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ownership"³¹ refers not so much to the making of the same products in the same plant, but to an appearance to the employee of a continuation of the old labor policy, which, in turn, frustrates the policies of the National Labor Relations Act.

An innocent purchaser can now be required by the NLRB to remedy the unfair labor practices of his predecessor under the successorship theory. Although an unrestricted exercise of this authority may place an unjust burden upon the purchaser, an examination of the contractual options available to the purchaser indicates that innocent purchaser liability, as limited by the successorship theory, is not manifestly unfair. If the prospective buyer has notice of the unfair labor charge, as required by *U.S. Pipe*, he can insulate himself from the hardships imposed by the subsequent order either by negotiating for a reduced purchase price or for an indemnity clause in the contract of sale. Admittedly, the innocent purchaser cannot be relieved of all the burdens through contractual agreement;³² however, any remaining burden is negligible when contrasted to the deleterious effects of an unremedied violation. In light of this consideration, the court in *U.S. Pipe* properly balanced the equities.

JERRY W. LEONARD

Real Property—Mortgagee's Rights in Security

The California Supreme Court, in the recent decision of *American Savings & Loan Association v. Leeds*,¹ imposed significant limitations on a purchase money mortgagee's rights to his security. Contrary to the situations in other states, the California mortgagee finds himself in an increasingly precarious position. The *Leeds* decision not only increases the mortgagee's risk, but also injects a degree of uncertainty into the law.

The plaintiff in *Leeds* was the beneficiary of a deed of trust given to secure a debt defendant Leeds had incurred to purchase real estate from defendants Sheridan. The Sheridans had falsely represented that the house had been built on unfilled land and had also concealed defects caused by subsidence due to improper filling. After the sale, when further

³¹ *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544, 548 (5th Cir. 1968).

³² For example, a stigma possibly attaches to an employer involved in an unfair labor proceeding.

¹ — Cal. 2d —, 440 P.2d 933, 68 Cal. Rptr. 453 (1968).

subsidence rendered the property "worthless or of little or no value,"² Leeds sued the Sheridans for the purchase price and settled the action for an unknown amount. In its action, the mortgagee sought to recover general and punitive damages from the Sheridans, to hold Leeds liable for its loss on the theory that his failure to keep the property in repair destroyed its security, and to impose a trust on the amount Leeds had recovered from the Sheridans. Leeds demurred, and the court dismissed the complaint against him.

On appeal, plaintiff argued that covenants by Leeds in the deed of trust to "keep said property in good condition and repair . . . [and] to complete or restore promptly and in good condition and workmanlike manner any building which may be constructed, damaged, or destroyed thereon,"³ and to assign to the plaintiff "[a.]ny award of damages in connection with any condemnation for public use or injury to said property . . ." ⁴ entitled him to recover.

In ruling on the second quoted covenant, the court held that the settlement that Leeds had received in the prior suit was not for injury to the property, but for the "fraudulent or negligent wrong in inducing defendant to purchase the property."⁵ For that reason, the money could not be regarded as a substitute for the injured property. By differentiating between recoveries for injury *to* land and for fraudulent representations *about* land, the court apparently intended to distinguish the situation in *Leeds* from that in *Los Angeles Trust & Savings Bank v. Bortenstein*.⁶ There defendant's mortgaged land was flooded due to negligence on the part of the city, and defendant had recovered damages from the city. Plaintiff-mortgagee was allowed to share in the recovery to the extent of the mortgage as if the city had taken the land for public use. The money, according to the court, had taken the place of the land, and defendant had taken possession of the money subject to the plaintiff's security.

In *Leeds* the court, while denying that the money collected by Leeds "takes the place of the land," stated that if the Sheridans had paid Leeds the *full* purchase price in the settlement, the plaintiff could impose a constructive trust to the extent of its security in the premises. Since the plaintiff was unable to plead the amount that Leeds had received in the settlement, it was held to have failed to state a cause of action.

² *Id.* at —, 440 P.2d at 935, 68 Cal. Rptr. at 455.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at —, 440 P.2d at 937, 68 Cal. Rptr. at 457.

⁶ 47 Cal. App. 421, 190 P. 850 (1920).

