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Real Property

by *Herbert I. Lazerow**

Abandonment and Adverse Possession

During the year, the California courts made the acquisition of property, either by adverse possession or possession as a result of the owner's abandonment, more difficult. While the courts did not change the rules of law they insisted on their pristine application. This demonstrates an understandable tendency, in an urbanizing society, toward restricting the transfer of title by possession alone to non-owners.

Adverse Possession

In *Schoenfelt v. Pritzker*,¹ plaintiff sought to quiet title to

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1. 257 Cal. App.2d 117, 64 Cal. Rptr. 592 (1967).

six acres which defendants, the neighboring landowners, had cultivated in annual crops for twenty years. Although defendants had not paid taxes on the property, as required for adverse possession by California Code of Civil Procedure, section 325, they contended that the action was barred by section 318 of that code, which provides that no action for recovery of real property can be maintained unless plaintiff was seized or possessed of the property within five years of bringing suit. Plaintiff had not been in possession for the past twenty years, but the court held that the phrase "seized or possessed" included the seisin of a titleholder not in actual possession of the property. This construction integrates the two sections and provides that title may not be acquired by adverse possession unless, in addition to the other requirements,² the possessor has paid all taxes on the property. This would seem to conform to the legislative intent of the sections.

The court took a strict position in *Gerhard v. Stephens*.³ Plaintiffs, the owners of mineral rights, sued to quiet title to the mineral interests. Defendants were the owners of the surface, who had used it fully for longer than the period required for adverse possession. Since the mineral rights were not separately assessed, defendants had paid taxes for the statutory period. Defendants had also given mineral leases for their entire tract, which included the land on which the plaintiffs had drilling rights. All drilling, however, occurred outside plaintiffs' interest. The court held that possession of the surface did not include adverse possession of the mineral rights when such rights had been severed from the surface by deed. Nor does assertion of dominion over the mineral rights by giving a lease constitute adverse possession. Since no one drilled for minerals on plaintiffs' mineral lands, the plaintiffs had no cause of action for ejectment.

Defendants also invoked the doctrine of constructive adverse possession which provides that where a person is in adverse possession under color of title, the possession is deemed to apply to the entire tract described in his document

2. See Cal. Code Civ. Proc. §§ 322–325.

3. 68 Cal.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968).

of title. ^{Lazenby: Real Property} The court properly rejected this contention, forcefully making the point that for the doctrine of constructive adverse possession to apply, there must be some actual adverse possession on which an action of ejectment could rest. None existed in this case.

A case that took a view favorable to the acquisition of title by adverse possession was *Lawrence v. Maloof*.⁴ Plaintiff purchased property at an execution sale in 1955, but the marshal's deed was not delivered until 1964. Plaintiff then brought an action to quiet title against adverse possessors on the land who had paid the taxes throughout the entire period. The court held that plaintiff's cause of action accrued when he made the purchase at the execution sale since he had the right to eject anyone on the property at that time. He had absolute title, subject only to the former owner's right of redemption. Since the court held the date of delivery of the deed irrelevant, defendants acquired title by adverse possession.

Abandonment

In *Gerhard*, the court, after discussing adverse possession, went on to discuss the doctrine of abandonment. The defendants, in addition to their arguments for adverse possession, contended that plaintiffs had abandoned their interests in the mineral rights.

The court first held that an interest in oil and gas, being a profit *a prendre*, is closest to an easement in its characteristics and should be equally subject to abandonment. The fee simple interest in real property may not be abandoned because the property would be left without a titleholder. When a mineral lease or easement is abandoned, however, the interest reverts to the owner of the fee. This permits the clearing of title to mineral land, particularly when the interest is held by unknown parties. The court reaffirmed this traditional doctrine of abandonment, then proceeded to hold that

⁴ 256 Cal. App.2d 600, 64 Cal. Rptr. 233 (1967).

one of the prerequisites, intention to abandon, was not fulfilled by one group of plaintiffs.

The comparison between the two groups is instructive. Neither group made any use of the mineral rights during the half century that elapsed between their acquisition and the subsequent drilling under lease from defendants. The following acts of one group of plaintiffs were held insufficient as a matter of law to support a finding of intent to abandon: Failure to include their interest in the estates of deceased owners; failure to enter the land or attempt to search for oil or lease to others the right to search; failure to have their mineral rights separately assessed by the county for tax purposes; and failure to seek their share of the proceeds of oil leases given by the surface owners. The court buttressed its judgment by pointing out that these plaintiffs were but several of 148 different owners, many of whom could not be located. To begin drilling would have put the expense and risk on these owners completely. If they had succeeded, they would have had to share the proceeds with all of the other owners. In light of these economic realities, the omissions noted above by themselves were not sufficient evidence of intent to abandon. It is unclear whether the economic exigencies were the crucial factors, or whether the case stands for the proposition that non-use is never sufficient to establish intent to abandon, thus overruling to that extent cases such as *Payne v. Neuval*.⁵ It does overrule *Romero v. Brewer*,⁶ which found abandonment of an oil lease as a result of inadequate machinery for drilling, failure to obtain a permit from the state, and failure to erect a derrick. These would seem to be simply non-use and, if anything, would indicate an intention to drill which was carried out in an inefficient manner.⁷

The other group of plaintiffs was held to have abandoned their interests when they refused to accept distribution of them from the executor of their predecessor's estate as being worthless. The specific rejection, added to half a century of

5. 155 Cal. 46, 99 P. 476 (1908).

7. To the same effect, see *Rice v.*

6. 58 Cal. App.2d 759, 137 P.2d 872 (1943).

Lee, 44 Cal. App.2d 909, 113 P.2d 235 (1941).

non-use, was sufficient to find intent to abandon. The non-renouncing group was fortunate in not knowing of their interest; they had no opportunity to renounce and so prevailed.

In the course of the discussion of abandonment, the court pointed out that a conscientious owner of a mineral interest can always avoid abandonment by requesting that a separate tax assessment be assigned for the mineral interests.⁸ Continuous payment of taxes negates any presumption of intent to abandon that might be raised by other statements or activities.

