalent of the $30,000 payments. (*Sheveland v. Reed* (1958) 159 Cal.App.2d 820, 822 [324 P.2d 633].) The economic realities of the transaction, however, do not support this analysis. First, the language of the agreement states that the "Optionors hereby grant to Optionee the exclusive right and option for a five year period. ..." The parties agreed to bind themselves to a period of five years with the price payable in five installments. On the basis of risk allocation, it is clear that each payment of the $10,000 installment was partially for an option to buy the land during that year and partially for a renewal of the option for another year up to a total of five years. With the passage of time, plaintiffs have paid more and more for the right to renew, and it is this right that would be forfeited by requiring payment strictly on time. At the time the forfeiture was declared, plaintiffs had paid a substantial part of the $30,000 for the right to exercise the option during the last two years. Thus, they have not received what they bargained for and they have lost more than the benefit of their bargain. In short, they will suffer a forfeiture of that part of the $30,000 ***332** attributable to the right to exercise the option during the last two years. [FN3]

FN3 Plaintiffs also allege forfeiture of "great amounts of money" expended for the de-

> velopment of surrounding land. Evidently none of the investment was made in the option property. Since there is nothing to indicate that the development was not highly profitable in its own right or that inclusion of defendant's property was necessary to make the development a success, it would not seem that any part of these expenditures can be considered forfeited by a termination of the contract. (Cf. *Scarbery v. Bill Patch Land & Water Co., supra,* where the plaintiff offered evidence justifying the allocation of collateral development expenditures to the amounts forfeited by cancellation.)

Plaintiffs have at all times remained willing and able to continue with the performance of the contract and have acted in good faith to accomplish this end. Defendant has not suffered any injury justifying termination of the contract, and none of his reasonable expectations have been defeated. [FN4] Moreover, he will receive the benefit of his bargain, namely, the full price of the option granted plaintiffs. As we stated in *Barkis,* "when the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so." (*Barkis v. Scott, supra,* at p. 122.)

> FN4 Although the initial tender was made to defendant and his wife and not to the Security Title Insurance Company as the escrow instructions specified, it gave defendant notice within one day of the due date that plaintiffs sought to keep the contract in force.

The judgment is reversed and the trial court is directed to enter a summary judgment for plaintiffs in accord with the views herein expressed.

McComb, J., Peters, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred. *333

Cal.
Holiday Inns of America, Inc. v. Knight
70 Cal.2d 327, 450 P.2d 42, 74 Cal.Rptr. 722

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EXHIBIT 11

CANDREW SHEVELAND et al., Respondents,
v.
FRED E. REED et al., Appellants.
Civ. No. 9368.

District Court of Appeal, Third District, California.
Apr. 30, 1958.

HEADNOTES

(1) Vendor and Purchaser § 52--Options--Return of Consideration.
Where the trial court did not find that the original option given by plaintiffs to defendant to purchase certain realty was void, but found that a subsequent option was void, and where the entire sum paid to plaintiffs had been paid as consideration for the original option and its extensions, defendant had received the full equivalent of the price paid, there was no consideration for the subsequent option (which was complete within itself and expressly canceled all prior options), and since no payments were made pursuant thereto defendant was not entitled, on plaintiffs' action to quiet title to the property and to have the subsequent option canceled, to a return of the money previously paid plaintiffs.
See **Cal.Jur.**, Vendor and Purchaser, § 56.

SUMMARY

APPEAL from a judgment of the Superior Court of Napa County. Ben R. Ragain, Judge. [FN*] Affirmed.

FN* Assigned by Chairman of Judicial Council.

Action to quiet title to real property and to have an option to purchase it canceled. Judgment for plaintiffs affirmed.

COUNSEL

Riggins, Rossi & Kongsgaard for Appellants.

Dwyer, King, Price & Mering, James D. Boitano and Harold T. King for Respondents.

WARNE, J. pro tem. [FN*]

FN* Assigned by Chairman of Judicial Council.

This is an appeal from a judgment quieting respondents' title to a tract of land in Napa County.

The material facts, as found by the trial court, are that on March 18, 1953, the respondents, in consideration of $1,000, gave appellant a 30- day option to purchase the subject property at $1,000 an acre, to be paid as follows: $1,500 at the time of the exercise of the option, $37,500 within 90 days thereafter, and the balance of $190,000 at the rate of $40,000 a year. The option provided that appellant would obtain title insurance at his expense and that respondents should have 60 days within which to cure any defect in the title. The option was not exercised within the time specified, but appellant did pay respondents an additional $5,500 and on February 4, 1954, respondents agreed to extend the option to July 31, 1954, if appellant paid $3,000 by March 5, 1954. Upon the payment of $2,000 on March 1, 1954, the option was further extended to April 1, 1954. On March 27, 1954, respondents executed an agreement which recited that, in consideration of the $8,500 theretofore paid, respondents would extend the option if appellant paid $1,000 on or before April 1, 1954, and $24,500 on or before July 31, 1954.

The called for payments were not made and respondents brought the present action to quiet their title to the property and to have the option cancelled. Appellants, by way of cross-complaint, sought specific performance of the agreement to convey, claiming that the option had not terminated because respondents failed to clear title as required in the extension agreement of March 27, 1954. They also asked for declaratory relief.

The March 27, 1954 option contained the following provision:

"... If at the time for exercise of option ... July 31, 1954, the title to the property covered in this agreement is

not free and clear of all liens and encumbrances including those specifically listed as exceptions Number Two (2) to nine (9) *822 inclusive in that certain preliminary report for a policy of title insurance, Order Number 48724, dated February 4, 1954, and issued by the Napa County Title Company, then *the time for exercise of said option is extended until said liens and encumbrances have been removed,* and Vendee shall have ten (10) days thereafter to exercise the first purchase right over said property as provided in this agreement." (Emphasis added.)

In addition to the facts heretofore stated, the trial court found that on March 27, 1954, appellant waived any objection to the condition of the title, that the selling price as of March 27, 1954, and as of July 31, 1954, was inadequate, and that the offer to sell was not accepted prior to July 31, 1954, and expired on that date.

Appellants do not challenge the court's findings, but contend that since the court found that the option was void they are entitled to the return of the $8,500 they paid to the respondents, and that the parties should be restored to status quo.

(1) We do not agree with appellant. The trial court did not find that the original option, as extended on March 1, 1954, was void. It did find that the option of March 27, 1954, was void. Further, the entire $8,500 had been paid as the consideration for the original option and its prior extensions. Appellants had received the full equivalent of the price paid, hence there was no consideration for the March 27, 1954 option (which was complete within itself and expressly cancelled all prior options) and as no payments were made pursuant thereto there was nothing to be returned to the appellants. It is said in 1 Corbin on Contracts, section 273, page 914:

"... When that time expires, the option holder has received the full agreed equivalent of the price he paid for his option; and a refusal to give effect to an acceptance that is one minute late results in no forfeiture."

