constitutional liberties,[36] the California court accords with the *Walker* dissenters[37] in looking to the substance of the judicial act in the belief—articulated by Justice Douglas—that, "Courts as well as citizens are not free 'to ignore all the procedures of the law' . . . . 'Constitutional freedom' . . . can be won only if judges honor the Constitution."[38] Where, as here, the court finds that the order abridges first amendment freedoms, the interest in those freedoms rather than the state's interest in order is the interest deserving vindication.[39]

Walker v. City of Birmingham has come under much criticism from commentators who believe that the rule reaffirmed by *In re Berry* is not only "more consistent with the exercise of first amendment freedoms"[40] but constitutionally required.[41] It is hoped that the United States Supreme Court will once again follow California's lead.[42]

IV

CONTRACTS

A. Parol Evidence

Masterson v. Sine.[1] In a decision which significantly altered the California parol evidence rule, the supreme court abandoned the "face

36. *See* 388 U.S. at 316, 320-21. For revealing support of this view, see Tefft, *Neither Above the Law Nor Below It: A Note on Walker v. Birmingham*, 1967 SUP. CT. REV. 181, where the author notes: "One cannot help wondering whether the majority had taken cognizance of John A. McCone's report on the causes of the Watts riots." *Id.* at 186. The author then proceeds to focus on the *disobedience* to the unconstitutional order—not its issuance—as contributing to the "breakdown of law and order" sweeping the country, and as encouraging riots. *Id.* at 192. However, fear of "Black Power" or black people on the march provides no basis for limiting first amendment rights. *See* Comment, *Black Power Advocacy*, 56 CALIF. L. REV. 702 (1968).

37. 388 U.S. at 327, 330-31, 334 (dissenting opinion of Warren, C.J.); *id.* at 336 (dissenting opinion of Douglas, J.); *id.* at 344, 345-48 (dissenting opinion of Brennan, J.).

38. 388 U.S. at 338. *See* Note, 56 CALIF. L. REV. 517, 524 & n.59; *See also* Note, *supra* note 4, at 75, where Professor Amsterdam describes the role of the doctrine of constitutional indefiniteness as creating a "buffer zone" around the Bill of Rights. It is hard to believe that the Bill of Rights requires protection from a legislative body but not from a superior court judge. *Compare* Staub v. City of Baxley, 355 U.S. 313 (1958), *with Walker.*

39. *See* Walker v. Birmingham, 388 U.S. 307, 343-44 (dissenting opinion of Brennan, J.). Since the right to violate the injunction is premised upon the lack of jurisdiction of the court, it seems clear that the scope of review after violation of the order is limited to the question of jurisdiction. Obviously, the knowledge that a criminal prosecution is imminent upon violation has chilling effects, even though one is ultimately successful. However, perhaps some of the all-or-nothingness of the decision should be reduced if the scope of review could be broadened where the petitioner's good faith belief in the unconstitutionality of the injunction is wrong.

40. 68 A.C. at 148, 436 P.2d at 282, 65 Cal. Rptr. at 282.

41. *See, e.g.*, Rudman & Soloman, *supra* note 29, at 185.

42. *See* Carroll v. Princess Ann, 37 U.S.L.W. 4041 (Nov. 19, 1968).

1. 68 A.C. 223, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

of the document" standard for determining whether a contract is fully integrated, in favor of the *Restatement* and Uniform Commercial Code tests. In addition, the court appears to have significantly weakened the requirement that parol evidence must be consistent with the written terms of the contract in order to be admissible.

Dallas Masterson and his wife Rebecca conveyed property they owned as tenants in common to Lu Sine and his wife Medora. Dallas and Medora were brother and sister. The deed expressly reserved in the grantors an option to repurchase. Subsequent to the conveyance Dallas was adjudged bankrupt. His wife Rebecca and the trustee in bankruptcy sought declaratory relief to enforce the option. Defendants attempted to show that the parties had orally agreed to keep the property in the family, and that the option was therefore personal to the grantors. Invoking the parol evidence rule, the trial court ruled that evidence of the alleged oral agreement was inadmissible.[2] The supreme court reversed, two justices dissenting, holding that parol evidence was admissible to prove that the option was nonassignable and thus nonexercisable by the trustee in bankruptcy.[3]

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2. The trial court also ruled that parol evidence *was* admissible to explain the terms ("same consideration" and "depreciation value") of the option clause. 68 A.C. at 225, 436 P.2d at 562, 65 Cal. Rptr. at 546. Both the majority and dissent agreed that the trial court properly admitted that evidence. 68 A.C. at 226, 233, 436 P.2d at 563, 567, 65 Cal. Rptr. at 547, 551.

