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. . . ."[102] The rule that, absent a waiver, "no person may be imprisoned . . . unless he was represented by counsel at his trial"[103] could apply to the military without undue disruption of its functions. In reaching a contrary conclusion, the *Middendorf* Court over-estimated the needs of the military and under-estimated the needs of the individual.

MARK A. STERNLICHT

Mortgages—Use of Due on Sale Clause by a Lender Is Not a Restraint on Alienation in North Carolina

During the last seven centuries of judicial history, courts have construed restraints on alienation to be contrary to public policy and therefore void.[1] The North Carolina Supreme Court has followed this tradition by consistently holding that conditions that restrain the alienation of legal[2] and equitable[3] estates are void. In *Crockett v. First Federal Savings & Loan Association*,[4] however, the court altered its position. In departing from the traditional restraints on alienation doctrine, the court developed a new test and sustained the use of a due on sale clause[5] as a valid restraint on alienation.[6] This result was reached de-

102. Note, *Military Law—Courts-Martial—Recent Cases Defining the Right to Counsel Before Summary Courts-Martial*, 1975 B.Y.U.L. REV. 285, 292-93.
103. 407 U.S. at 37.

1. The Statute of Quia Emptores, 18 Edw. 1, cc. 1-3, was enacted in 1290. Under this statute the doctrine of subinfeudation was limited by prohibition of feudal tenures in a fee simple estate. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 15 (2d ed. 1956). This statute laid the basis for many of the common law doctrines dealing with restraints on alienation.
2. Brooks v. Griffin, 177 N.C. 7, 97 S.E. 730 (1919); Latimer v. Waddell, 119 N.C. 370, 26 S.E. 122 (1896).
3. *E.g.*, Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916).
4. 289 N.C. 620, 224 S.E.2d 580 (1976).
5. Mortgages that contain a due on sale clause permit the lender to withhold consent to possible transfers by the mortgagor. A mortgagor who seeks to alienate his property without the lender's consent faces the possible exercise of the clause by the lender. An exercise will force acceleration of the existing note and all principal will be due on the note at the time of sale. The clause used in *Crockett* reads:

> [O]r if property herein conveyed is transferred without the written assent of the Association, then in all or any of said events the full principal sum with all unpaid interest thereon shall at the option of Association, its successors or assigns, become at once due and payable without further notice and irrespective of the date of maturity expressed in said note.

Id. at 622, 224 S.E.2d at 582.
6. *Id.* at 630-31, 224 S.E.2d at 587.

spite the fact that the sole reason for the lender's decision to enforce the due on sale clause, and thus to accelerate the note, was to collect a higher interest rate.

In April of 1975, plaintiffs, Mrs. Crockett and Mr. and Mrs. Proctor, entered into a contract with defendant Association for the purchase of three apartment buildings. The agreement was conditioned on the Proctors' ability to assume the outstanding balance of the indebtedness on the buildings at the seven percent rate specified in the note.[7] Defendant Association agreed to accept the assumption agreement provided that the Proctors consented to a new interest rate of nine and three-quarters percent. If a transfer were made under any other circumstances, the Association would accelerate the note. Suit was brought by plaintiffs to restrain enforcement of the clause and for money damages. In superior court, summary judgment was granted for plaintiffs.[8] The supreme court reversed, holding that justifiable reasons exist for enforcing such clauses and that their overall effect on alienation is insignificant.[9] These justifiable reasons are not limited to security impairment but could include significant economic interests such as raising the interest rate.[10]

To evaluate the *Crockett* decision properly, it is necessary to examine prior case law dealing with the restraint on alienation doctrine and its relationship with the due on sale clause. Courts have taken three different approaches in analyzing restraints. The first two approaches deal with direct restraints on the alienability of property. The majority doctrine of direct restraints, which is the traditional view, holds all restraints invalid per se unless the restriction falls within certain recognized exceptions.[11] Under the minority doctrine of direct re-

7. Crockett had assumed the note when she purchased the apartments from Domar Corporation, the original debtor, in May of 1968. The original interest rate was seven percent. *Id.* at 635, 636, 224 S.E.2d at 590 (Lake, J., dissenting).

8. Crockett v. First Fed. Sav. & Loan Ass'n, No. 75 CVS 5941 (Super. Ct. of Mecklenburg County, Sept. 24, 1975). The issue of damages was ordered to remain upon the civil docket. 289 N.C. at 620-21, 224 S.E.2d at 581.