The findings and the record fully support the judgment.

Other points discussed in the briefs do not require discussion.

The judgment is affirmed.

Van Dyke, P. J., and Schottky, J., concurred.
A petition for a rehearing was denied May 29, 1958. *823

Cal.App.3.Dist.
Sheveland v. Reed
159 Cal.App.2d 820, 324 P.2d 633

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EXHIBIT 12

93 Cal.App.3d 170, 155 Cal.Rptr. 460
(Cite as: 93 Cal.App.3d 170)

BARRY T. SIMONS, Plaintiff and Respondent,
v.
JAMES L. YOUNG et al., Defendants and Appellants.
Civ. No. 20074.

Court of Appeal, Fourth District, Division 2, California.
May 17, 1979

SUMMARY

A lessee entered into a lease for two apartments, which lease provided for an initial term of two years commencing February 1, 1975, and terminating January 31, 1977, and granted the lessee four distinct options to renew the term of the lease. A provision of the lease specified that in order to exercise the option to renew "[L]essee must serve upon Lessor in writing, notice of election to renew said lease not later than three (3) months from the termination of said lease or any renewal thereof." The lessee remodeled the apartments into law offices, making substantial improvements to the premises. The deadline for notice of exercise of the first renewal option, October 31, 1976, passed without the lessee giving notice of election to renew the lease. Upon notification by the lessors to the lessee on November 22, 1976, that, as he had failed to exercise his option to renew the lease, he would be expected to vacate the premises by January 31, 1977, the lessee telephoned the lessors, expressing his intention to renew the lease, and mailed to the lessors a letter constituting a notice of his election to renew the lease. Upon the lessors' refusing delivery of this letter, the lessee drafted and mailed an identical letter dated December 1, 1976, which was received by the lessors in due course. When the lessors refused to recognize the lessee's "renewal" of the lease, the lessee filed an action for declaratory relief, specific performance, injunction, relief from forfeiture and, alternatively, for recovery on the basis on unjust enrichment. The court found that the lessee would suffer extreme hardship if his right to renew the lease were forfeited and that the lessors did not suffer any damage as a result of the lessee's giving notice of intent to renew on November 26 or December 1, rather than on October 31, and concluded that this was a proper case for relief from forfeiture and that the lessee was entitled to specific performance of the lessors' obligation to extend the lease for the period from February 1, 1977, to January 31, 1979. (Superior Court of Orange County, No. 261700, Bruce W. Sumner, Judge.)

The Court of Appeal reversed. The court held that the provision in the lease requiring the lessee to give notice of his exercise of the option "not later than three (3) months from termination of said lease" might not be construed to mean not later than three months after the termination of the lease; other provisions of the lease made it abundantly clear that notice was to given 90 days prior to expiration of the term of the lease. The court further held that Civ. Code, § 3275, which provides relief for forfeiture, was not applicable to the failure of the lessee-optionee to exercise the option to renew his lease within the time agreed upon by the parties and specified in the lease. The court further held that, although a court may grant equitable relief in cases of fraud, accident, or mistake, it may not grant equitable relief to extend an option period beyond that agreed to by the parties, where the failure to timely exercise the option was due entirely to the neglect of the lessee and where the lessor in no way contributed to the failure. (Opinion by Kaufman, J., with Tamura, Acting P. J., and McDaniel, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Landlord and Tenant § 28--Leases--Options to Renew.
A trial court's finding that a lessee performed all the terms and conditions of the lease requisite to his right to extend the lease for two years was unsupported by the evidence, where there was no evidence that the lessee gave notice of any kind of his exercise of the option to renew prior to November 26, 1976, and where the last date under which the lessee was permitted to give such notice according to the terms of the lease was October 31, 1976.

(2) Landlord and Tenant § 28--Leases--Options to Renew--Waiver or Estoppel.
Upon sufficient evidence in an appropriate case a lessor may be found to have waived timely notice of his lessee's election to exercise an option to renew the

lease or be estopped to assert such a requirement embodied within a lease. However, in an action brought by a lessee for declaratory relief, specific performance, injunction, relief from forfeiture and, alternatively, for recovery on the basis of unjust enrichment after the lessors refused to recognize the lessee's attempted renewal of the lease, there was no substantial evidence of any waiver by the lessors of the right to 90 days' notice of the lessee's election to exercise the option to renew the lease nor was there substantial evidence of any conduct on the part of the lessors upon which the lessee relied in failing to give notice. The fact that the lessors were aware of the improvements made by the lessee in the leased property and of the lessee's intention to make further improvements constituted no evidence of either waiver of estoppel. The lessee did not give within the prescribed time either verbally or by conduct any unequivocal indication of his intent to exercise the option to renew the lease, and neither the lessors nor their predecessor in interest did anything or said anything evidencing a waiver or upon which the lessee relied in failing to give notice within the prescribed time.

(3) Landlord and Tenant § 28--Leases--Options to Renew--Time of Notice of Exercise.
The specification in a lease of time by which notice of exercise by the lessee of an option to renew the lease must be given is a condition precedent to the exercise of the option. 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. Thus, a provision in a lease setting forth the time period in which the lessee was required to give notice of his exercise of the option to renew the lease might not be construed as a covenant, rather than a condition precedent. Furthermore, the lessee did not promise to give notice of his election to exercise the option and was not bound to do so.

(4) Landlord and Tenant § 15--Leases--Interpretation--Rules for Construction.
A construction advanced by a lessee that a lease provision requiring the lessee to give notice of his exercise of the option to renew the lease "not later than three (3) months from the termination of said lease or any renewal thereof" meant that notice be given not later than three months after the termination of the lease would render the provision nonsensical, since the lessor would not know until 90 days after the termination of the lease whether the lease was to be renewed or not. Furthermore, the construction advanced by the lessee would be inconsistent with numerous provisions in the lease, including a provision giving the lessor "at any time within thirty (30) days prior to the expiration of this lease or renewal" the right to enter the premises to place "To Let" or "To Lease" signs and a provision giving the lessee the right to remove certain fixtures provided that such removal "shall be effected before the expiration of said term or any renewal or extension thereof."

(5) Landlord and Tenant § 15--Leases--Interpretation--Rules for Construction.
The rule of construction that the language of the lease is to be interpreted adversely to the party who caused its ambiguity is resorted to only when the ambiguity is not resolved by other appropriate rules of interpretation. (Civ. Code, § 1654.)

(6) Forfeitures and Penalties § 5--Relief--Under Statute.
Civ. Code, § 3275, which provides relief in case of forfeiture, has no applicability to the failure of a lessee-optionee to exercise the option to renew his lease within the time agreed upon by the parties and specified in the lease. When the time in which an option is to be exercised expires the option holder has received the full agreed equivalent of the price he paid for his option and a refusal to give effect to a late acceptance of an option results in no forfeiture.