Vendor and Purchaser

Consumer Protection

Traditionally, the consumer in a real estate transaction had no protection against the seller. No warranties were implied for real estate sales or construction.⁹ Any express warranties that existed in the contract were extinguished by merger into the deed.¹⁰

The latter rule has been specifically relaxed in some jurisdictions,¹¹ and impliedly relaxed in California.¹² There has also been a tendency to expand the definition of fraud in realty sales in order to avoid the harshness of caveat emptor.¹³ Two cases decided this year confirmed the growing trend toward

8. Rev. and Tax. Code § 2803. Another case strictly confining the doctrine of abandonment with regard to easements by grant is *Faus v. City of Los Angeles*, 67 Cal.2d 350, 62 Cal. Rptr. 193, 431 P.2d 849 (1967).

9. Williston, *Contracts* § 926 (1963); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 Vand. L. Rev. 541 (1961).

10. Williston, *Contracts* (1963) §§ 926, 926(a).

11. *Weck v. A:M Sunrise Construction Co.*, 36 Ill. App.2d 383, 184 N.E.2d 728 (1962). (Merger depends

on intention of the parties; no merger found. The *Weck* case also found an implied warranty in the contract. This holding was later overruled in *Coutrakon v. Adams*, 39 Ill. App.2d 290, 188 N.E.2d 780 (1963), affirmed on other grounds, 31 Ill.2d 189, 201 N.E.2d 100.

12. *Greenberg v. Hastie*, 202 Cal. App.2d 159, 20 Cal. Rptr. 747 (1962). Cf. *Pollyanna Homes, Inc. v. Berney*, 56 Cal.2d 676, 16 Cal. Rptr. 345, 365 P.2d 401 (1961).

13. *Buist v. C. Dudley De Velbiss Corp.* 182 Cal. App.2d 325, 6 Cal. Rptr. 259 (1960).

more consumer protection. One case presages the imposition of implied warranties in real estate contracts.

In *Sweeney v. Stone*,¹⁴ defendant purchased subdivision lots and hired a contractor to construct a house on one of them. Though unstable soil is common in the area, no soil tests were made. Plaintiff purchased the completed house from defendant. Much of the lot eroded during the ensuing rainy season. Plaintiff recovered damages for negligence from defendant, on the theory that defendant and his contractor had a duty to plaintiff to construct the home in a non-negligent manner. The court ignored the fact that the house was built by defendant for sale, which might have been a significant distinction.¹⁵ Failure to draw the distinction was proper in this case, where the house would be sold to some person, although his exact identity was unknown. The decision solidifies a line of cases dating from 1963 permitting a buyer of a house to hold the builder liable for damage to the house caused by negligence in its construction,¹⁶ and extends it to damage done to the land by such negligence.

*Coons v. Gunn*¹⁷ is a fragmentary opinion that breaks startling new ground in the field of real property sales. Plaintiff's assignor agreed to sell undeveloped property to defendant buyers for \$80,000. As a result of soil tests, buyers refused to proceed with the contract unless the price was reduced to \$70,000. An appropriate amendment was made to the escrow instructions. Then buyers discovered that there were no sewer connections to the property, septic tanks were forbidden, and substantial off-site improvements would be needed to connect to the nearest sewer line. They refused to proceed with the contract. Plaintiff sued for damages. The appellate court held that from the circumstances surrounding the sale,

14. 265 Cal. App.2d —, 71 Cal. Rptr. 497 (1968).

15. See *Stewart v. Cox*, 55 Cal.2d 857, 13 Cal. Rptr. 521, 362 P.2d 345 (1961) (landowner recovered damages for negligence of contractor in installing swimming pool in land already owned).

16. *Sabella v. Wisler*, 59 Cal.2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963); *Conolley v. Bull*, 258 Cal. App.2d 183, 65 Cal. Rptr. 689 (1968).

17. 263 Cal. App.2d 594, 69 Cal. Rptr. 876 (1968).

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there was an implied condition that the lots were usable as residential lots without substantial and expensive work. It also reversed the trial court's finding that the property was usable residential property, because the evidence was insufficient for the finding. Thus, in the absence of waiver of the condition by the buyers, damages for their failure to perform could not be recovered.

The implications of the case are enormous. Knowledge that the buyers were seeking the property for residential use was held sufficient to imply a condition of suitability. This will protect buyers who, as in this case, refuse to complete the contract.

But the case contains broader implications. If a condition of suitability can be implied, why not a covenant of suitability? This is nothing more than a warranty of suitability, the breach of which will incur a suit for damages. Such a warranty would be of substantial help to the vast majority of buyers with complaints about real estate purchases. Most of them do not discover that the property is uninhabitable or unsuitable for the planned use until after the deed is delivered; then the buyers try to use it. The buyer needs a remedy that will permit him to keep the land and recover whatever damages are required to make the land suitable for his use.

The doctrine that the contract of sale is merged into the deed, even if it contains implied warranties, should be no obstacle to recovery, since the doctrine is being relaxed. If the standard for merger is the intention of the parties, merger should not be found where there is an implied warranty. Warranties must survive the delivery of the deed to be effective, so the parties could not have intended to extinguish them with the deed.

Even without an extension into warranties it will add enormously to the remedies of innocent buyers. They will no longer be obligated to prove fraud in order to avoid the contract. Proof that both parties knew that buyers had planned to use the property for a residence and that it is unsuitable for such use is sufficient. Presumably, the rule would apply

to old housing as well as new, and provide a full defense to a suit for damages or for the purchase price in a case where the property did not meet the provisions of the Housing Code in force at the time¹⁸ or, with multi-unit rental property, where the zoning ordinance did not permit the use contemplated by the parties.

Strict Compliance with Sales Contract

In several cases this year, the courts have insisted on strict compliance with the contract of sale before the parties will be granted specific performance. Substantial performance was deemed insufficient.

