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Real Property

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Introduction

Many cases were decided in the field of real property during the period covered by the survey, but very few of them were decided in the California Supreme Court. There is one case of special importance that was decided in the Appellate Department of the Superior Court. Only those cases thought to be of special significance are included in this survey, and legislation enacted during the period will not be discussed.

Deeds

Mecchi v. Picchi[1] is a case presenting a question concerning delivery of deeds. A father manually delivered two deeds to his daughters by a previous marriage, and requested that

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1. 245 Cal. App.2d 470, 54 Cal. Rptr. 1 (1966).

they not be recorded until after his death. In each deed, the father reserved a life estate and referred to an affidavit executed contemporaneously with the deeds, which recited the motivation for the execution of the deeds.[2] Subsequently, the father executed and recorded another deed to a portion of the same property, naming himself and his second wife as joint tenants. After the death of the father, the daughters recorded their deeds and brought an action to quiet title. At the trial, the daughters sought to introduce the affidavit into evidence, but, upon objection by the surviving spouse, the proffered evidence was rejected. The Court of Appeal reversed, holding that the affidavit should have been admitted because it was, in essence, incorporated into the deeds. The court noted that under provisions of the Code of Civil Procedure,[3] verbal or written acts of the immediate grantor are admissible to prove that the transfer was absolute or that the grantee took the deed subject to conditions. The court then determined that the affidavit and other evidence were sufficient to overcome the inference of nondelivery arising from evidence that (a) the deeds were not recorded until after the grantor's death, (b) the grantor retained possession of the property, (c) the grantor paid the taxes, and (d) another deed was subsequently executed by him in an attempt to convey the property again.

An interesting situation arose which for the first time called for the construction of certain statutes that seek to protect the health and welfare of aged persons in California when they enter into a contract for lifetime care.[4] In *Stenger v. Ander-*

2. 245 Cal. App.2d at 477, n. 3: "The recitals read: 'I am doing this to clear my conscience, and to right a wrong which I have committed. My first wife, Domenica Picchi, died leaving a will which left all properties to me for my life and then to my two daughters above named, upon my death. I destroyed that will and testified in the Superior Court of San Mateo County . . . that I could not find a will and did not know of the existence of a will for Domenica Picchi. This was untrue and I knew it to be untrue when I so testified, but I was not well at the time and my present wife, Maria Picchi, made me do it.'"

3. See former Cal. Code. Civ. Proc. §§ 1850, 1870, providing for admissibility of acts or declarations which are a part of a transaction.

4. Cal. Welf. & Inst. Code §§ 2300–2360. In 1965, these sections were renumbered (Cal. Stats. 1965, ch. 1784, § 5) and now appear as §§ 16200 to 16318. This legislation was designed

son,[5] an 86-year-old widow transferred property to another, in exchange for a promise to care for her for the remainder of her life. She then had second thoughts and brought an action to rescind the contract, which was granted by the trial court and affirmed on appeal to the California Supreme Court. The California Supreme Court based its decision on § 16300 of the Welfare and Institutions Code, which requires the person furnishing the life care to obtain a license. Former case law and statutes had held that the license was necessary only for institutional care, but the court gave credence to legislative policy that recognizes the unequal status of the parties and the vulnerability of the aged to exploitation, and found this contract within the purview of legislative intent. Failure to comply with the statutory requirements therefore rendered the contract invalid.

Lundgren v. Lundgren,[6] which involved the problem of priority, the court had to determine who held title where a mother had executed two deeds: the first, a quitclaim deed to a daughter; the second, a deed to a son. The daughter claimed that the son had given no consideration and thus could not a bona fide purchaser. The court said that the circumstances existing at the time of a transfer determine if the consideration is fair and adequate. Although the son paid a token price, he made repairs and permitted the mother to reside there. The property was so dilapidated that it could not be rented; the mother was unable to pay the taxes on the property. The consideration was held to be adequate even though the repairs and improvements were made after the giving of the deed. At no time did the son know of the prior deed.

The daughter argued that to allow the son to prevail would be an unjust enrichment because the property had improved in value. The court held that the daughter was guilty of laches. She knew that the son was making repairs and im-

to prevent the infliction of harm to the elderly by those who are not fully qualified to care for them under proper conditions and on reasonable terms.