(7) Landlord and Tenant § 28--Leases--Options to Renew--Timeliness of Notice--Equitable Relief.
Equitable relief may be granted upon a showing of fraud, accident or mistake, but equitable relief will not be granted where a lessee-optionee's failure to exercise an option to renew a lease within the specified and agreed time is due entirely to the lessee's inadvertence or neglect and not contributed to by the lessor-optionor. Hence, a trial court erred in granting a lessee equitable relief, and, in effect, extending an option period for renewing a lease beyond the time agreed to by the parties, where the lessee, who had made improvements in the leased premises in excess of $27,00, had failed, through inadvertence, to give timely notice to the lessors of his exercise of the option to renew.
[See **Cal.Jur.3d**, Landlord and Tenant, § 291; **Am.Jur.2d**, Landlord and Tenant, § 1187.]
COUNSEL

93 Cal.App.3d 170, 155 Cal.Rptr. 460
(Cite as: 93 Cal.App.3d 170)

Wenke, Taylor, Schumacher & Evans and Raymond J. Ikola for Defendants and Appellants.

Barry T. Simons, in pro. per., and George S. L. Dunlop for Plaintiff and Respondent. ***174**

KAUFMAN, J.

Defendants (defendants or lessors) appeal from a declaratory judgment in favor of plaintiff (lessee) which, in effect, decreed specific performance of an option for renewal of the lease between the parties. The controlling question is whether the trial court erred in granting lessee equitable relief from his failure timely to exercise the option. We have concluded it did and that the judgment must be reversed.

Facts

The facts are not in serious dispute. On October 14, 1974, lessee entered into a lease for two apartments located in a building at 448 South Coast Highway, Laguna Beach, with the owner of those premises, Harry Howard Company, represented by Mr. Harry Howard. The lease provided for an initial term of two years commencing February 1, 1975, and terminating January 31, 1977. Paragraph 5 of the lease entitled "Option to Renew" granted lessee four "distinct options to renew the term of said lease for additional periods of two (2) years per renewal," commencing February 1, 1977, and at two-year intervals thereafter terminating January 31, 1985. Paragraph 5 specified: "In order to exercise said option to renew the term of this lease as herein provided, Lessee must serve upon Lessor in writing, notice of election to renew said lease not later than three (3) months from the termination of said lease or any renewal thereof. Provided Lessee does exercise said option to renew the term of this lease as aforesaid, ... Lessor shall renew this lease for an additional two (2) year period, terminating two (2) years from the date of expiration of the foregoing term upon the same terms, provisions and conditions as prevail during the first two (2) year term of this lease so far as applicable."

Rent, originally set at $8,400 for two years, payable $350 a month, was subject to cost-of-living increases based on the Consumer Price Index during both the original term and any renewal term "if the options as set forth ... are exercised. ... "All utility charges for water, gas and electricity were to be paid by the lessor. Lessee was given the right to make reasonable alterations, additions and modifications to the premises including some structural changes.

In the negotiations for the lease, lessee asked Mr. Howard if he could have a lease for 10 years, and Howard indicated he could. However, ***175** lessee then requested an original term of two years with four two-year options to give himself more flexibility and limit the responsibility he was undertaking. Mr. Howard furnished his "standard" form of lease, but lessee, who is an attorney, indicated he preferred to prepare the lease himself. He turned the lease form supplied by Mr. Howard over to his law clerk, John Vodonick, and instructed Mr. Vodonick to revise the proposed lease in a manner that would be as favorable and flexible to lessee as possible. It was his desire "not to be tied in for the full 10 years if [he] didn't want to be." The lease thus prepared by lessee was presented to Mr. Howard, who accepted it as drafted except for changes required in the provision for cost-of-living increases in rent and the inclusion of a provision relating to the posting of notices of nonresponsibility. The provisions of paragraph 5 granting lessee the four consecutive two-year options and specifying the time and manner for exercise thereof were never discussed by lessee and Mr. Howard.

At the time the lease was executed the demised premises were residential apartment units and were not in good condition. It was lessee's intention to remodel the apartments into law offices. Mr. Howard was aware of lessee's intention, and both parties realized that the conversion to law offices would entail extensive renovation, repair and remodeling. From November 1974 to February 1975 and from June 1975 to November 1975, lessee converted the apartments into law offices by extensive remodeling and refurbishing. [FN1]

> FN1 Among other things, a reception area was created and a marble and tile mosaic floor was specially designed for and installed in the reception area. Additionally, wood paneling was installed in much of the leased premises.

Lessee personally put into the remodeling over 1,000 hours of his time; his out-of-pocket costs exceeded

$11,089.39. In addition, in exchange for labor, lessee forgave debts amounting to $6,500 and gave two years' free rent to one of his sublessees. If made at the time of trial, the cost of the "improvements" made by lessee to the premises would exceed $27,000. The remodeling was done, of course, with the knowledge and consent of Mr. Howard.

In December 1975, lessee approached Mr. Howard and submitted to him a proposed amendment to the lease by the terms of which he would be granted two additional five-year options in consideration of improvements theretofore made to the premises and to be made in the future. Mr. Howard refused to sign the proposed amendment. He slapped lessee on the back and stated: "Come on, you've got ten years already; what more ***176** do you want?" Mr. Howard had the impression that lessee was desirous of remaining as a tenant; he "didn't speak like a man that intended to move." However, Mr. Howard did not construe lessee's submission of the lease amendment as an election to exercise the option to renew; he construed it as an act of one who desired to improve his position. Lessee did not inform Mr. Howard that he intended to exercise his options, nor did Mr. Howard tell lessee that he would not require written notice of the exercise of the options as specified in the lease. In fact, no discussion ever took place between lessee and Mr. Howard in which lessee informed Mr. Howard that he intended to exercise any renewal option.

Thereafter, on April 1, 1976, Harry Howard Company agreed to sell and on May 27 conveyed the property to defendants, and as successor in interest to Harry Howard Company, defendants assumed the role of the lessor. When they purchased the property, defendants were aware that the lease granted lessee options to renew and expected that lessee would exercise the options.

Between their purchase of the property and November 1, 1976, one or more of defendants visited the leased premises several times. On one occasion the visit was simply for the purpose of meeting the tenants. The others were connected with ascertaining the suitability of an attic for remodeling as an apartment. During one visit defendant Young was taken on a tour of lessee's offices and lessee pointed out improvements that he had made and materials that were on the site for additional work. Lessee informed Young that he planned to install stained glass windows in the waiting room and asked Young about defendants' plans for remodeling the exterior of the building. Young informed lessee that the plans had not yet been developed, and lessee told Young that he wished to be notified of the plans so that his improvements would be designed consistently with the exterior improvements. At no time during any of these visits or at any other time prior to November 1, 1976, was the renewal of the lease discussed by lessee with Young or anyone else representing lessors.