In *Moss v. Minor Properties Inc.*,¹⁹ plaintiff seller and defendant buyer executed identical escrow instructions providing that if the conditions of the escrow were not completed by March 1, 1965, they could be completed thereafter unless a written demand was made by one of the parties to cease the escrow. On the date appointed, the deed had been sent to the title company but not recorded, and no title insurance had been issued. On that day the buyer received approval of his loan, but instructed the escrow holder in writing to terminate the escrow. The court held that unless the terms of the escrow were strictly complied with, specific performance should not be granted. The fact that the purchaser deposited the purchase price with the escrow holder after learning that escrow would not close on March 1, 1965, was held not to constitute a waiver; he merely complied with his covenant.

In *Andover Land Co. v. Hoffman*,²⁰ the court found strict compliance with the escrow instructions. These instructions set a closing date on the escrow. It was provided that a party who had fully complied could thereafter demand termination of the escrow, but that no termination would be permitted until five days after notice of the demand had been given to the other party. Since the defaulting party had cured his default

¹⁸. See e.g., *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. [1968]); *Pines v. Persson*, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

¹⁹. 262 Cal. App.2d 847, 69 Cal. Rptr. 341 (1968).

²⁰, 1, 264 Cal. App.2d 87, 70 Cal. Rptr. 38 (1968).

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within five days, the demand was insufficient to terminate the escrow.

Escrows

The courts discussed the liability of escrow holders in several cases. In *Lee v. Title Insurance & Trust Co.*,² plaintiff sued defendant escrow holder for failure to notify plaintiffs that sellers were defrauding them, since the \$135,000 trust deed they were receiving secured only a \$100,000 note. The court exonerated the escrow holder because it had faithfully executed its instructions. The rationale was that the escrow agency is limited and liability would subject the escrow holder to a high litigation risk. In every case where a real estate transaction fails, the injured party would sue the escrowee for failure to disclose. While this argument is not overly persuasive, it is difficult to place an absolute obligation on the escrow holder to reveal anything of which he has knowledge or notice. He is not a trustee for the parties, only an agent for limited purposes. Plaintiff argued that where the purposes were such that they gave the escrow holder a unique opportunity to discover the facts, he should have had an obligation to disclose them. The court correctly refused to accept this argument.

Consistent with the *Lee* holding, *Kish v. Bay Counties Title Guarantee Co.*³ held an escrow holder liable for consequential damages when he failed to follow instructions. A qualification, however, was placed on this liability. Where the conditions in the escrow could not have benefited the injured party, the escrow holder was not liable to him. Plaintiff sued the escrow holder for all damages resulting from a disastrous real property deal wherein he exchanged his house and a substantial note for Nevada commercial property. The escrow holder neglected to have plaintiff sign the trust deed on the Nevada property called for in escrow agreement. The escrow holder was held not liable for the damages resulting from completion of the transaction. He was, however, held

2. 264 Cal. App.2d —, 70 Cal. Rptr. 378 (1968).

3. 254 Cal. App.2d 725, 62 Cal. Rptr. 494 (1967).

liable in the amount of any deficiency judgment recovered by the note holder against plaintiff.⁴

*Akin v. Business Title Corp.*⁵ nullified exculpatory clauses in escrow contracts. The escrow company placed an exculpatory clause in its contract relieving itself from liability for ordinary negligence. It erroneously recorded a trust deed in Los Angeles County instead of in Orange County where the land was located. The buyer went bankrupt and seller was left without a remedy. Overruling *Simmons v. Bank of America*,⁶ the court held the exculpatory clause invalid. On the authority of *Tunkl v. Regents of the University of California*,⁷ the court found the clause to be against the public interest if: (1) it involved a transaction which concerned a business of a type suitable for public regulation; (2) the party insisting on the exculpatory clause had a decisive advantage of bargaining strength because of the importance of the service to the public; and (3) no provisions were available for additional protection against negligence. Recognizing that the inherent inequality of the escrow situation requires a limit on contractual provisions, the court extended its view of what transactions constitute contracts of adhesion.⁸ It is likely that this rule will be applied to other contracts of adhesion, such as leases in a tight rental market.⁹

Security Problems

This year, as last, the striking thing about property litigation is the number of cases in the field of real estate financing.

4. See text infra at note 12.

5. 264 Cal. App. 2d —, 70 Cal. Rptr. 287 (1968).

6. 159 Cal. App.2d 566, 323 P.2d 1043 (1958).

7. 60 Cal.2d 92, 32 Cal. Rptr. 33, 383 P.2d 441, 6 A.L.R.3d 693 (1963).

8. See Reith, *Contractual Exculpation from Tort Liability in California—*

The "True Rule" Steps Forward, 52 Cal. L. R. 350 (1964); *Grisinger v. Golden State Bank*, 92 Cal. App. 443, 268 P. 425 (1928). For a view of the policy as applied to landlord-tenant law, see *Kay v. Cain*, 154 F.2d 305, 81 App. D.C. 24 (1946).

9. But see contra, *Barkett v. Brucato*, 122 Cal. App.2d 264, 264 P.2d 978 (1953).

Deficiency Judgments

California Code of Civil Procedure section 580b prohibits a deficiency judgment where a purchase money security interest is insufficient to cover the debt. This provision received conflicting treatment in three cases this year.

In *Paramount Savings & Loan Association v. Barber*,¹⁰ defendant purchased property subject to a construction loan and executed an assumption agreement on the obligation. Although defendant contended that he qualified under section 580b because he assumed the note as a purchase money obligation, the court held that the obligation must be characterized at the time it is initially issued, and at that time it had been a construction loan, not a purchase money loan. Therefore, the loan did not fall within section 580b and defendant could be subjected to a deficiency judgment.

Defendant in this case was within the class sought to be protected by the anti-deficiency statute. He was a purchase money borrower. The only argument that can be made in opposition is that the lender has his rights impaired without consent if his obligation is changed from non-purchase money to purchase money after he issues it. But there is no loss in rights, as the lender can still recover from the original trustor on a personal judgment if the security is insufficient to satisfy the debt. The original trustor is not a purchase money debtor. Where the creditor has no control over the assumption, the assignee-debtor should nevertheless be protected by the anti-deficiency legislation.