The result that the court would have reached had the full purchase price been paid would apparently be grounded on general constructive trust principles,⁷ and not because the court regarded the money as a substitute for the land merely because the entire purchase price had been refunded. The court reasoned that in that situation the Sheridans would have intended a complete settlement for all liability and that Leeds thus is presumed to have mistakenly taken money which belongs to the plaintiff. But it is unclear why a constructive trust should be imposed if Leeds collected the whole amount to which he and the plaintiff were entitled, but not if he collected less than that amount, but more than that to which he himself was entitled. Furthermore, damages for fraud would be measured by subtracting the actual value of the property at the time of conveyance from the price paid.⁸ Given this measure, it may be accurate to say that the recovery did not "take the place of the land" for remedial purposes, but still the settlement may have been for more than Leeds' damages, especially since the damages he prayed for in the prior suit equalled exactly the purchase price paid to the Sheridans. With this possibility, why must the plaintiff plead the exact amount Leeds received, rather than being allowed to take advantage of discovery mechanisms to ascertain the amount of that recovery?⁹ The court says little to solve these problems.¹⁰

As to the first covenant to restore damaged property, the court found that even if it could be interpreted to obligate Leeds to correct the fill, the state's anti-deficiency judgment statute, section 580b of the CALIFORNIA CODE OF CIVIL PROCEDURE,¹¹ would prohibit such an effect. By

⁷ The court cited RESTATEMENT OF RESTITUTION § 160 (1936), which outlines the general nature of the constructive trust remedy.

⁸ CAL. CIV. CODE § 3343 (West 1954).

⁹ The plaintiff might have escaped this dilemma by pleading on information and belief that the defendant had received the entire purchase price, thereafter using discovery procedures and amending its complaint accordingly. The complaint was dismissed without leave to amend, however.

¹⁰ Justice Mosk, dissenting, criticized the majority for its inattention to these problems, and for "hinting" that a future action may lie, while not allowing a determination in the case before them.

¹¹ CAL. CODE CIV. PROC. § 580b (West Supp. 1967). This section provides: *No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to the vendor to secure payment of the balance of the purchase price of real property, or under a deed of trust, or mortgage, on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all of or part of the purchase price of such dwelling occupied, entirely or in part by the purchaser.* *Italicized portions were adopted by amendment [1963] Cal. Stat., ch. 2158, § 1.*

so ruling, the court applied the statute to a situation markedly different from that in which such statutes are normally applied.

A "deficiency judgment" has been traditionally defined by the courts as "that part of a debt which a mortgage was given to secure and [which is] not realized from the sale of mortgaged property."¹² California's anti-deficiency statute has been interpreted to give broad protection to purchasers of real estate. It was originally enacted in 1933,¹³ and was later modified to prohibit a deficiency judgment "after any sale of real property for failure of the purchaser to complete his contract of sale . . ."¹⁴ The California courts (before the amendment that specifically so provided) construed the statute, contrary to other court's interpretations,¹⁵ to cover money advanced to the purchaser by persons other than the vendor.¹⁶ It has been held that when a grantee of a purchase money mortgagor assumes the debt he is entitled to the protection of section 580b.¹⁷ The court has also found that a purchase money mortgagor is protected by the statute from the claims of a holder of a second purchase money deed of trust, even though the security was exhausted in a sale by the holder of the first trust deed.¹⁸

The court has stated that the purpose of the statute is to insure that "for a purchase money mortgage or deed of trust, the security alone can be looked to for recovery of the debt,"¹⁹ and thus to put on the lender the risk that the security may be inadequate at the time of default. An attempt was subsequently made to ascertain the purposes that the statute was designed to achieve.²⁰ The court discussed and rejected the possibility that the statute was intended to prevent a creditor from purchasing the mortgaged premises for less than their true value at a forced sale and thereafter obtaining a large deficiency judgment. Other sections

¹² Harrow v. Metropolitan Life Ins. Co., 285 Mich. 349, 353, 280 N.W. 785, 787 (1938).

¹³ [1933] Cal. Stat., ch. 642, § 5.

¹⁴ [1935] Cal. Stat., ch. 680, § 1.

¹⁵ See Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict of Laws Method*, 1960 DUKE L.J. 1, 17-18.

¹⁶ Bargioni v. Hill, 59 Cal. 2d 121, 378 P.2d 593, 28 Cal. Rptr. 321 (1963).

¹⁷ Stockton Sav. & Loan Bank v. Massanet, 18 Cal. 2d 200, 114 P.2d 592 (1941).

¹⁸ Brown v. Jenson, 41 Cal. 2d 193, 259 P.2d 425 (1953). *Contra*, Sivade v. Smith, 104 N.J. Eq. 528, 146 A. 364 (1929). In Gates v. Schuster, 227 Cal. App. 409, 38 Cal. Rptr. 644 (1964), a plaintiff who had sold both real and personal property and accepted cash and a promissory note secured by a trust deed on the real property only was held to have contracted to forego further security, and was therefore unable to obtain a deficiency judgment on the personalty.

¹⁹ Brown v. Jenson, 41 Cal. 2d 193, 198, 259 P.2d 425, 427 (1953).