The deadline for notice of exercise of the first renewal option, October 31, 1976, passed without lessee giving written notice of election to renew the lease. On November 18, 1976, lessors noted that the rent payment due on November 1 had not been received. In checking the lease to determine whether there had been a prepayment, lessors noticed that the period in which lessee could exercise the option in accordance with the lease had expired. Lessors went to lessee's law office in the leased premises to ***177** inquire about the overdue rent payment and were advised by a secretary that lessee was out of the country but was expected to return within a few days. Thereafter on November 22, lessors notified lessee by letter that inasmuch as he had failed to exercise his option to renew the lease, he would be expected to vacate the premises by January 31, 1977. Lessee returned to the United States on November 24 and was immediately informed by his secretary of lessor's letter of November 22. The next day was Thanksgiving Day. The following day, November 26, lessee telephoned lessors and orally expressed his intention to renew the lease. The same day he drafted and mailed to lessors by certified mail a letter constituting a notice of his election to renew the lease. Lessors refused delivery of this letter. Lessee then drafted and mailed to lessors an identical letter dated December 1, 1976, which was received by lessors in due course.

When lessors refused to recognize lessee's "renewal" of the lease, lessee filed this action for declaratory relief, specific performance, injunction, relief from forfeiture and alternatively, for recovery on the basis of unjust enrichment. Lessors cross-complained against lessee and his sublessees for unlawful detainer seeking both possession of the premises and damages for holding over. Pending the action, by stipulation of the parties, lessee continued to pay rent under the terms of the lease at the rate of $407.35 per month without prejudice to lessors' right to relief by way of

the cross-complaint. Although lessors requested a finding on the fair rental value of the leased premises, the court made none. However, a qualified real estate appraiser testified that the fair rental value of the leased premises was in the range of 70 to 75 cents per square foot per month and that based upon a determination that the premises contained 1,705 square feet, the fair rental value amounted to between $1,193 to $1,279 per month. Lessee himself testified that, in addition to his own office, he had three subtenants in the premises paying him a total of $1,000 per month rent.

Trial was to the court. The court found in accordance with the foregoing facts and further found that the lease is ambiguous because of the use of the word "from" in the specification of the period within which notice of the lessee's election to exercise the option could be given but that, "[n]o evidence was submitted on the origin of the use of the word. Whether it originated in the original Howard lease or in the lease drawn by plaintiff is not known. Because the case can be decided on the grounds of relief from forfeiture if there was any, further testimony will not be required to resolve the ambiguity." The court also found that lessee ***178** would suffer extreme hardship if his right to renew the lease were forfeited as a result of his failure to notify lessors of his election to exercise the option to renew 90 days before the expiration of the lease; that lessors did not suffer any damage as a result of lessee's giving notice of intent to renew on November 26 or December 1, 1976, rather than on October 31, 1976; that lessee's delay in tendering his written notice of election to renew was not the result of grossly negligent behavior or a wilful or fraudulent breach of any duty; that lessee was not guilty of unclean hands; and that lessee "has performed all the terms and the conditions of the lease on his part to be performed precedent to his right to extend the lease for a period from February 1, 1977 to January 31, 1979." The court concluded that this was a proper case for relief from forfeiture; that lessors had no right to terminate the lease or evict lessee from the premises; and that plaintiff is entitled to specific performance of lessors' obligation to extend the lease for the period from February 1, 1977, through January 31, 1979, and for such additional time periods as lessee may be entitled to under the terms of the lease.

Discussion

Before reaching the central question of the appeal whether the court erred in extending the option period by granting lessee equitable relief from his failure to give notice of his exercise of the option within the time agreed upon, there are a number of questions that must be addressed.

Finding of Performance Unsupported by the Evidence

(1)The trial court's finding that lessee performed all the terms and conditions of the lease requisite to his right to extend the lease for two years is, of course, completely unsupported by the evidence. There is no evidence whatever that lessee gave notice of any kind of his exercise of the option prior to November 26, 1976. The last date under which lessee was permitted to give such notice according to the terms of the lease was October 31.

Waiver or Estoppel

(2)There is no question but that upon sufficient evidence in an appropriate case a lessor may be found to have waived timely notice of his lessee's election to exercise an option to renew or be estopped to assert such a requirement embodied within a lease. However, this is not such a case. In the first place, the court did not purport to find any such waiver ***179** or estoppel. Secondly, there is no substantial evidence of any waiver by lessors of the right to 90 days' notice of lessee's election to exercise the option to renew the lease, nor is there substantial evidence of any conduct on the part of lessors upon which lessee relied in failing to give notice.

Lessee urges that lessors were aware of the improvements that he had made and his intention to make further improvements and that the "conversations between [lessee] and Appellant Young regarding [lessee's] desire to make his improvements ... consistent with those of [lessors] put [lessors] on constructive notice that [lessee] intended to remain on the premises for quite some time." Admittedly that is true, but it constitutes no evidence of either waiver or estoppel. Numerous cases may be found in which verbally or by conduct the lessee manifested an unambiguous intention to exercise the option to renew and by conduct the lessor recognized the lessee's intent and was held to have waived the requirement that *written* notice be given. Here, however, lessee did not give within the prescribed time either verbally or by

conduct any unequivocal indication of his intent to exercise the option, and neither lessors nor their predecessor in interest did anything or said anything evidencing a waiver or upon which lessee relied in failing to give notice within the prescribed time. There is no evidence whatever that anything other than lessee's own forgetfulness or neglect caused him to fail to give notice within the prescribed time.

Construction of the Notice Requirement as a Covenant Rather Than a Condition

(3)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. (See *Palo Alto Town & Country Village, Inc. v. BBTC Company*, 11 Cal.3d 494, 502 [113 Cal.Rptr. 705, 521 P.2d 1097].) 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. (*Palo Alto Town & Country Village, Inc. v. BBTC Company, supra.*, 11 Cal.3d at pp. 498, 503-504;*Cicinelli v. Iwasaki*, 170 Cal.App.2d 58, 67 [338 P.2d 1005]; *Wilson v. Ward*, 155 Cal.App.2d 390, 394 [317 P.2d 1018]; *Auslen v. Johnson*, 118 Cal.App.2d 319, 321-322 [257 P.2d 664]; *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp.*, 117 Cal.App.2d 221, 229***180** [255 P.2d 473]; *Wightman v. Hall*, 62 Cal.App. 632, 634 [217 P. 580].) Moreover, lessee did not promise to give notice of his election to exercise the option and was not bound to do so. Accordingly the notice provision in the lease cannot possibly be construed as a covenant.