5. 66 Cal.2d 970, 59 Cal. Rptr. 844, 429 P.2d 164 (1967).

6. 245 Cal. App.2d 582, 54 Cal. Rptr. 30 (1966).

provements upon the property and took no steps to assert her claim for about 3½ years. Title was quieted in the son.

Descriptions

Three cases decided by the Court of Appeal involved problems of description. In *Saunders v. Polich,*[7] the court merely stated the general rule that a subsequent survey must be made from record of the federal government survey, and that the last federal survey is conclusive as a matter of law. In the absence of a comparison of the Department of Highways' field notes to those of the official survey, the state survey is insufficient.

Hixson v. Jones[8] presented a unique problem in land description. The title company identified a parcel by plot map and then, without the consent of the parties, proceeded to describe the property by metes and bounds. The metes and bounds description called for the property boundary to run to the line of Third Street and then to run parallel with the line of the street. The street had been abandoned by the city, and Hixson brought a quiet title action against the city and claimed ownership to the center of the street. Section 1112 of the Civil Code creates a statutory rebuttable presumption that a transfer of land, bounded by a street, passes title to the center of the street. The court was therefore confronted with the problem of determining whether the metes and bounds description rebuts the statutory presumption. The trial court held, in accordance with prior California law, that a metes and bounds description controls, and is an effective rebuttal of the statutory presumption. However, the Court of Appeal reversed and stated that the statutory presumption may be rebutted by the use of the metes and bounds description *only* if the metes and bounds description was inserted in the exercise of free choice by the grantor. Since the description was inserted to compensate for the vagueness of the plot map description and not at the request of the parties, it would seem that unless there is evidence that a different

7. 250 Cal. App.2d 136, 58 Cal Rptr. 198 (1967).

8. 253 Cal. App.2d 959, 61 Cal. Rptr. 883 (1967).

result was intended, a metes and bounds description does not overcome the statutory presumption that property lines extend to the center of the street.

Another description problem concerning ownership to the center of a street arose in *Murray v. Title Insurance and Trust Co.*[9] A deed had been drafted incorporating a reference to a plot map that showed that the street had been vacated of record. The problem raised was whether the title insurer was liable, as the policy did not cover the property to the center of the vacated street. The court considered a number of different problems arising from a conveyance with reference to a plot map and the problem of street vacation. It listed and discussed four types of conveyances that a grantor may make to a grantee.[10] It concluded that, as between grantor and grantee, if the grantor did, in fact, own to the center of the street, the grantee would take, although the recorded map showed the street as abandoned.

Landlord and Tenant

Two landlord and tenant cases deserve mentioning. *Weisberg v. Loughridge*[11] involved a lease in which the tenant (T) was given the right to remove improvements and trade fixtures. T placed the improvements upon the leased premises. He later assigned the lease. The assignee (A) agreed to purchase the improvements, and gave T a chattel mortgage as security for the unpaid portion of the improvements. Later, A subleased the premises to the defendant (S), who did not assume personal liability for the payment of the chattel mortgage. T then brought a foreclosure action against the property after default in payment of the chattel mort-

9. 250 Cal. App.2d 248, 58 Cal. Rptr. 273 (1967).

10. The court considered "implications of coverage under four different types of conveyances: (1) a conveyance of property by reference to a map which shows a bounding street; (2) a conveyance by reference to a map which shows a bounding street, abandoned in fact but not of record; (3) a conveyance by reference to a map which shows a bounding street abandoned of record, when the grantor owns the property-in-chief and the bounding strip and (4) the previous situation, when the properties are under separate ownership." (250 Cal. App.2d at 252, 58 Cal. Rptr. at 276.)

11. 253 Cal. App.2d 472, 61 Cal. Rptr. 563 (1967).

gage. Shortly after the institution of the action, A and the landlord (L) agreed to a surrender of the leasehold estate. Surrender was not known to plaintiff. L and S, then entered into a lease of the premises. After the foreclosure action resulted in a purchase by T, the defendant refused possession to remove the improvements.