9. *Id.* at 630-31, 224 S.E.2d at 587. *But see* Justice Lake's dissent, in which he stated that the due on sale clause is as fundamental a restraint as is the classic promissory restraint. *Id.* at 644, 224 S.E.2d at 595 (quoting Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests,* 58 IOWA L. REV. 747 (1973)).

10. *Id.* at 630-31, 224 S.E.2d at 587.

11. *See, e.g.,* Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969) (condition annexed to creation of charitable trust an exception to restraints doctrine); Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916) (condition preventing alienation of woman's separate equitable estate held a valid restraint). *See also* Note, *Deeds of Trust—Restraints Against Alienation—Due-On*

straints, a restraint is valid and reasonable when its purpose outweighs the actual hindrance on the property interest.[12] Under the third view only restrictions classified as indirect restraints on alienation are sustained as valid.[13] The latter two views differ noticeably from the majority direct restraint approach. Under the latter view, the court characterizes the supposed restraint either as an invalid hindrance or as an exception. This characterization is the extent of the analysis. The minority direct restraint view and the indirect view use a balancing process to determine whether justifiable purposes exist for the restriction. Most courts in considering whether the due on sale clause is a restraint on alienation have sustained the clause under either the minority doctrine of direct restraints or the indirect view.[14]

Out of this judicial balancing, several social and economic factors have emerged as salient to the decision whether a due on sale clause is a valid restriction. Most factors cited by the courts have involved security impairment[15] and the economic interests of the lender. These interests include increased interest rates,[16] reduced lending risk[17] and increased lending caused by greater turnover of loan funds.[18] In balancing the risk of security impairment against the economic interests of the lender, courts have developed three divergent views concerning the due on sale clause.[19]

Clause is an Unreasonable Restraint on Alienation Absent a Showing of Protection of Mortgagee's Legitimate Interests, 47 MISS. L.J. 331 (1976).

12. *See, e.g.*, Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1 (1975); Gale v. York Center Community Coop., 21 Ill. 2d 86, 171 N.E.2d 30 (1960). *See generally* Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173 (1959).

13. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1112 (2d ed. 1956). An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint on alienability, but with the incidental result that the instrument if valid would restrain practical alienability. *Id.*

14. *See* Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964); Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973).

15. *E.g.*, Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972); Mutual Fed. Sav. & Loan Ass'n v. American Medical Servs., Inc., 66 Wis. 2d 210, 223 N.W.2d 921 (1974).

16. *E.g.*, Stith v. Hudson City Sav. Inst., 63 Misc. 2d 863, 313 N.Y.S.2d 804 (Sup. Ct. 1970); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973).

17. *E.g.*, Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 486 P.2d 190 (1971), *cert. denied*, 108 Ariz. 192, 494 P.2d 1332 (1972); Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969).

18. This is the ultimate result of use of the due on sale clause. A greater number of loans can be made with adequate protection given by the due on sale clause. *See* Note, *supra* note 11, at 345.

19. Most of the early case law that laid the foundation for the three views came

In one view, the impairment of security approach, mere allegation by the lender that the covenants or conditions of the loan have been violated is not enough to justify acceleration.[20] "Acceleration can occur only when the purpose of the clause has been circumvented or the lender's security jeopardized."[21] The courts following this view feel that if circumvention were not present and the clause were enforced, then the equitable powers of the court would be invoked to impose an extreme penalty on the debtor.[22] This approach is the most restrictive of the three.

A second view, the reasonable circumstances view, allows the lender to enforce the due on sale clause when his action is reasonable under the circumstances.[23] Courts using this approach usually balance the equitable factors involved.[24] Economic interests of both the borrower and the lender are also balanced under this view. An interesting development in these cases is that the lender's desire to increase the interest rate of a note is not an invalid reason per se.[25] By recognizing both the economic interest of the lender and the individual circumstances of the mortgagor, this approach leads to varied results.

The final view, the per se approach,[26] gives the lender the greatest amount of authority. Under this approach, the lender may enforce the

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from the California Supreme Court. The first of these cases was Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964), which held that the due on sale clause was a valid instrument if it served to protect justifiable interests (*e.g.*, property upkeep, integrity and character of purchaser). In Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969), the court held that lenders had discretion in the use of their money and no obligation existed to act reasonably. Later cases began to cut back on this precedent. In La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971), the court recognized that automatic enforcement of a due on encumbrance clause was unnecessary to protect security. Finally in Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974), the court severely limited *Cherry, supra,* by holding that automatic enforcement of a due on sale clause will no longer be permitted. Legitimate interests must exist before a lender will be able to exercise the clause.