"Not later than three (3) months from the termination of said lease" Should Be Construed to Mean Not Later Than Three Months After the Termination of the Lease

(4)The provision requiring lessee to give notice of his exercise of the option to renew the lease required that notice be given "not later than three (3) months from the termination of said lease or any renewal thereof." Lessee urges that the quoted expression should be construed to mean that he was required to give notice of his exercise of the option to renew not later than three months *after* termination of the lease rather than three months *before* termination of the lease. Statement of the argument is its own refutation. Lessee's proposed construction would render the provision nonsensical. The lessor would not know prior to the end of the term of the lease and, indeed, not until 90 days thereafter, whether the lease was to be renewed or not, and the lease could be "renewed" after it had expired. (Cf. *Royal Grocery Co. v. Oliver*, 57 Cal.App. 278, 280 [207 P. 61].) Moreover, it is fundamental that a writing is to be construed with reference to and harmonizing all of its parts (Civ. Code, § 1641), and the construction advanced by lessee would be inconsistent with numerous other provisions in the lease. Paragraph 11 of the lease gives the lessor the right "at any time within thirty (30) days *prior* to the expiration of this Lease or renewal thereto [*sic*]" to enter the premises to place "To Let" or "To Lease" signs. (Italics added.) It is not likely the lessor would have been given that right if the lessee had the right to renew the lease for a period of 90 days after its expiration. Paragraph 8 of the lease gives the lessee the right to remove certain fixtures provided that such removal "shall be effected before the expiration of said term, or any renewal or extension thereof. ..." Again, it is unlikely the lessee would be required to remove his trade fixtures, if he wanted to retain them, prior to the expiration of the term of the lease if he had the right to renew the lease for a period of 90 days after its term expired.

Relying on the court's "finding" that there was no evidence as to which party was responsible for the use of the word "from," lessee contends the ambiguity should be construed against lessor (see *Streicher v. Heimburge*, 205 Cal. 675, 683 [272 P. 290]; *McAulay v. Jones*, 110 Cal.App.2d 302, 306***181** [242 P.2d 650]). This contention is ill-founded. In the first place, in the absence of proof as to which party supplied the specific word, lessee would be presumed to be the author of the ambiguity inasmuch as the lease was drafted and prepared by him. [FN2] (5)In any event, however, the rule that the language of a writing is to be interpreted adversely to the party who caused its ambiguity is resorted to only when the ambiguity is not resolved by other appropriate rules of interpretation. (See Civ. Code, § 1654.) Here, as already noted, other provisions of the lease make it abundantly clear that notice was to be given 90 days prior to expiration of the term of the lease.

FN2 Mr. Howard testified that the lease form supplied by him required that notice of election to exercise an option to renew be given six months before expiration of the lease but that lessee requested the six-month notice to be reduced to three months' notice and that paragraph 5 of the lease was drafted by lessee to so provide.

Equitable Relief

Lessors assert that the trial court granted lessee relief from forfeiture under the provisions of Civil Code section 3275 which 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, wilful, or fraudulent breach of duty." (Italics added.) Lessors then argue that section 3275 is inapplicable because by the very nature of an option contract the optionee incurs no forfeiture as a result of any failure to perform an obligation. [FN3] Lessee contends to the contrary and further asserts that the court's power to grant him equitable relief was not limited to the authority conferred by Civil Code section 3275 nor that conferred by Code of Civil Procedure section 1179, [FN4] but, rather, that the court could ***182** afford him such relief under its general equity powers. We have concluded: (1) that Civil Code section 3275 is inapplicable; (2) that, while 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 optionor in no way contributed.

FN3 As a result of the request by this court for supplemental briefing, lessors also contend that the trial court erred in granting lessee relief from forfeiture without requiring him to himself "do equity" by paying the reasonable rental value of the premises rather than the rent specified in the lease. As lessors cogently put it: "[I]f equity is to rewrite one side of the contract, it ought to in fairness rewrite both sides of the contract." In this connection lessors point out that while the trial court found they were not injured by lessee's belated notice of exercise of the option to renew, in a practical sense that is not true, for they could have leased the premises to someone else for a rent in excess of $1,200 per month immediately upon expiration of the option period, and they argue that they should not be penalized because they did not actually run out and do that. In view of our conclusion, however, that the trial court erred in extending the option period by granting lessee equitable relief in the circumstances shown, we find it unnecessary to resolve this issue.

FN4 Code of Civil Procedure section 1179 reads in pertinent part: "The Court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the Court. ... In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made."

A. Civil Code Section 3275

(6)The applicability of Civil Code section 3275 was considered and rejected in *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp., supra.*. The court said: "In both of the above cases, the court provided for relief against forfeiture by a liberal interpretation of forfeiture provisions in the lease itself, which is the sound and correct application of equitable principles. In the matter at bar, however, the judgment against defendant was based upon its failure to exercise the option as required by its particular terms. 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 optionor 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. (See *Wightman v. Hall*, 62 Cal.App. 632, 634 [217 P. 580].) By varying the terms of the option in his purported renewal, defendant in effect rejected the option, which became extinguished with the expiration of the term of the lease. Section 3275 is therefore

inapplicable in these circumstances." (117 Cal.App.2d at p. 229.)

Although Civil Code section 3275 was not involved, in responding to a claim that the option price should be reimbursed, the court in *Sheveland v. Reed*, reasoned: "'... When that time [(the time in which the option is to be exercised] expires, the option holder has received the full agreed equivalent of the price he paid for his option; and a refusal to give effect to an acceptance that is one minute late results in no forfeiture.'" (159 Cal.App.2d 820, 822 [324 P.2d 633], citing 1 Corbin on Contracts, § 273, p. 914, now 1A Corbin on Contracts, § 273, p. 593.)

The reasoning in the *Hayward Lbr.* and *Sheveland* cases is fully supported by the many cases discussing the nature of an option contract, ***183** some of which have already been referred to in our discussion of lessee's contention that the notice requirement should be construed as a covenant rather than a condition. As succinctly stated by the court in *Wightman v. Hall, supra.*: "A full appreciation of the nature of an option precludes the idea that courts may allow the optionee time beyond that limited in the writing in which to accept the offer of the other party. With the lapse of time the right to exercise the option automatically expires. ... It is not a case of cancellation of a right, for the right only existed up to a certain time and then ceased by the mere passing of that time." (62 Cal.App. at p. 634.)

And in *Auslen v. Johnson, supra.*, the court explained: "The nature of such an option [to purchase real property] is too well settled to require much discussion. ... The optionor offers to sell the subject property at a specified price or upon specified terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. If the offer be accepted upon the terms and in the time specified, then a bilateral contract arises which may become the subject of a suit to compel specific performance, if performance by either party thereafter be refused. It is futile to discuss, as appellant does discuss, the question as to whether or not the written option contained anything indicating that time was of the essence thereof. Such considerations have nothing to do with options. ..." (118 Cal.App.2d at pp. 321-322; accord: *Wilson v. Ward, supra.*, 155 Cal.App.2d at p. 394.)