In the instant action brought by T to establish ownership, S relied on the principle that articles attached to the land belong to the owner after a lease comes to an end, and he therefore argued that the articles sought to be possessed belonged to the lessor and were part of the property leased to lessee. The court held that this is a general rule, but that it was not applicable here. The lessor had disclaimed any rights to the articles, and the court held that the rule was primarily for the benefit of a landlord. Here, the lease had come to an end by surrender. The rule between landlord and tenant is that a tenant should have a reasonable time to remove. This rule should operate in the same manner in favor of the mortgagee. The defendant also claimed title to the articles as the purchaser under a tax foreclosure proceeding against the improvements. The court dismissed this claim because defendant was under a legal duty to pay the taxes. Purchase by one who has a duty to pay nullifies the sale, and therefore, title was in the plaintiff.

The other case, *Buckner v. Azuli,*[12] represents a trend that affords more protection to tenants. The case, decided in the appellate department of the Superior Court of California, was an action for damages against a landlord. Contending that a constructive eviction had occurred when the leased premises became infested with vermin, the plaintiff prevailed in the trial court. The landlord appealed, claiming that the tenant had no cause of action because, in the lease, he had waived the statutory duty imposed by Civil Code § 1941,[13] and that

12. 251 Cal. App.2d Supp 1013, 59 Cal. Rptr. 806 (1967).

13. Cal. Civ. Code § 1941. **Lessor to make dwelling house fit for its purpose.** The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hun-

therefore the common-law rule controlled. The Appellate Department of the Superior Court refused to recognize this claim, holding that a provision for waiver of Civil Code § 1941 must be strictly construed. It further found that the waiver in the written lease pertained only to one part of the premises and was therefore not material to the action because vermin infested the entire building. The court stated that even if the waiver were applicable, it would be invalid because it was against the public policy, as reflected by the housing regulations[14] that require the landlord to keep the premises free from vermin.

Cotenancy

Several cases involving cotenancy deserve mention. The age-old problem of disagreement among cotenants leading to partition forms the basis for *Felder v. Felder*.[15] Parties involved owned 15/32, 1/16, and 15/32 interests in the subject property. In the partition action, the parties stipulated that the property could be partitioned in kind, and they provided the general basis for determining the boundaries for the respective parts. The appellant contended that as a result of the survey conducted incident to the partition, the stipulated partition should be void because of mutual mistake of fact. The allegations of mistake and uncertainty arose when the parties discovered, after the survey, that the tract did not contain as many acres as they thought. The court held that the mutual mistake was immaterial where the mistake had been compensated for by a proportionate downward adjustment of acreage allotted to each. The division was fair and equitable as the two parcels represented approximately equal values. Moreover, the court said that the division followed the stipulation of the parties except for the reduction in acreage.

dred and twenty-nine. (Enacted 1872. As amended Code Am. 1873–74, c. 612, p. 245, § 205.)

14. 8 Admin. Code § 17906. See also Halliday v. Greene, 244 Cal. App.2d 482, 53 Cal. Rptr. 267 (1966); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

15. 247 Cal. App.2d 718, 55 Cal. Rptr. 780 (1967).

Heber v. Yaeger[16] represented a longstanding controversy between two cotenants. Each party held a life estate with the remainder interest owned by defendant, who was also in possession. The plaintiff sued for partition and an accounting, and the defendant was granted a summary judgment by the trial court. The Court of Appeal reversed on the grounds that there were triable issues of fact, such as the fact that a prior judgment in 1944 had provided for the means of accounting between the parties, and that the plaintiff argued noncompliance with that agreement. Furthermore, as a result of an action pending in 1958, an agreement between plaintiff and defendant was entered into whereby the plaintiff promised to waive any future income from one of the three properties as long as it was operated as a citrus ranch, if the plaintiff would not be charged any portion of the cost or expense of its operation during the period. The defendant contended on trial that this agreement constituted a waiver of the right to partition during the lifetime of plaintiff, rather than only during the time the property was operated as a citrus ranch, as indicated in the agreement. The court stated that the right to partition is absolute unless limited by agreement, express or implied. Here, the court could find no such waiver from the agreement although the right to profits was therein expressly waived. The court also held that the right to accounting provisions contained in the 1944 agreement was not affected by the waiver, since the waiver pertained only to the citrus property and not to the other two parcels of property owned by the parties.