The opinion fails to mention whether the loan agreement permitted the lender to call the loan when the property was sold (a common provision in trust deeds). If so, failure to call the loan puts the lender in the same position as though he had called the loan and then re-lent the money to the purchaser. In that case, the lender would be a purchase money lender, and a substance-over-form argument would dictate the same result in the case at bar.¹¹ The specific revision of

¹⁰ 263 Cal. App.2d 166, 69 Cal. Rptr. 390 (1968). *Curbing Deficiency Judgments*, 48 Cal. L. R. 705 (1960); Hetland, *Deficiency*

¹¹ Riesenseld, *Calif. Legislation Judgment Limitations in California—A*

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 580b in 1968 to include 3rd party lenders points in the same direction.

In two choice-of-law cases, however, the court read section 580b expansively. In *Kish v. Bay Counties Title Guarantee Co.*,¹² an intervening homeowner sued the escrow-holder for failure to follow the escrow instructions by not preparing and executing a proper trust deed for the homeowner to sign. That would have protected him from a deficiency judgment. The intervener and escrowee were both California residents and the escrow was to be performed in California. The property was situated in Nevada. The court held section 580b applicable despite the fact that the property in question was in another jurisdiction. Since the intervener would have been protected from a deficiency judgment had the trust deed been executed, he recovered damages.

The second choice-of-law case, *Yunker v. Reseda Manor*,¹³ concerned a deed of trust executed by a California corporation and a California resident in Nevada on Nevada land. The court rejected the argument that questions relating to real property are decided by the law of the situs on the reasonable ground that the question did not involve the real property, but rather concerned a personal judgment against the owner. In going on to balance the contacts, the court found a strong California policy in preserving the solvency of its residents and held that the statute extended to this transaction. It also distinguished *Bernkrant v. Fowler*,¹⁴ a leading choice-of-law case, on rather dubious grounds. A more realistic distinction would contrast California's strong policy against deficiency judgments with the weaker policy of the statute of frauds involved in *Bernkrant*.

Taken together, these cases presage a wide geographical scope for the protection of the California anti-deficiency statute. Since the predominant contact identified seems to be the residence of the debtor, and such actions usually must be

New Judicial Approach, 51 Cal. L. R. 1 (1963).

12. 254 Cal. App.2d 725, 62 Cal. Rptr. 494 (1967).

13. 255 Cal. App.2d 431, 63 Cal. Rptr. 197 (1967).

14. 55 Cal.2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961).

brought at his place of residence, effective protection can be given Californians from deficiency judgments.

*Union Bank v. Gradsky*¹⁵ also emphasized strong protection against deficiency judgments. Although the case involved the question of whether a creditor, who elected to sell property at a non-judicial sale could recover the deficiency from the guarantor, the court discussed the California Code of Civil Procedure section 580d. This section provides that deficiency judgments can be recovered only where the debtor has a right to redeem, that is, in a judicial foreclosure. Though only dictum, its force and persuasiveness carry much weight. The court decided that section 580d would apply to bar a guarantor's recovery in a suit by a guarantor who paid the debt, subrogated to the creditor's rights against the debtor. The guarantor's rights derived from the creditor's and since the creditor could not have recovered a deficiency, it should not be possible to subject the debtor to a deficiency judgment by adding an additional step to the process. The creditor could either have judicially foreclosed, preserving his right and the right of the guarantor to recover a deficiency from the debtor, or he could have elected a non-judicial sale where he would not have been entitled to a deficiency from the debtor. Since he elected a non-judicial sale, the court held that the creditor was estopped from recovering a deficiency from the guarantor. The concept of estoppel was inappropriate here. This was an application of the theory that any discharge of the debtor discharges the surety.¹⁶

Deeds of Trust

*Gates v. Crocker-Anglo National Bank*¹⁷ involved a dragnet clause in a trust deed. Co-tenants of real property gave a trust deed to refinance the prior secured indebtedness of one co-tenant. The deed provided that it would secure "the payment of all other monies and indebtedness now and hereafter

15. 265 Cal. App.2d —, 71 Cal. Rptr. 64 (1968). For further discussion of this case, see YORK, REMEDIES, in this volume.

16. Cal. Civ. Code §§ 2810, 2819.
17. 257 Cal. App.2d 857, 65 Cal. Rptr. 536 (1968).

due or owing from trustor or any of them to the beneficiary.” Unknown to the other co-tenant, a prior unsecured note of the first co-tenant to the beneficiary was in default. The court held that the other co-tenant did not intend to include the separate debt within the mortgage since he did not know of it. The case reasonably restricts the ability of a security holder to bring unintended debts within its ambit. This case of first impression in California suggests that when a pre-existing debt by one co-tenant is meant to be included, it must either be specifically included in the instrument or the holder of the security interest must establish that the non-debtor co-tenant knew of the prior debt. In dictum, the court quoted *First v. Byrne*¹⁸ with approval in setting forth the general rule that the property covered by the security interest is existing or future joint indebtedness; existing or future individual indebtedness of the mortgagor whose interest is foreclosed; and existing or future debts known or consented to by the person foreclosed. Although the court was able to distinguish *Langerman v. Puritan Dining Room Co.*,¹⁹ which involved advances made subsequent to the mortgage, the spirit of the two cases are directly opposed. Thus, security lenders would be wise in the future to secure specific agreements in writing for the inclusion of new loans in the mortgage. Relying on testimony of the behavior and speech of the trustor is uncertain, and, without a court’s finding that the party foreclosed consented to the inclusion of the subsequent debt within the security interest, it will not be enforced.

*Manning v. Queen*²⁰ involved the impairment of a junior security. Trustor sued the beneficiaries of a second trust to enjoin foreclosure after default, contending that the payment of the amount of the default and the delinquency fee cured the default.¹ The beneficiaries contended that trustors were still in default since trustors had defaulted on the first trust by failing to pay taxes, insurance, and several fees, which the

¹⁸. 238 Iowa 712, 28 N.W.2d 509, 172 A.L.R. 1072 (1947).