In support of his contention that the trial court's affording him equitable relief was authorized by Civil Code section 3275, lessee relies heavily on the decision in *Holiday Inns of America v. Knight*, 70 Cal.2d 327 [74 Cal.Rptr. 722, 450 P.2d 42]. That case, however, does not assist lessee's cause. In fact, in its reasoning the court in that decision specifically explained that it is inappropriate to extend an option period beyond that the parties have bargained for.

The case involved an option contract in which the option period was five years and in which the option price was to be paid in annual installments over the five-year period. The contract provided that the failure to make any one of the installment payments on the option price on or before the prescribed date would automatically cancel the option. After paying the first two installments of $10,000 each, the optionee was apparently either one day or seven days late in tendering the third installment payment. The optionor declared the option cancelled. The ***184** court held that equitable relief under Civil Code section 3275 would be appropriate, reasoning: "The parties agreed to bind themselves to a period of five years with the price payable in five installments. On the basis of risk allocation, it is clear that each payment of the $10,000 installment was partially for an option to buy the land during that year and partially for a renewal of the option for another year up to a total of five years. With the passage of time, plaintiffs have paid more and more for the right to renew, and it is this right that would be forfeited by requiring payment strictly on time." (70 Cal.2d at p. 331.)

Lessee would analogize the present case to *Holiday Inns of America v. Knight* by reasoning that part of each rental payment made by lessee was in part for rent and in part was consideration for the right to renew the lease. We see no flaw in the reasoning, but neither do we see that it leads to the result lessee advocates. So long as lessee paid consideration for the option to renew, and there is no question but that he did, the size, amount or nature of the consideration is irrelevant. As was pointed out in *Sheveland v. Reed, supra.*, 159 Cal.App.2d at page 822, which was cited in the *Holiday Inns* decision (70 Cal.2d at p. 331): "'... When that time [the time in which the option is to be exercised] expires, the option holder has received the full agreed equivalent of the price he paid for his option. ...'" That is true regardless of the amount or na-

ture of the consideration.

Furthermore, in invoking the authority of *Holiday Inns*, lessee overlooks a vital distinction expressly noted by the court in that decision. The court stated: "Although the contract in the instant case is an option contract, the question is not whether the exercise of the option was timely, but whether the right to exercise the option in the future was forfeited by a failure to pay the consideration for that right precisely on time. Defendant's reliance on *Cummings v. Bullock* (9th Cir. 1966) 367 F.2d 182, and *Wilson v. Ward* (1957) 155 Cal.App.2d 390 [317 P.2d 1018] is therefore misplaced. *Both those cases dealt with the time within which an option must be exercised and correctly held that such time cannot be extended beyond that provided in the contract. To hold otherwise would give the optionee, not the option he bargained for, but a longer and therefore more extensive option.* In the present case, however, plaintiffs are not seeking to extend the period during which the option can be exercised but only to secure relief from the provision making time of the essence in tendering the annual payments. ..." (70 Cal.2d at pp. 330-331; italics added.) Although the quoted language may not technically have constituted a part of the holding of the *Holiday Inns* decision it is difficult to ***185** imagine a more direct and specific indication of the court's view that it would be inappropriate to grant relief under Civil Code section 3275 to permit exercise of an option after the option period had expired.

Lessee's argument that he will suffer a forfeiture unless equitable relief is granted centers upon the fact that he expended substantial effort and money refurbishing and improving the property. [FN5] That assumes, however, that the improvements made by him will be a total loss to him if he is not permitted belatedly to exercise the option. There is no inevitability of that result. Lessee claims that a great part of the increase in the rental value of the premises is due to the improvements made by him. If he can prove that fact and show that lessors are unjustly enriched (and lessors admittedly purchased the property with the expectation that lessee would exercise his options) lessee may well be entitled to recover from lessors the unrecouped value of his improvements to the extent lessors are shown to have been unjustly enriched. Lessee sought relief on that basis, but, of course, the trial court did not reach these issues or make findings upon them, and they are not before us in this appeal.

FN5 A similar argument evoked from the Supreme Court of Virginia the following response: "While the financial loss that will be suffered by the lessee on failing to obtain a renewal of the lease will be substantial and perhaps serious to him, yet it is clear that his difficulty can in no wise be charged to the fault of the lessors and he alone is the author of his misfortune. Courts, even in equity, must respect lawful contracts made by competent persons ..." (*McClellan v. Ashley* (1958) 200 Va. 38 [104 S.E.2d 55, 58].) In *Koch v. H & S Development Company* (1964) 249 Miss. 590 [163 So.2d 710, 726], in declining to afford the lessee equitable relief, the court pointed out: "If there is a real hardship in the case it appears it rests upon the appellee for the reason it has been paid an extremely low rental for this valuable rental property. But, both parties executed a contract with their eyes open. Both lived by the contract and both should abide by it."

Arguably, similar responses might be made to lessee in the case at bench, who not only failed to give notice of his exercise of the option within the time agreed, but was the party who insisted on a two-year term with four two-year options rather than a ten-year term and who, in addition, drafted the lease.

We conclude that Civil Code section 3275 has no applicability to the failure of a lessee-optionee to exercise the option to renew his lease within the time agreed upon by the parties and specified in the lease.

B. Relief under General Equitable Principles

Although no similar California case has been called to our attention, courts in other states have, in some circumstances, granted a lessee-optionee equitable relief from a failure to exercise an option to renew his lease strictly within the time specified in the lease. The cases are collected and discussed in annotations at 44 A.L.R.2d 1359 et seq. and ***186** 27 A.L.R. 981 et seq. The courts are divided on the answer to the question whether equitable relief is appropriate when the failure to exercise the option timely resulted entirely from the neglect or inadvertence of the lessee-optionee.