The defense of adverse possession was raised in *Russell v. Lescalet,*[17] an action for partition. The defendants, a husband and wife, had owned the property in joint tenancy. Prior to acquisition of the property by plaintiff, a predecessor in title of the plaintiff had acquired the wife's interest by a sheriff's deed issued under a writ of execution. The defendants remained in possession of the property, paying taxes and otherwise treating it as their own. The court followed

16. 251 Cal. App.2d 258, 59 Cal. Rptr. 353 (1967).

17. 248 Cal. App.2d 310, 56 Cal. Rptr. 399 (1967).

the general rule that if the tenant in possession does nothing more than occupy the premises, his possession is not adverse to the cotenant out of possession; the latter must have notice, actual or constructive, that the former's possession is hostile to him. Under the facts of this case, since the possession of the wife, who had no interest in the property, could not be considered separate and apart from that of her husband, the court held that no title by adverse possession could be acquired.

In *Moore v. Hall,*[18] the property in question had been owned in common by the judgment debtor husband and his wife. Plaintiff was the judgment creditor of the husband and, after levy and sale, became the purchaser of the property for $100. After the purchase by the plaintiff and before the time for redemption had expired, the husband conveyed his interest in the property to his wife. She thereafter redeemed the property from the sale. The plaintiff then proceeded to levy against the property a second time. This levy led to a second sale to the plaintiff. Plaintiff then filed a quiet title action. The court made the distinction between a redemption by the judgment debtor, which revives the lien of the creditor, and the redemption by a successor in interest, which terminates the lien. The plaintiff further argued that although this is true, the purchase by the wife of the judgment debtor was nevertheless a fraud upon creditors. The court said that one of the primary purposes of statutory redemption is to force the purchaser at the execution sale to bid on the property at a price approximating its fair value. There was no showing that the $100 paid by the plaintiff met this test. Title was quieted in defendants.

Subjacent and Lateral Support

Marin Municipal Water District v. Northwestern Pacific Railroad Company[19] is a case that the court calls one with no precedent in California and one that is a pure subjacent support case. Plaintiff's water mains were on the surface

18. 250 Cal. App.2d 25, 58 Cal. Rptr. 70 (1967).

19. 253 Cal. App.2d 82, 61 Cal. Rptr. 520 (1967).

of property, under which, at some time in the past, a railroad tunnel had been constructed. The tunnel collapsed causing damage to plaintiff's mains. The complaint alleged that the common-law rule of absolute liability applied and that the railroad was liable. The court stated:

> At common law, where one person owns the surface of land and another the subjacent land, the owner of the surface is entitled to have it remain in its natural condition, without subsidence by reason of the subsurface owner's withdrawal of subjacent support. . . . The same authorities agree that the common-law right of subjacent support is closely analogous to that of lateral suport. . . . Under all the authorities, also, the common-law obligation of subjacent support is "absolute" [and] the common-law obligation of lateral support is similarly "absolute."[20]

The court then distinguished the two obligations by saying that support is lateral where the supported land and the supporting lands are divided by a vertical plane; support is subjacent where the supported land is above and the supporting land is beneath it.

The water district contended that the common-law rule of absolute liability for deprivation of subjacent support is still law in California. The railroad asserted that the legislature changed the rule by enactment of Civil Code § 832. The court held that Civil Code § 832 applied only to coterminous surface landowners; five reasons for this limitation were given: (1) Civil Code § 832 frees an owner from absolute liability for lateral support. (2) Civil Code § 832 declares entitlement of a coterminous owner to support from adjoining land. Both "coterminous" and "adjoining" import a common boundary, but "coterminous" denotes the same or coincident boundary while "adjoining" denotes touching or contiguous. On the surface of the land, it is feasible that such a boundary can be drawn. This relationship cannot be drawn between surface and subsurface ownerships. Thus, by the use of

20. 253 Cal. App.2d at 87, 61 Cal. Rptr. at 524.