20. *E.g.*, Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 486 P.2d 190 (1971), *cert. denied,* 108 Ariz. 192, 494 P.2d 1322 (1972).

21. *Id.* at 81, 486 P.2d at 193.

22. *See, e.g., id.*

23. *See generally* Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests,* 58 IOWA L. REV. 747 (1973).

24. *E.g.*, Mutual Fed. Sav. & Loan Ass'n v. American Medical Servs., Inc., 66 Wis. 2d 210, 223 N.W.2d 921 (1974).

25. *E.g.*, People's Sav. Ass'n v. Standard Indus., Inc., 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973).

26. *See, e.g.*, Stith v. Hudson City Sav. Inst., 63 Misc. 2d 863, 313 N.Y.S.2d 804 (Sup. Ct. 1970). Controversy has centered around whether Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964), should be placed in this

clause for strictly economic reasons, for example: (1) lender can rid his portfolio of low yield loans and make new agreements at higher rates; (2) lender can escape arbitrary termination provisions.[27] The per se approach narrowly construes the due on sale clause in favor of the lender.[28]

In *Crockett*, the North Carolina Supreme Court appears to have rejected the majority direct restraint on alienation doctrine and moved into a balancing process. Application of this balancing process involved mixing several restraint on alienation views with the due on sale approaches. One of the main criteria used was the *Restatement of Property* definition of restraints.[29] Under this definition restraints are justified by measuring the amount of actual interference with alienation and comparing this result with the objectives sought by enforcement of the restraint. If the actual interference with alienability is insignificant, the supposed restraint will be sustained.[30] This objective-versus-restraint approach is similar to the analysis under both the minority view of direct restraints and the indirect restraint view.[31] In using a balancing approach, the court also incorporated the reasonable circumstances view of due on sale clauses used in other jurisdictions.[32] Unlike the courts in these other jurisdictions, however, the North Carolina court mentioned only a few of the many factors usually involved in due on sale decisions.

One policy consideration mentioned by the court was the failure of the lender to use prepayment penalties.[33] By not using the prepayment penalties, the lender allows the mortgagor to refinance with little difficulty when interest rates drop. Allowing the lender the same abil-

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category. Justice Lake in his dissent suggested that *Coast Bank* did follow the per se approach. 289 N.C. at 638, 224 S.E.2d at 592. Volkmer, *supra* note 23, at 774-75, suggests that Justice Traynor was trying to write *Coast Bank* under the reasonable circumstances view.

27. *See* Stith v. Hudson City Sav. Inst., 63 Misc. 2d 863, 867, 313 N.Y.S.2d 804, 808 (1970).

28. *See, e.g., id.* at 863, 313 N.Y.S.2d at 804.

29. RESTATEMENT OF PROPERTY § 410, Comment a at 2429 (1944).

30. 289 N.C. at 628, 224 S.E.2d at 586.

31. *See* Bernhard, *supra* note 12. *See generally* L. SIMES & A. SMITH, *supra* note 13, at § 1112.

32. 289 N.C. at 628, 224 S.E.2d at 586.

33. *Id.* at 627, 224 S.E.2d at 585. Prepayment penalties are used by many lenders. If the mortgagor wants to pay the loan off before maturity date, he may have to pay a certain percentage fee based on the outstanding loan amount or the original debt. These fees usually run from one to two percent. *See* Comment, *Usury Law in North Carolina,* 47 N.C.L. REV. 761, 785 (1969). *See also* N.C. GEN. STAT. § 24-10 (Cum. Supp. 1975).

ity to adjust the rates seems equitable.[34] The stress put on this factor by the *Crockett* court is consistent with precedent in other jurisdictions.[35]

Another policy factor[36] mentioned by the court was the ability of plaintiff to alienate her realty absolutely without fear of penalty or forfeiture.[37] Although the mortgagor has the ability to sell his equity, the lender's decision to exercise the clause may often be as effective a "deterrent" as the issuance of an injunction barring the sale.[38] With the emergence of the interest rate as a component of real estate value,[39] the decision by the lender to exercise the clause may either reduce the proceeds of the sale or preclude it entirely.[40] Low interest rates and the ability to assume low interest loans are often major considerations in buying residential real estate.