Lessee relies on those cases adhering to the view, apparently followed principally in Connecticut, New York and New Jersey, epitomized by the statement in *F. B. Fountain Co. v. Stein* (1922) 97 Conn. 619 [118 A. 47, 49-50, 27 A.L.R. 976]: "All authorities agree that such relief cannot be afforded where the failure has been due to willful or gross negligence. They differ as to whether such relief can be afforded in cases of mere negligence as by forgetfulness. ... We think the better rule to be that, in cases of willful or gross negligence in failing to fulfill a condition precedent of a lease, equity will never relieve. But in cases of mere neglect in fulfilling a condition precedent of a lease, which do not fall within accident or mistake, 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 tenant as to make it unconscionable to enforce literally the condition precedent of the lease." (Accord: *Galvin v. Simons* (1942) 128 Conn. 616 [25 A.2d 64, 66]; *Xanthakey v. Hayes* (1928) 107 Conn. 459 [140 A. 808, 812-814]; *Sy Jack Realty Co. v. Pergament Syosset Corp.* (1971) 27 N.Y.2d 449 [318 N.Y.S.2d 720, 267 N.E.2d 462, 463-464; *Jones v. Gianferante* (1953) 305 N.Y. 135 [111 N.E.2d 419, 420];[FN6] *American Houses v. Schneider* (3d Cir. 1954) 211 F.2d 881, 883 [44 A.L.R.2d 1352]; *Sosanie v. Pernetti Holding Corp.* (1971) 115 N.J.Super. 409 [279 A.2d 904, 907-908]; *Marjer v. Layfmen* (1947) 140 N.J.Equity 68 [53 A.2d 187, 188-190].)

> FN6 Lessee claims that Civil Code section 3275 was derived and is worded the same as New York Civil Code section 1831 under which he asserts the New York cases upon which he relies were decided. Our reading of the cases, however, discloses that only *Jones v. Gianferante, supra.*, 111 N.E.2d at page 420, placed any reliance on statutory authority and the statutory provision there mentioned was section 1425 of the New York Civil Practice Act authorizing the assertion of equitable defenses in eviction proceedings by a landlord against the tenant.

(7)Lessors rely on what is perhaps the majority view that equitable relief may be granted upon a showing of fraud, accident or mistake constituting traditional grounds for equitable intervention, but that equitable relief will not be granted where the lessee-optionee's failure to exercise the renewal option within the specified and agreed time was due entirely to his inadvertence or neglect and not contributed to by the lessor-optionor. Representative of this view are ***187***Koch v. H & S Development Company, supra.*, 163 So.2d at pages 727-728, and *McClellan v. Ashley, supra.*, 104 S.E.2d at pages 59-60.

In *McClellan v. Ashley* the court concluded: "The powers of courts of equity may not be arbitrarily exercised to alter the terms of a contract understandingly made in order to relieve an unfortunate situation caused solely by the negligent failure of the party seeking relief to observe its requirements. 'Hard cases must not be allowed to make bad equity any more than bad law.'" (104 S.E.2d at pp. 59-60.)

In *Koch v. H & S Development Company, supra.*, the court reasoned: "Provided it is not illegal or against public policy, persons have and should have the right to contract with reference to their property, their interests therein, and the use thereof with other persons, and to rely upon the terms and conditions of the contract mutually agreed upon. Parties thus contracting should not be required to anticipate or guess how a panacean court of equity may 'feel' a valid contract should be construed or enforced, because one of the contracting parties may breach the simple conditions precedent, agreed to by both parties before the contract can be renewed. The written words of the contract afford greater certainty of intention, and more accurate compliance with and performance of the terms of the contracts by the parties thereto than do the retrospective, impassive conclusions of a court of equity. A court of equity should not be the first, but the last resort. It is bound by a contract as the parties have made it and has no authority to substitute for it another and different agreement, and should afford relief only where obviously there is fraud, real hardship, oppression, mistake, [or] unconscionable results ... [¶] The rule is well recognized that equity will not relieve against a forfeiture in case of default of performance due to inadvertence, neglect, or ignorance to which lessor in no way contributed. ... Equity will not relieve against mere forgetfulness and will not intervene where there is no fraud, accident or mistake on account of which the lessee neglected to avail himself of the option. [Citations.]" (163 So.2d at pp. 727-728.)

Lessee directs our attention to a statement by the California Supreme Court in *Streicher v. Heimburge, supra.*, 205 Cal. 675, 681, in which the court referred

to the *F. B. Fountain Company* case with apparent approval. The question before the court was whether mutual agreement by the parties upon the amount of rent was a condition precedent to the effectiveness of an option for renewal which provided that the rent for the renewal period would be as agreed between the parties. The court quite properly found it was not. However, in its discussion of covenants and ***188** conditions the court, citing the *F. B. Fountain Company* case said, "... 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."

We find the court's reference to the *F. B. Fountain Company* case inexplicable. The proposition for which it was cited was wholly unnecessary to the decision and barely germane to the discussion. Although we are bound to follow the ratio decidendi of controlling decisions of the California Supreme Court, we are not required to give precedential value to its dicta (*People v. Gregg*, 5 Cal.App.3d 502, 506 [85 Cal.Rptr. 273]; *Hess v. Whitsitt*, 257 Cal.App.2d 552, 556 [65 Cal.Rptr. 45, 32 A.L.R.3d 1297]) and it is our judgment that the dictum in *Streicher* making a passing reference to the rule in *F. B. Fountain Co. v. Stein* was not intended to be an authoritative statement of the rule in California. Moreover, the *Streicher* dictum would appear to be wholly inconsistent with the later and more direct statement previously quoted from *Holiday Inns of America v. Knight, supra.*, 70 Cal.2d at page 330, that an option period may not be extended beyond that provided in the option contract.

Neither are we persuaded that the rule of *F. B. Fountain Co. v. Stein, supra.*, ought to be adopted on principle. The only decision we have discovered in which any substantial attempt was made to explain the rule with reference to the nature of an option contract is *Xanthakey v. Hayes, supra.*, 140 A. at page 812, where the court stated: "It is held by high authority that time is always of the essence of a contract of option. In support of this construction it is said the question 'is not one of condition implied in law, but of an express condition which must be strictly performed in order to hold the promisor liable.' [Citation.] That would be true of an option such as a mere option to buy real estate. It is not true, we think, as to all forms of contracts of option, nor of the provision for an option to renew in the lease before us. It has no relation to an option granted a lessee for the renewal of his lease upon his giving notice of his intention to renew in a stated manner and time such as is found in the lease made by these parties. 'All of the clauses of the instrument are to be construed together as a whole, so as to give effect to all of its parts.' [Citations.] The consideration of this lease was not merely the payment of the rental provided in the lease but that, plus the subsequent ownership by the lessor of all improvements made a part of the leased building by the lessee. The consideration of the lease to the lessee was not merely the use of the leased premises for the first term, but also the prospective use ***189** in the renewal term. The promise on the part of the lessor to grant a renewal, and the prospect that the lessees would avail themselves of their right to a renewal was an indivisible part of the contract of lease, and formed a substantial consideration for it. The lessees were undoubtedly willing to pay more rent for a lease of business property near the center of Waterbury for a stated term with a privilege of renewal upon the same terms than they would have been for a single term, and willing to make more extensive improvements, and to agree that these should become the property of the lessor, because of the opportunity to secure a longer lease. With each payment of rent, and with every improvement made, the lessees were paying the consideration agreed upon for the renewal of the lease. Having completed the payment of the entire consideration which they had agreed to pay they ought not to be denied the equitable relief which would be accorded them in their situation in every form of contract other than one for an option."