"coterminous" and "adjoining" in Civil Code § 832, the statute is limited to surface ownerships. (3) Civil Code § 832 also applies to excavations on, and not underneath, the land. Again, this applies to surface owners only. (4) Section 832 is found in the division of the Civil Code entitled "Boundaries." Boundaries are characteristic of surface ownership of land, and other sections in that division of the code refer to surface owners. (5) Subjacent support applies mostly to mining cases. California legislative history shows that surface protection statutes were part of the early code but were not included in Civil Code § 832, and that the mining statute was finally abolished in 1933 as obsolete.

The railroad then contended that the common-law rule applies to land in its natural condition, and thus does not protect the mains because they are structures. The court stated that this is generally true, but that the authorities and cases on the point say the right is not lost unless the downward pressure of the weight of the structures contributed to the subsidence. The burden to show this is on the railroad and is a matter of affirmative defense and proof. Thus, California follows the absolute liability doctrine with regard to subjacent support, and has a pure subjacent-support case as authority.

An enjoyable footnote to the fifth reason listed above is purely historical.

> The 1871 [Code] commission itself was unquestionably versed in the problems of subjacent support of land in mining operations. Charles Lindley, one of its three members, was a pioneer mining lawyer in California and Nevada. Curtis H. Lindley, his son and later the author of Lindley on Mines, became the commission's secretary in early 1872. History's full circle may be closed with the note that one of the younger Lindley's notable accomplishments in later life was the organization of the Marin Municipal Water District, appellant herein. (Colby, Curtis Holbrook Lindley (1850–1920) 9 Cal.L.Rev. 87.)[1]

1. 253 Cal. App.2d at 94, 61 Cal. Rptr. at 528.

Security Problems

California is a big state, with a large population. It appears that the problems involved in financing real estate transactions constitute one of the largest areas of litigation, and the cases are diverse. Some are good cases, some are bad, and some merely reinforce the factor of bigness.

Jones v. Sacramento Savings and Loan Association[2] is perhaps an outstanding example of the problem. Thirteen lots were sold. Purchase-money deeds of trust provided that they would be subordinated to construction loans under certain conditions. Defendant made loans under these provisions. Notes on both purchase-money security and construction-loan security were defaulted. The beneficiary under purchase-money notes caused notice of default and sale to take place on six of the lots involved. The beneficiary under the construction-money notes caused notice of default to be given and sale to take place on eleven of the lots involved, six of which had already been sold under the first sale. The plaintiff was a purchaser under purchase-money notes and sued to quiet title. The court held that provisions for subordination under purchase-money notes were not complied with, and that the defendant did not acquire any interest that was superior to that of plaintiff as a result of the sales. Thus, as to the sales made by the plaintiff, the interest of the defendant was terminated. As to the sales that the defendant made, the interest of the plaintiff was unaffected. However, the court did go on to grant the defendant's request that an equitable lien be asserted against the plaintiff's interest in the property on the basis of unjust enrichment. A general doctrine of equity permits imposition of an equitable lien where the claimant's expenditure has benefited another's property under circumstances entitling the claimant to restitution. A specific application of the doctrine occurs when a lender advances money that benefits the land of another in mistaken reliance upon an imperfect mortgage or lien upon that land.

2. 248 Cal. App.2d 522, 56 Cal. Rptr. 741 (1967). For a more exhaustive discussion of this case, see York, REMEDIES, in this volume.

One would have to say that the case is remarkable for its result. Perhaps the court was influenced by the fact that the purchase-money notes were for about $800 for each lot, purchased before sale by plaintiff at a discount, whereas the construction loans were for approximately $12,000 for each lot. It seems that the unjust enrichment rule should not apply here.[3] The lender knew that the property was subject to purchase-money notes that had provisions for subordination. According to facts presented to the court, when the lender issued escrow instructions asking for subordination to be secured, the title company involved refused to issue insurance covering the deeds unless it received additional subordination agreements from the trustee of the purchase-money trust deeds. The defendant then withdrew the escrow, and another title company became the escrow depositary. At this point, the defendant seems to have been proceeding at its own risk. Later, when the sales of the property were to take place, there was no attempt by the defendant to reinstate or to challenge the sale made by the purchase-money beneficiary. Perhaps the fact that Jones was not the original holder of the purchase-money notes might have made a difference. The court stated that when Jones bought the notes, he knew that the property was being improved as a result of the construction loans. However, the court found that that fact did nothing except raise the equity in the defendant. The question is: How far will this case go as precedent in other cases where the lender acts this recklessly, but yet wishes to be protected against its own actions?