Another element of major importance in real estate transactions is the relative experience of the parties involved. In *Crockett*, the court attached considerable importance to the principle that courts will not inquire into contractual obligations when parties are of equal competence.[41] Mrs. Crockett and Domar Corporation may have been on "equal footing" with defendant since each had engaged in some commercial property dealings before.[42] But the situation may be quite different when a commercial lender is dealing with the typical residential purchaser,[43] who is extremely naive in real estate transactions. Whether *Crockett* will be limited to its facts or will be extended to include

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34. 289 N.C. at 626, 224 S.E.2d at 585.

35. *See, e.g.*, Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 486 P.2d 190 (1971), *cert. denied*, 108 Ariz. 192, 494 P.2d 1322 (1972). Enforcement of an acceleration clause was denied on the ground that large prepayment penalties were involved. *Id.* at 81, 486 P.2d at 193.

36. 289 N.C. at 625, 224 S.E.2d at 584.

37. Several commentators, however, point out that the due on sale clause inhibits alienation. *See, e.g.*, Bonanno, *Due-on-Sale and Prepayment Clauses in Real Estate Financing in California in Times of Fluctuating Interest Rates—Legal Issues and Alternatives*, 6 U.S.F. L. REV. 267, 309 (1972); Note, *Judicial Treatment of the Due on Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 STAN. L. REV. 1109 (1975).

38. *See* Note, *supra* note 37, at 1113.

39. *See* Bonanno, *supra* note 37, at 309.

40. *See* Note, *supra* note 37, at 1113.

41. 289 N.C. at 630, 224 S.E.2d at 587. The court relied on Roberson v. Williams, 240 N.C. 696, 83 S.E.2d 811 (1954).

42. 289 N.C. at 630, 224 S.E.2d at 587 (quoting Roberson v. Williams, 240 N.C. 696, 83 S.E.2d 811 (1954)).

43. *See* Justice Lake's dissenting opinion, 289 N.C. at 642-43, 224 S.E.2d at 594-95.

all real estate purchasers is a problem that the court must face in the future.

Although impairment of security is usually the most important policy factor in due on sale cases, the *Crockett* court did not mention any of the considerations that enter the balancing process to determine whether a lender's security has been impaired. The lender's security often improves upon assumption of an existing note by a new debtor because the lender now has two sources from whom to collect. The new debtor becomes the principal obligor and the initial mortgagor becomes a surety.[44] Another consideration in determining whether security is impaired is actual physical waste or depreciation of the mortgaged premises.[45] Perhaps the most controversial element of security is the identity and personality of the borrower. Several courts have recognized the lender's maintenance of control over the mortgagor's identity and his financial responsibility as an acceptable business objective.[46] Security impairment is of major importance to both the courts and the lenders. The court in *Crockett,* however, failed to analyze the existence of that factor properly.

Because it rejected the traditional view of direct restraints in *Crockett,* the North Carolina Supreme Court had to balance the policy reasons underlying the restraints on alienation doctrine against the need to protect both the economic vitality of secured transactions and the freedom to contract.[47] Enormous policy considerations support each of these important legal concepts. In using a balancing test to determine the validity of the restriction, the court touched on several additional factors that support not only the due on sale clause, but the whole real estate industry. The *Crockett* court described due on sale clauses as conditions that *promote* alienability of property.[48] Without the due on sale clause, a lender would be encouraged to explore alternatives that could significantly reduce consumer access to the housing

44. *See* First Carolinas Joint Stock Land Bank v. Page, 206 N.C. 18, 173 S.E. 312 (1934).

45. *See, e.g.,* Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974).

46. *See, e.g.,* Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1 (1975); Peoples Sav. Ass'n v. Standard Indus., Inc., 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970).

47. *See* Comment, *Mortgage Consent to Sale Clause: A Reasonable Restraint on Alienation?,* 8 J. MAR. J. PRAC. & PROC. 513, 529 (1975). These principles were appropriately called "Giants of the Law."

48. 289 N.C. at 625, 224 S.E.2d at 584.

market.[49] Higher risks, which could be alleviated by use of the due on sale clause, would force interest rates upward and make mortgage evaluation criteria much stricter. All of these factors point to a reduced supply of mortgage money, which of course restricts alienability.