¹⁹. 21 Cal. App. 637, 132 P. 617 (1913).

²⁰. 263 Cal. App.2d 672, 69 Cal. Rptr. 734 (1968).

¹. Cal. Civ. Code § 2924c.

beneficiary under the first trust advanced. This resulted in an increase in the principal of the first trust of \$890. The second trust had required that these payments on the first trust be made. The beneficiaries on the first trust had, in fact, made the payments but had not been reimbursed by the trustors. The court held the trustors in default, since a trustor may not impair the security interest of his beneficiary. Here, the increase in the amount of the prior trust impaired the beneficiary's interest.

The case on its facts is easy, since the provision for the payment of taxes and insurance was incorporated in the second trust deed and a failure to discharge these debts was both a technical and substantial default. A more difficult case would be presented where a specific provision was not included in the second trust. There, it would be questionable whether the beneficiary would be justified in considering this a default. He could, of course, sue for his damages resulting from the impairment of the security.² The beneficiary's damages could be measured either by the damage to the security or by the extent to which the security is worth less than the debt. The security cushion is one of the factors taken into consideration in determining other aspects of the loan, such as term and interest. Therefore any diminution in the value of the security should be recoverable³ whether it constitutes a default or not, and the recovery applied against the debt.

*Hill v. Gibraltar Savings & Loan Association of Beverly Hills*⁴ involved a trust deed sale for cash. The beneficiary of the first trust deed bid the amount due on that trust. A stranger raised the bid several hundred dollars. Plaintiff, the beneficiary under the second trust, bid a higher amount but was unable to show cash for that amount. His request for a

2. Cal. Civ. Code § 2929 provides that no person whose interest is subject to the lien of mortgage may do any act which will substantially impair mortgagee's security. This provision requires determining what impairment is substantial. In the case at bar, the first trust was \$15,900; the second trust, \$2,-

750. The impairment was \$890. The impairment of security to the extent of 30% of the debt secured is certainly substantial.

3. Osborne, *Mortgages*, 318-319 (1951).

4. 254 Cal. App.2d 241, 62 Cal. Rptr. 188 (1967).

delay to secure cash was denied.⁵ The court held this proper because the outside buyer might have disappeared in the interim, withdrawing his bid. In distinguishing dictum in a prior case,⁵ the court leaned toward an opposite result if the only parties bidding had been the holders of the first and second trust deeds. There the beneficiary of the first trust would have lost nothing by allowing the second beneficiary a reasonable period to go to the bank to secure cash. In the instant case, however, the outside purchaser, who was willing to pay cash, might have withdrawn his bid. The court was willing to protect a junior lienholder only where it would not injure a senior lienholder.

Concurrent Estates

Two California cases this year demonstrate the strong and continuing hold of common-law doctrine and the continued importance of form over substance in the field of real property titles.

In *Burke v. Stevens*⁶ one joint tenant conveyed her interest to a straw man who then reconveyed it to her. None of the deeds was recorded or returned to her but rather they were placed in her attorney's file. Despite the fact that the other joint tenant had no knowledge of the conveyance and no innocent party's rights had intervened, the court held that the secret conveyance was sufficient to terminate the joint tenancy.

In another case, *Clark v. Carter*,⁷ one joint tenant had conveyed property from herself as joint tenant to herself as tenant in common and recorded the deed. The court adhered to the common-law rule that every conveyance requires a grantor and a grantee and that they must be different people. It was argued that since California Civil Code section 683 permits a transfer from an individual to that individual and another as joint tenants, it should also permit the severance of joint tenancy without the use of a straw man. The court, disagreed,

5. *Kleckner v. Bank of America*, 97 Cal. App.2d 30, 217 P.2d 28 (1950). 7. 265 Cal. App.2d —, 70 Cal. Rptr. 923 (1968).

6. 264 Cal. App.2d 30, 70 Cal. Rptr. 87 (1968).

however, reading California Civil Code section 1039 to prohibit any transfer where only one party is involved. This is a strained reading of section 1039, which simply defines the word “transfer” as an act by which the title to property is conveyed from one living person to another. It can be argued that the conveyance from one person in a particular form to himself in a different form is equivalent to the transfer from one person to another. Furthermore, the section seems to be a preliminary definition to a large number of sections interpreting “transfer,”⁸ and having nothing whatsoever to do with the question at bar in this case.

Some footwork was needed to sustain the logical symmetry of this area of law in *Estate of Casella*.⁹ Here, one of the joint tenants fraudulently induced his wife, the other joint tenant, to deed her interest to him. He then conveyed the property to a bona fide purchaser. The court held that the joint tenancy was never severed; the deed from husband to wife was fraudulent and therefore voidable. When the court set the deed aside, it declared that it was as though it had never existed. Faced then with the contention that the husband’s subsequent conveyance of the entire property terminated the joint tenancy, the court again dodged. It held, confusingly enough, that the husband did not intend to sever the joint tenancy by making the conveyance, but rather intended to pass full title. Under the rule that the sale of joint tenancy property impresses joint tenancy upon the proceeds, the court then held that the proceeds were subject to the usual rules of survivorship.¹⁰ The analysis here is inadequate. The court neglected to observe that the fraudulent, voidable deed from wife to husband was never avoided. A bona fide purchaser intervened, preventing the wife from recovering her interest in the realty itself. It would have been better to consider the realty impressed with a constructive trust in joint tenancy because of the fraudulent procurement of the deed. When it

8. Cal. Civ. Code §§ 1040–1085.

9. 256 Cal. App.2d 312, 64 Cal. Rptr. 259 (1967).

10. The court’s justification for this is interesting. “To hold that by this

sale the joint tenancy relationship as to the purchase money was destroyed would be to give Domenico a premium on his fraud.” 256 Cal. App.2d at 323, 64 Cal. Rptr. at 266.