Another application of the problem of subordination arose in *Pollack v. Tiano*.[4] A vendor entered into an agreement to sell property and to subordinate the vendor's security interest in the property to a construction lender's lien. The construction loan did not comply with the terms of the subordination agreement, and the vendor refused to execute the subordination papers. At this point, the lender refused to

3. Estate of Pitts, 218 Cal. 184, 22 P.2d 694 (1933); Smith v. Anglo-California Trust Co., Beckwith v. Sheldon, 168 Cal. at 746–47, 145 P. at 99 (1914); and see 17 CAL. L. REV. 412.

4. 253 Cal. App.2d 221, 61 Cal. Rptr. 235 (1967).

make the loan, and the purchaser refused to make the down payment as agreed. The purchaser then brought an action for specific performance of the contract to sell and in the alternative for damages. The vendor filed a cross complaint for damages for failure to perform the agreement. The court awarded the vendor damages on the cross complaint and denied recovery to plaintiff. The case is an example of the problems that can arise when property is purchased with a small down payment and financing is obtained upon the vendor's agreement to subordinate his security interest. The failure in this case is that the purchaser wanted to use a portion of the construction loan to pay for the property, which was clearly not within the terms of the agreement.

Other cases in this area involve antideficiency problems. *Powell v. Alber*[5] was concerned with a land sale contract which provided that upon default by the purchaser, the entire purchase price would become due, or the purchaser would forfeit the contract and execute a quitclaim of all his rights, title, and interest in the property to the vendor. The court stated that these provisions were merely attempts to waive the antideficiency provisions contained in the Code of Civil Procedure,[6] and that such waivers are contrary to public policy and unenforceable.

Another waiver attempt was made in *Loretz v. Cal-Coast Development Corporation*.[7] The note used to purchase property was secured by a deed of trust on property other than that being purchased. The note also provided for an agreed valuation of the security property. Upon default, the security property was sold for an amount less than the agreed valuation. The holder of the note sued for the difference, claiming that the extent of the value stated over the price received at the trustee's sale was equivalent to a second unsecured note. The court held that the agreed valuation provision was tantamount to a waiver of the antideficiency statute and therefore void as against public policy.

5. 250 Cal. App.2d 485, 58 Cal. Rptr. 657 (1967).

6. Cal. Code Civ. Proc. § 580d.

7. 249 Cal. App.2d 176, 57 Cal. Rptr. 188 (1967).

However, in *Jonathan Manor, Inc. v. Artisan, Inc.*[8] and *Van Vleck Realty v. Gaunt,*[9] unsecured notes were sued upon by the holders, who prevailed over the attempted application of the antideficiency defense. The result seems correct in *Jonathan,* since the holder specifically provided in the escrow agreement that the notes were to be unsecured; subsequent transfers of three of the notes made it clear that those three were the only notes to be secured. The holder sued on a remaining unsecured note. Although the note had been given for a portion of the purchase price, it did not run afoul of the antideficiency legislation since it was not secured by a deed of trust or mortgage.

The *Van Vleck Realty* case is not so clear. The trial court found that the note was unsecured as a matter of fact, but, relying on *Bargioni v. Hill,*[10] concluded that as a matter of law the note was part of the obligation secured by a second deed of trust and that it was barred by § 580b of the Code of Civil Procedure. The appellate court reversed, holding that the case is controlled by *Roseleaf Corp. v. Chierighino,*[11] which pointed out that § 580b discourages overvaluation by placing the risk of inadequate security on the purchase-money mortgagee, and that this purpose is achieved only if the statutory limitation applies exclusively to security transactions. The court also cited *Jonathan* as authority for holding that a note given for the purchase price of property comes under the antideficiency statutes only when a security device is used.

In *Baumrucker v. American Mortgage Exchange, Inc.,*[12] the plaintiff bought from the defendant notes secured by deeds of trust. After default and purchase by the plaintiff, one piece of the property was sold for a sum much less than the value of the notes, and he found the other property to be unmarketable. He thereupon sued defendant for damages, including money spent to make the property suitable for rent-

8. 247 Cal. App.2d 651, 56 Cal. Rptr. 14 (1967).