²⁰ Roseleaf Corp. v. Chierighino, 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963).

of the California Code²¹ limit a deficiency judgment under *any* mortgage to the difference between the amount of the obligation and the *fair market value* of the property sold. Hence, a mortgagor is protected from a deficiency judgment following a low auction bid if the fair market value is equal to or greater than the mortgage debt. The court felt, therefore, that if section 580b is not merely redundant, it must have been intended to protect *purchase money* mortgagors, whether the mortgagee be the vendor or a third party, from deficiency judgments even when the fair market value of the land is not as great as the mortgage debt. Also rejected as the basis for the statute was the assertion that the lender knows more about the property being sold than the buyer.

Three considerations have been accepted as underlying the statute's stated goal:²² (1) to discourage the vendor's overvaluing the land; (2) to discourage speculative land promotions; and (3) to prevent the aggravation of an economic depression that might result from the purchaser's losing both the land and the amount of the judgment. The *Leeds* decision may be evaluated in light of its tendency to further these three ends. The first goal is not relevant in *Leeds* because the plaintiff there was not the vendor. The *Leeds* decision might tend to further the second goal of braking speculative land sales by forcing potential third party lenders to investigate the value of the premises offered as security before extending loans. The third goal, offsetting deflationary tendencies in the economy, is acknowledged to be the primary objective. The *Leeds* case did not involve the most obvious way depressions could be accelerated by deficiency judgments because, unlike the normal deficiency judgment action, there was no possibility of the defendant's losing both the land and part of his other assets.

In ascertaining whether the *Leeds* decision could operate to lessen the severity of a depression in some other way, there are two approaches that might be read into the opinion. It could be contended that the court held (1) that the plaintiff must bear the risk that the security was damaged at the time of sale only, or (2) that if the security becomes inadequate at any time, for any reason, plaintiff must bear the burden. The relevant language is:

Even if defendant's agreement to "keep said property in good condition and repair" and to "restore . . . any building which may be . . . damaged or destroyed thereon" could reasonably be interpreted to

²¹ CAL. CODE CIV. PROC. §§ 580a, 726 (West 1955).

²² *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963).

include an obligation to correct the improper fill condition and repair all physical damage caused thereby, section 580b of the Code of Civil Procedure would preclude giving effect to that interpretation To require defendant to correct the condition of the property existing at the time of sale . . . would shift to him one of the risks that section 580b requires plaintiff to bear.²³

The second interpretation might open the possibility of exhaustion of the security by a dishonest or negligent mortgagor, with no recourse for the lender. Both the court's choice of language ("condition . . . existing at the time of sale") and the background of the decision make it unlikely that this was the intended meaning.²⁴

If the court's interpretation passed the risk of inadequate security at the time of sale only to the vendor, the decision has no effect on the severity of depressions. If offsetting deflationary tendencies is the only legitimate purpose of section 580b,²⁵ the statute would apply only when the fair market value of the premises had fallen below the amount of the mortgage debt because of declining land values. The plaintiff urged that fighting such a snowball effect of declining land prices is the sole aim of the statute, and that the risk placed on the lender was of an economic nature caused by price fluctuation.²⁶ But the court, by its ruling, extended the disabling effect of the statute to those lenders who find the value of the premises to be below the amount of the debt because they took inadequate security originally, and implicitly held that the statute had purposes other than "cycle-leveling." The *Leeds* decision may rest on the goal of discouraging speculation or on purposes not previously enumerated by the court.

By apparently refusing to limit section 580b's purpose to "cycle-leveling," and by speaking of "the risks that section 580b requires plaintiff to bear"²⁷ without explicitly stating what those risks are, the court has left the mortgagee's rights and contract options open to question. It is certain that the mortgagee cannot protect himself from the risk that the security is inadequate at the time the mortgage is made, regardless of the cause of the inadequacy. Probably, the validity of a promise by a

²³ — Cal. 2d at —, 440 P.2d at 937, 68 Cal. Rptr. at 457 (citation omitted).

²⁴ *Easton v. Ash*, 18 Cal. 2d 530, 116 P.2d 433 (1941), held that the mortgagor's right to sue for waste remains intact. There is dicta to that effect in *Weaver v. Bay*, 216 Cal. App. 732, 31 Cal. Rptr. 211 (1963).

²⁵ *Hetland, Deficiency Judgment Limitations in California—A New Judicial Approach*, 51 CALIF. L. REV. 1 (1963), suggests that "cycle-leveling" should be the sole purpose.

²⁶ Appellant's Opening Brief at 12, Petition for Hearing by Supreme Court at 8, — Cal. 2d —, 440 P.2d 933, 68 Cal. Rptr. 453 (1968).