Real Property

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was sold, the proceeds would have been held in the same fashion. But to say that there was no actual severance of the unities here by either of the two conveyances is an unsatisfactory fiction.

The right to the use of property was litigated in *Garibaldi v. Garibaldi*.¹¹ The parties held several contiguous parcels of timberland as tenants in common. Defendant cut timber from one parcel which constituted more than his share of the value of the timber on that property, but less than his share of the total value of the timber. The court held that no action would lie for recovery of an aliquot share of the profits because the property could be reasonably partitioned to satisfy the parties' interests. While this case does not purport to be an extension of the rule that business profits earned on the property need not be shared with non-risk taking co-tenants,¹² it seems contrary to several prior California cases¹³ which require the co-tenant to account for net profits from mines, oil wells, or lumbering. The case can, however, be reconciled on the theory that it was combined with an action for partition and it was as easy to partition, considering the ease of apportioning the remaining timber value of the land, as it was to apportion the profit and then partition the land into portions of current value. It is not precedent for denial of an accounting where there is no partition, or where partition is not possible in equitable fashion because one of the co-tenants took excessive profits from the land.

Boundaries

Where the parties are uncertain as to the boundary between their property, a boundary fixed by an oral agreement will be valid if one of the parties relies thereon to his detriment.¹⁴ The justification for this doctrine is that the uncertainty of

¹¹. 264 Cal. App.2d 9, 70 Cal. Cal. 134, 27 P. 863 (1883); Payne v. Rptr. 92 (1968). Callahan, 37 Cal. App.2d 503, 99 P.2d

¹². Pico v. Columbet, 12 Cal. 414 1050 (1940); Hihn v. Peck, 18 Cal. 640 (1859). (1861).

¹³. See, for example, McCord v. Oakland Quicksilver Mining Co., 64 ¹⁴. Burby, *Real Property* § 124 (1965).

the boundary and the acquiescence for such a period of time as to found reliance is tantamount to a construction of the deeds that will be binding on the parties. It is a way of avoiding the statutory prohibition on conveyance of interests in land without a written document. It is also designed to secure repose in boundary disputes.

In *Roman v. Ries*,¹⁵ defendants purchased land adjacent to plaintiff's predecessor without knowing the exact boundary line. Plaintiff's predecessor pointed out the boundary line but was mistaken. In reliance thereon, defendant built his house partly on plaintiff's predecessor's land. Plaintiff sued to quiet title, contending that the agreed boundary had not been maintained for the period of the statute of limitations. The court held that the defendant had relied on the agreed boundary to his detriment in constructing the house and that he should not be deprived of it to his injury. The court went on to hold that only that portion of plaintiff's land which had reasonable relation to the construction would be transferred as a result of the boundary agreement. Against defendant's contention that the boundary agreement should either be approved in full or disapproved, the court held that equity could fashion whatever relief seemed appropriate. Here, the boundary agreement was upheld only because the defendant would have suffered damage otherwise. There was no reason to give him more land than would be sufficient to counteract that damage. The decision demonstrates that the court will fashion a remedy as flexible as necessary to find a solution without unjustly enriching the prevailing party. Presumably the judgment will be recorded to put future purchasers on notice of the odd boundary lines.

Easements and Licenses

In recent cases the courts have taken a liberal view of the purposes behind easements and have found that a change in use conforms to the original purpose. In *Faus v. Los Angeles*,¹⁶ the original grantors had given an easement for

¹⁵ 259 Cal. App.2d 65, 66 Cal. Rptr. 120 (1968).

¹⁶ 67 Cal.2d 350, 62 Cal. Rptr. 193, 431 P.2d 849 (1967).

an electric railway. After discontinuance of the railway, the easement was used for a bus service. The court held that the grantor's intent was to provide public transportation across the land, and bus service was an adequate substitute. In *Norris v. State of California ex rel. Department of Public Works*,¹⁷ the court held that an easement granted for highway and road purposes along a lake included the construction of a roadside rest and scenic vista.

The granting of an oral license followed by substantial reliance by the licensee was found to be an irrevocable license in *Hammond v. Mustard*.¹⁸ Where the license is one of passage across property, as in this case, it is hard to see what useful function is served by not calling this type of estate an easement. The only possible objection, that an easement is an estate in real property requiring compliance with the statute of frauds, is not persuasive. If the equivalent of an easement requires statute of frauds compliance, then this type of license should not be allowed under any circumstances. This seems an appropriate case for an exception to the statute of frauds, because the reliance provides sufficient evidence to avert fraud.

Waste

In *Haskell v. Wood*,¹⁹ California adopted the unopened mine rule for allocation of rights in minerals on the land between the life tenant and remainderman. There is no waste where the parties intended to permit the life tenant or tenant for years to extract minerals from the property. The rule has grown up that where a mine or oil well is open, the parties intended to permit the person in possession of the land to continue working it in the absence of evidence to the contrary. On the other hand, where the mine was sealed, it is presumed that the parties did not intend to permit the tenant to enjoy the minerals. While the unopened mine rule is universal,²⁰

17. 261 Cal. App.2d 41, 67 Cal. Rptr. 595 (1968).

18. 257 Cal. App.2d 384, 64 Cal. Rptr. 829 (1967).

19. 256 Cal. App.2d 799, 64 Cal. Rptr. 459 (1967).

20. 5 Powell, *Real Property* 640 (1968), 5 *American Law of Property*

the converse (that an open mine may be completely exhausted by a tenant), although unchallenged, makes no sense. It is more reasonable, in searching for the intention of the parties, to assume that where a mine is open, it will be worked in accordance with the practice of the prior possessor of the land. In the absence of other evidence, there is no basis for assuming an intent of the parties to change the pattern of development to the detriment of the landlord or remainderman. The open mine rule arose when there was more concern for speedy development and less for conservation of natural resources. A more limited view of the tenant's right to remove minerals from open mines should prevail today.