3. The Sines' contention throughout the trial and on appeal was that the option was so vague as to be completely invalid, and therefore exercisable by neither the bankrupt nor the trustee in bankruptcy. On appeal, they claimed that their purpose in attempting to prove the collateral oral agreement was to show that they were holding the property in trust for the Mastersons. Appellants' Petition for Hearing by the Supreme Court at 4. The court of appeal held that inasmuch as this theory was first argued on appeal, it was untimely. Unpublished Report at 5. The supreme court did not mention appellants' theory; instead, it construed the offer or proof as an attempt to show that even if the option were valid, it was personal to the grantors, and therefore did not pass to the trustee in bankruptcy.

Since appellants did not contend that the option could be exercised—if at all—only by the bankrupt, a major issue, first appearing in the supreme court opinion, was not litigated at any stage in the case. This was whether the option, even if proved to be nonassignable, could nevertheless be excercised by the trustee in bankruptcy. The supreme court assumed, without discussion, that it could not. The language of the Bankruptcy Act, however, militates against this conclusion. Section 70a provides:

"The trustee of the estate of a bankrupt . . . shall . . . be vested . . . with the title of the bankrupt . . . to . . . . (3) powers which he might have exercised for his own benefit . . . ." 11 U.S.C. § 110 (1964).

Although apparently no court has ever decided whether a personal option passes to the trustee, the broadly inclusive language of section 70a, *see* 4A COLLIER, BANKRUPTCY 123 (14th ed. 1967), would seem to cover such an option.

Since the bankruptcy issue was neither litigated in the trial court, nor raised by the parties on appeal, the supreme court's conclusion that the option does not pass to the trustee in bankruptcy should not be accorded mueh weight as precedent. Whether on retrial the trial court will feel bound by the supreme court's conclusion is unclear; however, since the issue was never litigated, it would seem proper that it be fully heard at the trial level.

When the parties to a contract embody the terms of their agreement in a writing, intending the writing to be a complete integration—the final expression of their entire agreement—parol evidence cannot be admitted to add to or vary its terms.[4] Since the leading case of *Harrison v. McCormick*,[5] California courts have generally stated that a determination of whether a contract is fully integrated must be based solely upon an examination of the face of the document;[6] if the document appears on its face to embody a complete and final agreement, parol evidence must be excluded. Although the incompleteness of the agreement on its face is a necessary condition for the admissibility of parol evidence, it is not the only condition. It is generally held that the parol evidence must also be consistent with the writing.[7] Therefore, even if parol evidence might otherwise be admissible because the agreement is incomplete on its face, under the traditional rule it would be excluded if it is inconsistent with the written terms of the contract.

Masterson repudiated the "face of the document" rule, thereby aligning California with leading contract scholars who have criticized this rule.[8] Although this rule properly requires the trial court to admit parol evidence when construing an informal writing which does not purport to be an integration, it is an inadequate device for determining whether a writing which appears complete and final on its face was so regarded by the parties.

Even before *Masterson*, however, the California courts were apparently not consistently applying the "face of the document" rule. Not only did courts occasionally permit proof of a collateral oral agreement, despite the fact that the writing seemed complete on its face,[9] but it is likely that some judges, feeling constrained by the

4. *See, e.g.*, Estate of Gaines, 15 Cal. 2d 255, 100 P.2d 1055 (1940); Mangini v. Wolfschmidt, Ltd., 165 Cal. App. 2d 192, 331 P.2d 728 (1958). California has codified its parol evidence rule in CAL. CIV. CODE § 1625 (West 1954) and CAL. CIV. PRO. CODE § 1856 (West 1955).

For three recent analyses of the parol evidence rule, see Calamari & Perrilo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333 (1967); Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQUESNE L. REV. 337 (1966); Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036 (1968).

5. 89 Cal. 327, 26 P. 830 (1891).

6. *E.g.*, Pollyana Homes, Inc. v. Berney, 56 Cal. 2d 676, 365 P.2d 401, 16 Cal. Rptr. 345 (1961); Thoroman v. David, 199 Cal. 386, 249 P. 513 (1926).

7. *E.g.*, Mangini v. Wolfschmidt, Ltd., 165 Cal. App. 2d 192, 331 P.2d 728 (1958); RESTATEMENT OF CONTRACTS § 240(1) (1932); UNIFORM COMMERCIAL CODE § 2-202(b).

8. *See, e.g.*, 3 A. CORBIN, CONTRACTS §§ 581, 582 (rev. ed. 1960); 9 J. WIGMORE, EVIDENCE § 2431, at 103 (3d ed. 1940).

9. *See, e.g.*, Greathouse v. Daleno, 57 Cal. App. 187, 206 P. 1019 (1922). In this case the written agreement provided that plaintiff would grade and level defendant's land. Although the

strictness of this rule, freely listened to evidence of the circumstances existing at the time of the writing. Whatever courts were doing or purporting to do in the past, *Masterson* makes it clear that instead of limiting their inquiry to the writing, they must now carefully examine both the alleged oral agreement and the circumstances existing at the time of the writing.