9. 250 Cal. App.2d 81, 58 Cal. Rptr. 246 (1967).

10. 59 Cal.2d 121, 28 Cal. Rptr. 321, 378 P.2d 593 (1963).

11. 59 Cal.2d 35, 27 Cal. Rptr. 873, 378 P.2d 97 (1963).

12. 250 Cal. App.2d 451, 58 Cal. Rptr. 677 (1967).

ing. The defendant demurred, contending that the suit was merely an action for a deficiency judgment following the sale of the property under the deed of trust. Numerous violations of the Real Property Securities Dealer Law were alleged as a basis for the complaint.[13] In overriding the demurrer sustained by the lower court on a pleading of § 580d of the Code of Civil Procedure, the appellate court held that an action under the statute is not an action for a deficiency judgment, and therefore Code of Civil Procedure § 580d does not apply.

A case with interesting procedure is *Lee v. Ski Run Apartments,*[14] wherein the plaintiff asserted a right to rents pledged in a deed of trust of which plaintiffs were the beneficiaries. The defendant had defaulted the senior encumbrance, which also constituted a default of the terms of the plaintiff's deed of trust. Judgment was given for the plaintiff for a sum of money not prayed for in the complaint. The defendant appealed on the basis that a default judgment is void and may be appealed when the relief granted by the judgment is greater than that asked for in the complaint.[15] In its decision the court stated the general rule that a trustor in possession of the property is entitled to the rents and profits, and that absent an actual assignment of rents and profits, the beneficiary has only a security interest. Otherwise, a beneficiary must actually acquire lawful possession by consent or lawful procedure, or must secure the appointment of a receiver in order to perfect his claim to the rents. The court reversed on the rule that a money judgment not prayed for was beyond the jurisdictional limits of the court, but remanded the case for a decision on the question of receivership.

An action to enjoin a bank from selling property in default of payment by the purchaser was denied in *Kemple v. Security First National Bank of Los Angeles.*[16] The federal statute provides that "no attachment, injunction, or execution shall be issued against [a national banking association] or its prop-

13. Cal. Bus. & Prof. Code §§ 10237–10238.7.

14. 249 Cal. App.2d 298, 57 Cal. Rptr. 496 (1967).

15. Cal. Code Civ. Proc. § 580.

16. 249 Cal. App.2d 719, 57 Cal. Rptr. 838 (1967).

erty before final judgment in any suit [or] action . . . in any State . . . court."[17] In rejecting appellant's argument that the statute applied only when a national banking association's efficiency would be impaired, the court cited and quoted from a recent case ruling that had settled the issue adversely to appellant.[18] Thus the Superior Court below did not have jurisdiction to grant a preliminary injunction.

In the absence of provisions to the contrary, insurance proceeds payable to a beneficiary of a deed of trust operate to reduce the debt *pro tanto,* and the beneficiary is not required to apply the proceeds to any particular instalment of the note. Therefore, even though the proceeds of the insurance are paid to the beneficiary, if the trustor does not thereafter make payments according to the terms of the note, the beneficiary may give notice of default and proceed with sale of the property under power of sale. So held *Lee v. Murphy.*[19] The insurance clause contained in the trust deed was the typical provision found in most deeds of trust, which permits the proceeds to apply to the indebtedness secured and in such order as the beneficiary may determine. The court held that this provision as to order applies where there is more than one indebtedness, but where there is only one debt, the *pro tanto* rule applies.

Vendor and Purchaser

Closely related to the problems of security discussed above is the problem of liquidated damages in a contract to sell. In *Greenbach Bros., Inc. v. Burns,*[20] the vendor sought to recover the deposit made into escrow. After judgment for the vendor, court granted vendee's motion for a new trial. On appeal the court held that the amount deposited in escrow had no bearing on the damages and did not satisfy the provision of Civil Code § 1671 that liquidated damages are allowable where damages are impractical or impossible to ascertain.

17. 12 U.S.C. § 91.

18. See First Nat'l. Bank v. Superior Court, 240 Cal. App.2d 109, 49 Cal. Rptr 358, cert. denied 385 U.S. 829, 17 L.Ed.2d 65, 87 S.Ct. 65 (1966).