In his opinion, Justice Copeland noted several economic factors that may be the real crux of *Crockett.* Sensible lenders use the due on sale clause to minimize their risks.[50] Use of the clause also permits the lender to conform his loans to the current market rate. These points can be explained by the economic history of the due on sale clause. As one commentator suggested, the due on sale clause originally developed during times of stable interest rates as a device to protect against bad credit risks.[51] However, during the past few years, home loan interest rates have become volatile. These increased rates have put the savings lender in a different position:

> The basic dilemma of the savings association business is an inability to adjust earnings upward during periods of inflation accompanied by rising interest rates. . . .[52]
>
> Clearly, if a borrower were able to pass on to a vendee the borrower's low interest rate without interference by the lender, all mortgages would continue at that rate until their original maturity date. The effect of this increased payoff time over the current average actual payoff time of eight to ten years would be to freeze a lender's income at unprofitable levels for twenty to thirty years.[53]

Lenders who do not rely on depositors for their funds, such as commercial banks, real estate investment trusts and mortgage companies, are not faced with the same dilemma. However, all lending institutions rely to a great degree on the secondary mortgage market.

These economic considerations are especially important in North Carolina. The two largest investors in the secondary market are the Federal National Mortgage Association (FNMA) and the Federal Home Loan Bank Corporation (FHLBC). Each of these institutions' uniform loan documents contain the due on sale clause.[54] Therefore,

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49. *See* Comment, *Due on Sale and Due on Encumbrance Clauses in California,* 7 Loy. L.A. L. Rev. 306, 323 (1974).

50. 289 N.C. at 627, 224 S.E.2d at 585. *See also* Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969).

51. Comment, *Use of "Due on" Clauses to Gain Collateral Benefits: A Common Sense Defense,* 10 Tulsa L.J. 590, 610 (1975).

52. *Id.* at 592. *See also* United States League of Savings & Loan Ass'ns, Recommendations of the Committee on Savings Ass'n Needs, 1970.

53. Comment, *supra* note 51, at 592.

54. Brief for North Carolina Savings & Loan League as Amicus Curiae at 9, Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976). The uniform documents allow the lender to refuse consent to the transfer if the

as a matter of economic policy, *Crockett* is good for North Carolina. If the court had overturned the due on sale clause or construed it strictly, the two largest investors in the mortgage industry might have hesitated to buy North Carolina residential loans in the future.[55]

In addition to the economic factors mentioned by the court, the significant economic impact of the due on sale clause on both interest rates and credit availability is also an important consideration. During the last decade, this nation has witnessed a sharp rise in consumerism.[56] One area of attack by the "consumerists" has been the high interest rates charged by lending institutions. If lenders were precluded from using the due on sale clause, it would be necessary to charge a higher interest rate initially as a possible hedge against the loan continuing for a longer period of time than normal.[57] One result of *Crockett* is that the due on sale clause becomes a safety valve for both lender and borrower. The lender's liquidity is improved and his loan portfolio is kept close to the current rates, which in turn forces down the rate available to consumers.[58]

Several alternatives to adjust rates do exist that the court could have proposed for future use by North Carolina lenders. The first of these is the variable interest rate mortgage. One writer suggests that usage of these loans will render the interest rate an insignificant factor in the price of property.[59] Nevertheless, variable rates may not be the answer for North Carolina. Another financing scheme that could be used is the short term loan with a negotiable rate. However, short term loans may be against the public interest since the borrower's monthly payments are increased and he may have to refinance several times.[60]

As the shortcomings of the feasible alternatives indicate, the due

proposed purchaser and interest rate are not acceptable. Telephone interview with Gus Gesell, President of the Home Savings and Loan Association in Chapel Hill, North Carolina (Sept. 9, 1976).

55. *See* Brief for North Carolina Savings & Loan League as Amicus Curiae at 8, Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976).

56. *See generally Symposium—Consumer Protection,* 14 SANTA CLARA LAW. 447 (1974).

57. *See* Comment, *supra* note 51, at 594.

58. *See* Bonnano, *supra* note 37, at 809.

59. Brief for North Carolina Savings & Loan League as Amicus Curiae at 8, Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580. The brief states that Federal Home Loan Bank Board Regulations, 12 C.F.R. §§ 545.6-1, .6-3, 6.14 (1976), prohibit federal savings and loan companies from using variable interest rate loans while allowing state savings and loan companies to use them. These regulations would eliminate a large number of lenders in North Carolina.