Real Property Securities

*Harvey v. Davis*¹ involves the Real Property Securities Dealers' Act² and indicates that a very stringent interpretation will be given to it. The act was passed to eliminate certain abuses in the sale of real property securities which had previously been exempted from the aegis of the California Corporation Commissioner. A substantial market in real property securities had grown up with people buying without the benefit of accurate financial information on the properties involved. The provision construed in *Harvey* involved the question of whether an individual was engaged in the business of selling real property securities and thus obligated to register and provide financial information, subject to damages. Plaintiff had advertised his property for sale in the newspaper. Defendant contacted plaintiff and offered to purchase it for \$80,000 worth of approved second trust notes. When plaintiff accepted, defendant contacted a person who wished to sell 32 second trust notes, of which 24 would equal \$80,000 in value. Defendant promised the seller that he would dispose of the

§ 20.6 (1952), *Hardie v. Yuen*, 258 Cal. App.2d 301, 65 Cal. Rptr. 594 (1968) is not to the contrary; it holds that a mineral lease given by one cotenant cannot be cancelled by the other. This does not bear on the question of damages.

1. 69 Cal.2d 362, 71 Cal. Rptr. 129, 444 P.2d 705 (1968).

2. Bus. & Prof. Code §§ 10237 et. seq.

Cal Law Trends and Developments, Vol. 13, No. 1, p. 17 (1969).

rest. The court held on the basis of the legislative history, that a person who sells 24 notes is engaged in the business of selling real property securities. An analogy was drawn to the definition of a real estate broker who is described as a person who sells three or more properties during the year.³ Since 24 is more than three, the court held defendant to be in the business. The other obstacle was to find that the defendants were selling to the public. Taking their lead from federal securities cases, the court held that the public need not include more than one person. The public is a class of persons unable to protect themselves due to a lack of special competence and knowledge in the field of real estate securities.⁴

The stringency of this application is obvious. It would appear that a person who sells 24 notes to a single individual is no more in the business than a person who sells one larger note to that individual. Furthermore, the analogy to real estate brokers is somewhat inapposite. The essence of a real property security is that it is readily transferable. Realty, however, presents a more difficult subject for sale. Thus, a person may spend full time selling property and only accomplish three or four sales a year; the same is not likely to be true for real property securities. However, the interpretation of the phrase "in the business" is in accord with the purpose behind the statute—supplying appropriate information to unsophisticated investors.

Landlord and Tenant

Contributory Negligence of Landlord

The court showed a disposition to require due care of the landlord in an unusual case this year. *Travelers Indemnity Co. v. Titus*⁵ was a suit by the landlord's insurer subrogated to his claim against the tenant for negligence in using an incinerator which did not conform to statutory requirements.⁶ The tenant successfully defended on the ground that the land-

3. Cal. Bus. & Prof. Code § 10131.1.

4. S.E.C. v. Ralston Purina Co., 346 U.S. 119, 97 L.Ed.2d 1494, 73 S.Ct. 981 (1953).

5. 265 Cal. App.2d —, 71 Cal. Rptr. 490 (1968).

6. Pub. Res. Code § 4446.

lord was contributorily negligent in furnishing her with an incinerator that did not meet statutory standards and for failing to warn her of this deficiency. The court rejected the plaintiff's argument that the landlord is under no duty to warn tenants of obvious defects,⁷ taking the proper view that this doctrine is applicable only to cases where the tenant sues the landlord for damages.

The obvious defect exception is really a defense of contributory negligence, rather than one of determining the required standard of care. Where both parties are negligent, neither can recover. It can, however, be argued that in both cases the question of negligence should be left to the jury to determine whether, under the circumstances, the landlord was negligent in failing to warn the tenant of the defect. Obviously, the more patent the defect, the less likely failure to warn will constitute negligence as a reasonable man might presume that another person would note the defect.

Fixtures

*Larkin v. Cowert*⁸ was a suit by the owner of an apartment building against the foreclosing beneficiary of a trust deed to recover the value of draperies and carpets installed in the apartment. The lower court found that since the parties had intended to incorporate these items of personal property into the realty, title to them passed with the realty. The court of appeal affirmed, contrasting *Dean Vincent, Inc. v. Redisko, Inc.*,⁹ which involved the installation of carpets in an apartment building, with *Plough v. Peterson*¹⁰ in which carpets were installed in a private home.

Hints in the opinion call for a rule of law that carpets installed in apartments are generally intended to be part of the property, whereas carpets installed in private homes are not. This would be a misinterpretation, since the intention

7. *Hanson v. Luft*, 58 Cal.2d 443, 24 Cal. Rptr. 681, 374 P.2d 641 (1962).

8. 263 Cal. App.2d 27, 69 Cal. Rptr. 290 (1968).

9. 232 Ore. 170, 373 P.2d 995 (1962).

10. 140 Cal. App.2d 595, 295 P.2d 549, 55 A.L.R.2d 1042 (1956).

of the parties is the keystone. Moreover, the fact that carpets and drapes are necessary in most modern apartments in order to rent them, and that they are installed with the purpose of leaving them there for their useful lives, does not distinguish apartment buildings from private homes. More and more frequently, private homes are being sold with the carpets and drapes intact. The prevalence of wall-to-wall carpeting and custom-made drapes would indicate that in most cases, regardless of the "rental" nature of the property, these items are intended to become part of the realty. The best way to view these three cases is to note that in each case the decision of the trial court was affirmed. Where the question is one of intent the decision of the trial court will usually be determinative.

Constructive Eviction

If hard cases and small cases both make bad law, then the law made by *pro se* cases is atrocious. A good example is *Conterno v. Brown*.¹¹ Defendant tenant moved out before the expiration of his lease and plaintiff landlord sued to recover the rent due until the landlord found a replacement tenant.

That which the defendant could take no longer was the noisy tenants who occupied the apartment just below his. They were three in number, a twelve year old and her parents, who joined in song at all hours, when not joined in noisy quarrels that made sleep impossible. Defendant complained to plaintiff, the common landlord, and he expostulated with the offending tenant, to no avail.¹²

The lease provided that lessor would not be liable for damage arising from the acts or negligence of co-tenants, other occupants, or owners or occupants of adjacent property. The court held that this clause prevented the tenant from claiming constructive eviction, following the opinion in *Bilicke v.*

¹¹. 263 Cal. App.2d 135, 69 Cal. Rptr. 393 (1968).