19. 253 Cal. App.2d 244, 61 Cal. Rptr. 174 (1967).

20. 245 Cal. App.2d 767, 54 Cal. Rptr. 143 (1966).

The fact that the purchaser asked for additional time in which to secure financing, and as a condition of this, he was required to deposit an additional sum into escrow, aided the court in finding that the deposits were purely arbitrary.

Other vendor-purchaser problems arise when dealing with escrows. Two cases[1] stand for the proposition that once the escrow instructions satisfy the statute of frauds requirements, it is possible to introduce parol evidence as to the actual agreement between the parties. The purpose of an escrow is to carry out an agreement of sale; an escrow does not supplant the basic agreement.

Easement Problems

In *Pettis v. General Telephone Company,*[2] the plaintiff sought to quiet title to his property as against utility easements of the defendants. Prior to its acquisition by the plaintiff, the property had been condemned by the state to build a freeway. The utility companies involved were requested to relocate the utilities, and did so. Later, it was determined that the property was excess property, and the state deeded the property to the predecessor of plaintiff. There was no mention of the location of the utilities in the deed given by the state or in the deed to plaintiff. At the trial of the action, the utility companies said that action was without merit as to them, and moved for a summary judgment under Code of Civil Procedure § 437c. The motion was granted and, upon appeal, reversed. The court held that the motion was not proper upon affidavits, given both in support of and in opposition to the motion, if there was any triable issue of fact. Therefore, the question was whether plaintiff, as he alleged, was without notice of the easements when he purchased. If he was such a purchaser, his rights were prior to that of the utility companies. In such a case, then, the utility companies would be able to show that the public use of the

1. Goodman v. Community Savings & Loan Ass'n., 246 Cal. App.2d 13, 54 Cal. Rptr. 456 (1966); Leiter v. Eltinge, 246 Cal. App.2d 306, 54 Cal. Rptr. 703 (1966).

2. 66 Cal.2d 503, 58 Cal. Rptr. 316, 426 P.2d 884 (1967).

utilities required maintaining their utility lines through plaintiff's property, and the plaintiff would be relegated to the remedy of damages as in inverse condemnation.

In *Franceschi v. Kuntz*[3] a nonexclusive easement was conveyed to the buyer upon a sale of land and timber rights. The land and rights were subsequently reconveyed, and thereafter the timber rights were assigned to a number of successive assignees. The original seller contended that the easement was not transferable to the assignees. The court held that an easement may be granted to anyone entitled to make use of the dominant estate and that the easement attaches to that estate. Although the title to the property may not have passed, the dominant owner may transfer the timber rights and grant the purchaser of those timber rights the easement of access.

In a different vein, upon a partition of land, it was held in *Worchester v. Worchester*[4] that an easement may not be attached to land other than that being partitioned unless there is an agreement to the contrary. It makes no difference that the land to which the easement is made appurtenant belonged to one of the parties to the action; it must be part of the land partitioned.

In conclusion, an example of the proposition that much litigation leads to strange results is *First & C Corporation v. Wencke.*[5] An action by a successor vendee against the vendor was brought on an agreement giving the vendor possession after the purchase. The court found that the agreement essentially created an estate at will, and since no rent was reserved, no rent need be paid. Further, a provision in the lease provided for the erection of a building by the vendee and the offer of quarters in the building to the vendor. One portion of this provision called for a lease to the vendor with a yearly option to renew for a total of 10 years. Now here is the bombshell. The court said that this provision violates

3. 253 Cal. App.2d 1138, 61 Cal. Rptr. 810 (1967).

4. 246 Cal. App.2d 56, 54 Cal. Rptr. 436 (1966).

5. 253 Cal. App.2d 805, 61 Cal. Rptr. 531 (1967).

the rule against perpetuities and cites *Haggerty v. City of Oakland*[6] as authority. The court did not even cite *Wong v. DiGrazia,*[7] nor did it state that a reasonable interpretation of the instrument at bar would, as a matter of law, be one that could not be performed within a reasonable time. Perhaps this is an application of the old saw "small cases make bad law."

6. 161 Cal. App.2d 407, 326 P.2d 957, 66 A.L.R.2d 718 (1958).

7. 60 Cal.2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963).