Having abandoned the "face of the document" rule, the court substituted a test based on the credibility of the evidence, holding that, "Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled."[10] As standards for the credibility of the evidence, the court applied both the *Restatement* and the Uniform Commercial Code (UCC) tests for determining whether parol evidence is admissible. The *Restatement* permits proof of a collateral agreement if it "is such an agreement as might *naturally* be made as a separate agreement by parties situated as were the parties to the written contract."[11] The more liberal UCC test excludes such proof only if "the additional terms are such that, if agreed upon, they would *certainly* have been included in the document."[12]

The court noted that the option clause did not expressly provide that it contained the entire agreement;[13] moreover, the deed was silent as to the question of assignability. The court stated that the formalized structure of a deed made it improbable that all the terms of the agreement were embodied therein. Furthermore, the record did not disclose that the parties to the agreement recognized the possible disadvantages of failing to include all the terms in the instrument. On the basis of these facts, the court held that the "case is one . . . in which it can be said that a collateral agreement such as that alleged 'might naturally be made as a separate agreement.' A fortiori, the case is not one in which the parties 'would certainly' have included the collateral agreement in the deed."[14]

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instrument on its face appeared to embody a complete agreement, the court permitted plaintiff to prove that the parties made a collateral oral agreement that defendant would remove some trees from the land.

10. 68 A.C. at 229, 436 P.2d at 564, 65 Cal. Rptr. at 548.

11. RESTATEMENT OF CONTRACTS § 240(1)(b) (1932) (emphasis added).

12. UNIFORM COMMERCIAL CODE § 2-202, Comment 3 (emphasis added). California has adopted the UCC, CAL. COMM. CODE (West 1964), but section 2-202 only applies to sales contracts. Nevertheless, there is no reason why a court could not adopt the same approach to the parol evidence rule for all other contracts.

13. 68 A.C. at 229, 436 P.2d at 565, 65 Cal. Rptr. at 549. The court stated that the presence of an integration clause may help to resolve the integration issue. 68 A.C. at 227, 430 P.2d at 563, 65 Cal. Rptr. at 547. Whether the court was suggesting that such a clause will be considered along with all other evidence of intention to integrate, or that it will raise a conclusive presumption that the parties had made an integrated contract is unclear. For a discussion of integration clauses, see 3 A. CORBIN. CONTRACTS § 578 (rev. ed. 1960).

14. 68 A.C. at 230, 436 P.2d at 565, 65 Cal. Rptr. at 549.

In applying both the *Restatement* and the UCC tests, *Masterson* regrettably failed to indicate which test it adopted.[15] Because not every factual situation will satisfy both tests, the trial court's decision as to which applies could have a crucial effect on the outcome of a case. Under the *Restatement* test, the trial judge must determine whether parties, situated as were the parties to the contract, would generally make a separate agreement. If the judge so finds, the parties acted "naturally," and proof of the oral agreement is permitted.[16] Under the UCC test, however, the mere fact that the parties failed to behave "naturally" in making their contract will not preclude proof of the agreement. The trial judge will exclude parol evidence only if the parties would have "certainly" incorporated the additional terms in the writing had they been agreed upon. Unfortunately, guidance from the supreme court as to which test trial judges should use must await future decisions.

In addition to abandoning the "face of the document" rule in favor of the *Restatement* and UCC tests, *Masterson* seems to have diluted significantly the requirement that parol evidence, although otherwise admissible, must be consistent with the writing. This is true even though the court enunciated a similar requirement—that the agreement must not "directly contradict" the writing.[17] Ordinarily, an option is assignable.[18] This is based on the theory that options are property,[19] and the Civil Code expressly provides that property of any kind is transferable.[20] Nevertheless, the supreme court did not hold that proof of the alleged oral agreement that the option was not assignable must be excluded on the ground that it directly contradicted the writing.

Instead, the court relied on a number of cases in which proof of an oral agreement was permitted where it rebutted a term presumed

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15. The dissent apparently regarded the majority as having adopted the *Restatement* formulation, and as only incidentally showing that the UCC test was satisfied. 68 A.C. at 239, 436 P.2d at 571, 65 Cal. Rptr. at 555.

16. Although the majority in *Masterson* concluded that it was natural for the parties to make a separate agreement, the dissent persuasively argued that restrictions on the transferability of property are frequently included in deeds, and that the formalized structure of a deed could hardly be a formidable barrier to the inclusion of a short nonassignability clause. This disagreement between the majority and the dissent suggests that trial courts will not have an easy task in determining whether the parties acted naturally. For criticism of a test similar to that of the *Restatement*, see Sweet, *supra* note 4, at 1064 n.101.

17. 68 A.C. at 228, 436 P.2d at 564, 65 Cal. Rptr. at 548.

18. Mott v. Cline, 200 Cal. 434, 253 P. 718 (1927); Altmann v. Blewitt, 93 Cal. App. 516. 269 P. 751 (1928).

19. *See* Mott v. Cline, 200 Cal. 434, 253 P. 718 (1927).

20. CAL. CIV. CODE § 1044 (West 1954).