²⁷ — Cal. 2d at —, 440 P.2d at 937, 68 Cal. Rptr. at 457.

mortgagor not to impair the security is not affected by the *Leeds* decision. In *Mills v. Brown*,²⁸ a provision in a chattel mortgage on sheep whereby the mortgagor promised not to sell the sheep, their increase, or their wool was held to authorize a suit against the mortgagor for conversion, notwithstanding a statutory provision²⁹ limiting a mortgagee to one action to recover the debt or to enforce a right secured by the mortgage. The court found that the action was not one covered by the statute, but one to prevent impairment of the security given. This would seem analagous to an action for impairment of security by a mortgagor-occupier that is challenged by section 580b.³⁰ Moreover, the court has not in the past forbidden the mortgagee's contracting for further security on the same debt.³¹ The validity of a promise by a mortgagor to repair damages due to the actions of third parties or natural catastrophies, which might be regarded as "further security," is, nevertheless, put into question by the *Leeds* decision.³² The court did point out that *Leeds* involved an unusual situation where the damage had occurred before the transfer of the land. Also, in suggesting remedies that the mortgagee may still retain, the court included waste, suits against third parties for tortiously damaging the security, and rights in eminent domain proceedings, but made no mention of covenants to repair damage not caused by the mortgagor. There is nothing in the opinion to indicate whether such damage is included in the risks that section 580b puts on the lender, and the validity of such covenants by the mortgagor should be at least suspect.

Summarizing briefly, it was held by the court that the covenant by Leeds to assign "[a]ny award of damages" did not entitle plaintiff to a constructive trust in the proceeds of the settlement, the recovery not being for injury to land. The court further held that to interpret the covenant to "keep such property in good condition and repair" as imposing upon Leeds the duty to correct the fill would pass to him one of the risks section 580b requires the lender to bear. This decision has been evaluated in light of the three previously accepted reasons for the statute's policy. In assessing the effects of the decision on the primary goal, preventing depression, it is unlikely the court intended to require the mortgagee to

²⁸ 205 Cal. 38, 269 P. 636 (1928).

²⁹ CAL. CODE CIV. PROC. § 726 (West 1955).

³⁰ The dissenter found *Mills* applicable, — Cal. 2d at —, 440 P.2d at 938, 68 Cal. Rptr. at 458, and presumably felt that the analogy between realty and personalty was valid.

³¹ *Mortgage Guar. Co. v. Sampsell*, 51 Cal. App. 2d 180, 124 P.2d 353 (1942).

³² The court, in a footnote, — Cal. 2d at —, 440 P.2d at 936 n.2, 68 Cal. Rptr. at 456 n.2, did distinguish this case from those in which the damage was inflicted *after* the mortgage.

bear the burden of the security's becoming inadequate at any time for any reason. Since placing the risk of inadequate security at the time of sale on the mortgagee would not further the anti-depression goal, the court may have found purposes for section 580b not articulated in prior decisions. While it is possible to draw some conclusions about the effects of the decision on the mortgagee's position, it is not possible to say whether a provision making mortgagors responsible for damage to the security from third parties or natural calamity would be valid.

An authority on the law of mortgages has observed that "[i]n all legal systems there seems to be in the law of mortgages an evolution from a forfeit-idea in which the res is given as conditional satisfaction of some act for which there is no personal duty (at least not one for which there is a direct action) to a security idea."³³ This evolution has been due mainly to the skill of drafters of mortgages and other security agreements who, typically, are the lenders or their representatives. The California court's treatment of the anti-deficiency judgment statute has reversed the trend. The mortgaged real estate is no longer simply a convenient method for the lender to collect what is owed him, but a device for limiting the borrower's liability in loan transactions involving the sale of real estate. The facts that in the typical mortgage the lender is a professional and the borrower an amateur, that the lender often is in the better bargaining position, and that the market is sometimes lacking in competitiveness may have influenced the reasoning that brought the court to this position. It is the court's view that these considerations influenced the legislature in enacting the statute. But the presence or absence of these facts in the individual case is now irrelevant, the determination having been made in advance for the whole class of such cases in favor of the borrower.

Thus, California has again given special encouragement to buyers of land, and in doing so has apparently revived an earlier view of the mortgage relation.

STEPHEN MASON THOMAS

Torts—A Clarification of the Actual Malice Test

In a recent libel case, *St. Amant v. Thompson*,¹ a majority of the Supreme Court reaffirmed and clarified, but declined to expand, the "reck-

³³ G. OSBORNE, MORTGAGES, § 13, at 31 (1951).

¹ 390 U.S. 727 (1968), *rev'g* 250 La. 405, 196 So. 2d 255 (1967).