60. *See* Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1970). *See also* Comment, *Tucker v. Lassen Sav. & Loan Ass'n: "Due-on" Clause Held as Restraint on Alienation,* 7 U.W.L.A. L. REV. 258, 265 (1975).

on sale clause is the best economic alternative that the court could have approved. Lenders prefer the clause as a protective device. Although one writer has suggested that the personal credit of a person is irrelevant to the lender for security purposes,[61] the lender is much more secure with a financially responsible person in possession. This ability to determine who will be in possession affords much better protection to the lender than a later foreclosure on a bad risk he was forced to accept. Another added protection provided by the due on sale clause is the lender's ability to maintain his current loan portfolio at a higher rate of interest. A more current portfolio increases lending and stimulates economic activity. Of course these added protections are in turn passed on to the borrower. Due on sale clauses allow borrowers to receive a lower rate,[62] longer terms on the mortgage contract[63] and more readily available mortgage credit.[64] *Crockett* was indeed an economic victory for both the lenders and borrowers of North Carolina.

Crockett, although a success economically, may have its shortcomings as a practical standard for the public to follow. Much of the language used in the opinion points to application of the reasonable circumstances view of the due on sale clause. However, little discussion of the factors that usually go into this balancing analysis was made. A possible result of this inadequate discussion may be confusion in the lending market. A lender who reads *Crockett* as adopting the per se approach[65] may want to accelerate at any time to reach the current interest rate obtainable in the market. Every possible transfer in North Carolina would be subject to the unlimited scrutiny of the lender. These transfers could occur not only by inter vivos conveyances, but also by intestacy, testamentary devise, survivorship or even declaration of trust.[66] If the lender has an unrestrained power of consent to any possible transfer, then a virtual life and death control over the property exists.[67]

On the other hand, a borrower who reads the decision as adopting

61. *See* Bonanno, *supra* note 37, at 289-90.

62. *See* Comment, *supra* note 51, at 594.

63. *See* Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973).

64. *See* Comment, *Due on Sale and Due on Encumbrance Clauses in California*, 7 Loy. L.A. L. Rev. 306 (1974).

65. Mr. Justice Lake suggests this approach in his dissent. 289 N.C. at 638, 224 S.E.2d at 592.

66. *See* Bonanno, *supra* note 37, at 290.

67. *See* Comment, *Mortgages—a Catalogue and Critique on the Role of Equity in the Enforcement of Modern-Day "Due-on-Sale" Clauses*, 26 Ark. L. Rev. 485, 501 & n.71 (1973).

the reasonable circumstances view has no effective guidelines to follow. Will lenders be forced to divulge their trade secrets and give reasons to support their conclusions of who is or is not a bad credit risk? The definition of the creditworthy borrower—along with several other unresolved issues—will have to be answered in the future.[68]

Although a judicial landmark, *Crockett* will need future expansion. Nevertheless *Crockett* has laid a good foundation for adoption of the reasonable circumstances view in North Carolina.[69] The task for the courts is to build on this foundation and develop clear practical guidelines for all to follow. This task will be brought to the forefront soon, for the reasonable circumstances view of the due on sale clause will promote more litigation than either the per se approach or the impaired security view.[70]

Despite its unclear analysis and limited discussion of important factors, *Crockett* was a good result for North Carolina. Instead of involving itself in the traditional approach of restraint on alienation and merely dismissing the due on sale clause as a restraint, the court was able to recognize the significant economic policies involved in the case. Use of due on sale clauses encourages available mortgage credit, facilitates land ownership and, as a result, stimulates the alienation of property. Each of these effects is a needed and desirable stimulant for our economy. Although *Crockett* may well have damaged the traditional view of restraints on alienation, it did not destroy the doctrine. The court's awareness of the economic credit society in which we live and of the great effect lending institutions have on the public was the true basis for *Crockett*. Future North Carolina cases involving supposed restraints that do not carry these economic and public overtones will probably be decided under the traditional view of restraints.

WILLIAM ROBERT CHERRY, JR.

68. Several other factors left unconsidered are as follows: (1) the guidelines needed to measure the physical security impairment; (2) the borrowing class a certain individual is in; (3) the important variables of the money market; (4) the evidence needed to support a lender's decision regarding his loan portfolio; (5) whether the portfolio decision and requested interest rate increase will be analyzed under an objective or subjective approach. The weight to be given to these factors will have to be determined on a case-by-case basis. One court, however, has already suggested that a case-by-case basis will lead to instability in land titles. *See* Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1 (1975).

69. 289 N.C. at 630-31, 224 S.E.2d at 587. The court suggested that the circumstances of the case and the absence of other allegations supported the reasonable circumstances view.

70. *See generally* Note, *supra* note 11, at 336 & n.1.