We are unpersuaded. Unless there is some ambiguity in the option period, construing "all of the clauses of the instrument ... together" adds nothing to its duration. And, as previously observed, it is futile to discuss the size, amount or nature of the consideration paid for the option, for when the option period that was bargained for by the parties has expired, the optionee has received everything for which he bargained and for which he gave consideration, regardless of the amount or nature of the consideration. (*Sheveland v. Reed, supra.*, 159 Cal.App.2d at p. 822.)

Having rejected the only rationale offered for the rule epitomized by the *F. B. Fountain Company* decision and being persuaded that the rule represented by *Koch v. H & S Development Company, supra.*, 163 So.2d 710, 725, and *McClellan v. Ashley, supra.*, 104 S.E.2d

55, 59, is more consonant with the nature of an option contract as established by the California cases, we conclude that the trial court erred in granting lessee equitable relief and, in effect, extending the option period beyond that agreed to by the parties when lessee's failure to exercise the option timely resulted entirely from his own neglect or forgetfulness and was not contributed to by lessors.

Disposition

The judgment is reversed.

Tamura, Acting P. J., and McDaniel, J., concurred.
A petition for a rehearing was denied June 12, 1979, and respondent's petition for a hearing by the Supreme Court was denied August 15, 1979. ***190**

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EXHIBIT 13

CE. J. WIGHTMAN, Appellant,
v.
DELLA M. HALL et al., Respondents.
Civ. No. 4048.

District Court of Appeal, Second District, Division 2, California.
June 21, 1923.

HEADNOTES

(1) OPTIONS--EXERCISE OF--TIME.
--Where an option to purchase real property expressly limits the time within which it might be exercised, the option must be exercised within that time, otherwise the right is gone, notwithstanding time is not expressly made of the essence of the option.

(2) ID.--EXTENSION BY ONE CO-OWNER--SPECIFIC PERFORMANCE.
--The option not having been exercised within the time specified therein, and the extension of the option having been signed by only one of the co-owners of the property, the other co-owners not having ratified such extension or committed any acts constituting an estoppel to deny the same, the trial court properly denied specific performance as to all the co-owners.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. J. P. Wood, Judge. Affirmed.

The facts are stated in the opinion of the court.

COUNSEL

Swaffield & Swaffield and H. M. Barstow for Appellant.

Denio & Hart for Respondents.

CRAIG, J.

This is an action for specific performance of a written contract giving plaintiff an option to purchase property held by the defendants as equal co-owners in common. The contract was dated September 5, 1919, and expired January 15, 1920. On the last-mentioned date Della M. Hall signed her name, followed by the word "agent," executing a writing purporting to extend the plaintiff's option to February 15, 1920. On February 14th plaintiff tendered to Della M. Hall the agreed purchase price. She rejected this offer. The contract was executed by each of the defendants, but Della M. Hall was the only one to sign the extension agreement. Time was not expressly made of the essence of either writing. The trial court denied the relief sought and entered judgment for the defendant. [1] We think it clear that at the time of plaintiff's tender the original option had expired for all purposes unless it was kept alive by the writing signed by "Della M. Hall, agent." A number of authorities are cited by appellant to the proposition that where time is not expressly made of the essence of the contract the mere fixing of a time or date does not make it an essential factor. These cases principally deal with contracts other than option. In *Cates v. McNeil*, 169 Cal. 697 [147 Pac. 944], the contract was in creating an option. It was so construed that the offer to perform was within the time stipulated. *Vassault v. Edwards*, 43 Cal. 458, was a case where an agreement gave plaintiff twenty days in which to exercise his option, to accept or reject. Later plaintiff's time was extended indefinitely, so that defendant might perfect his title. It*634 was the court's opinion that time was of the essence of the original proposal for sale, although not expressly so stated. It is said in the opinion: "Had no time been mentioned the plaintiff would have been entitled to reasonable time in which to exercise his election, but the time having been fixed, the court has no power to extend it." This principle is applicable to the instant case. It is in accord with authority in other jurisdictions.

The rule fixing the time for the exercise of options is well stated in 21 American & English Encyclopedia of Law, 931, as follows: "Where by the terms of a contract for an option the exercise thereof is limited to a specific and definite time, it is necessary that the option be exercised before the expiration of such time, otherwise the right is gone. Attempts to exercise the option after the expiration of the time limited, on the ground that in equity time is not of the essence of a contract, have been uniformly met with the answer

that where the parties have seen fit to regard time as an essential element, the courts must likewise so regard it. However true in regard to executed contracts in general, the principle has generally been regarded as having no application to an offer to make a contract which by express agreement is to remain open for a specified time. There is, moreover, a strong inclination on the part of the courts to view any delay with great strictness, on the ground that the party seeking to enforce performance was not bound, while the other party was bound." Many English and American cases are cited supporting this statement of the law, and *Vassault v. Edwards, supra*, has not been questioned or qualified in this jurisdiction.

A full appreciation of the nature of an option precludes the idea that courts may allow the optionee time beyond that limited in the writing in which to accept the offer of the other party. With the lapse of time the right to exercise the option automatically expires. In this regard it is similar to an estate upon limitation, which terminates without any act of those claiming the estate to succeed to it. It is not necessary for the offerer of an option to notify the optionee that the offer is no longer open when the time limit has expired. It is not a case of cancellation of a right, for the right only existed up to a certain time and then ceased by the mere passing of that time. *635

The most that can be said for appellant's contention concerning the efficacy of the extension signed by Della M. Hall, as agent, is that the evidence was conflicting as to her authority. It is unnecessary to quote the testimony in detail, but there was direct testimony to the effect that she possessed no agency to bind her sisters in this transaction. [2] The evidence upon which appellant predicates the claim that Genevieve B. Scheurer and Cora M. Scheurer ratified the act of Della M. Hall in that behalf is quite insufficient. It appears that Cora Scheurer was informed of the signing of the extension by Della after it had been executed; the former discussed the matter with the latter, and carried on "negotiations" on the subject, although the transcript does not indicate the nature of them. These facts would not justify the conclusion that a ratification had occurred. Nor is the rule of estoppel applicable here. Plaintiff was not led to do anything in reliance upon Cora M. Scheurer's conduct. He failed to take advantage of his option and his right under the original agreement had expired before the acts or silence relied upon had occurred.

We conclude that the trial court rightly held that the plaintiff was not entitled to specific performance against Cora M. Scheurer and Genevieve B. Scheurer. Consequently it properly denied the prayer for specific performance against all of the defendants, since they were co-owners. (*Olson v. Lovell*, 91 Cal. 508 [27 Pac. 765].)

The judgment is affirmed.

Finlayson, P. J., and Works, J., concurred.
A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 20, 1923.

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