¹². 263 Cal. App.2d at 136, 69 Cal. Rptr. at 394.

Janss.¹³ The better interpretation of that lease clause would have been to hold the landlord free from suits for negligence on the grounds of activities by others in the building. To hold that this clause provides against constructive eviction by the activities of others is to take a strong pro-landlord position. Although the case does not indicate it, there were provisions in the common lease enabling the landlord to control the tenants.¹⁴ If he failed to do so to the extent that one tenant made the property uninhabitable by another, this constitutes constructive eviction by the landlord. Although there are many statements in California authorities that a person is not constructively evicted by another tenant, they are all dicta.¹⁵ The question had never been decided in this state. The general rule is that constructive eviction occurs when it is performed by someone deriving title from the landlord, including another tenant.¹⁶

The grand-daddy of constructive eviction cases, *Dyett v. Pendleton*,¹⁷ concerned the rental of adjoining units to persons who used them for immoral purposes, and illustrates that where the ousting activities are those of another tenant whom the landlord could control but does not, the acts of the tenant are considered the acts of the landlord.¹⁸ Thus, the exculpatory clause should have no application in *Conterno*, since the tenant was claiming constructive eviction resulting from the landlord's activity in failing to quiet the other tenants.

If the clause in *Conterno* was copied from *Bilicke* as the

13. 14 Cal. App. 342, 112 P. 201 (1910).

14. The lease forbade loud noise or disturbances, piano playing after 6:00 p.m., and singing.

15. 30 Cal. Jur.2d 187, *McDowell v. Hyman*, 117 Cal. 67, 48 P. 984 (1897) (successful suit by a tenant against his landlord for damages for eviction), *Sarina v. Pedrotti*, 103 Cal. App. 203, 284 P. 472 (1930) (action for damages against the landlord for the tenant's eviction by trespassers), *Lost Key Mines v. Hamilton*, 109 Cal. App.2d 569, 241

P.2d 273 (1952) (eviction by trespassers not constructive eviction where landlord cooperated to oust trespassers).

16. 2 Powell, *Real Property* § 225[3] (1967), 1 *American Law of Prop.* § 3-.51 (1952).

17. 8 Cow. 727 (N.Y. [1826]).

18. What makes this decision more surprising is that another adequate ground existed—a finding of no constructive eviction as a matter of fact, since the landlord evicted the noisy tenants, even releasing them from the remaining terms of their leases.

Cal Law 1969, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

Dependency of Lease Clauses

In *City of Stockton v. Stockton Plaza Corporation*¹⁹ the court took another step toward establishing the mutual dependency of lease clauses. The city had leased land adjacent to its urban renewal area to defendant, who agreed to construct a convention center and motel. The lease permitted lessee to terminate the lease after a year if he were unable to find financing but had no provision for termination by the lessor. The lessee was unable to find financing within a year and the lessor terminated the lease. The court held applicable a provision of the Civil Code which specified that a reasonable time is allowed for performance where no time is specified in the contract.²⁰

The court was swayed by the city's purpose in giving the lease—revitalizing the area and providing Stockton with an adequate convention center adjacent to the urban renewal facilities. The court assumed, but did not support, the view that the breach of lessee's covenant to build within a reasonable time would permit lessor to terminate the lease. In assuming that, the court implied that the covenant of quiet enjoyment and the covenant to build were mutually dependent. There is a strong argument, however, that the covenant to build was in fact a covenant to pay rent, which has always been dependent on the covenant of quiet enjoyment.

¹⁹. 261 Cal. App.2d 639, 68 Cal. Rptr. 266 (1968). ²⁰. Cal. Civ. Code § 1657.

Tort Liability of Property Occupiers

In the most important decision of the year, *Rowland v. Christian*,¹ the supreme court restored sanity and coherence to the tort liability of a possessor of land. The general rule for tort liability holds a person responsible for injury to others resulting from his lack of ordinary care or skill in managing his property.² Exceptions had, however, grown at common law differentiating the duty of care owed to trespassers, licensees, and invitees. These distinctions created a multitude of rules, definitions, and exceptions which often nonetheless resulted in liability.³ In *Rowland*, the court purported to extinguish those distinctions and to impose a duty to act reasonably regardless of the status of the injured party.

Plaintiff was a social guest in defendant's apartment. Defendant knew of a defect in one of the bathroom faucets, and had asked her landlord to fix it. Defendant failed to warn plaintiff of the defect when he used the bathroom, and the fixture shattered, injuring plaintiff severely. The trial court gave summary judgment to defendant. The supreme court reversed and remanded for trial on the question of defendant's negligence.

In attempting to limit the scope of the case, it will be noted that, since *Rowland* involved a licensee, comments with respect to trespassers are dicta. Moreover, this case would fall within a recognized exception whereby the occupier of land is obligated to warn a licensee of a concealed danger.⁴ It is clear, however, that the court intended to clean the Augean stables of this area, and to re-establish the usual rules of tort law.⁵

Rowland may have broad implications in other areas. If it

1. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). For further discussion of this case, see Moreau, TORTS, in this volume.

2. Cal. Civ. Code § 1714.

3. The means by which a harsh rule is avoided can be viewed acronymically as DEELS—Definitions, Exemptions, Exceptions, Limitations, and Special rules.

4. "This was the contention made by appellants in the court of appeals and the supreme court. Apparently only one question by Justice Peters concerned the eventual grounds for decision." (Letter from Jack K. Burman, February 13, 1969.)

5. For a full discussion of *Rowland v. Christian* see Moreau, TORTS, in this volume.

means that a single rule for tort liability should prevail, it may presage substantial changes in the rules relating to the right of a tenant or his guest to recover from the landlord for negligence in maintaining property. For example, where the landlord is negligent in providing safe facilities and the tenant is negligent in failing to warn an injured party of defects in the premises, the injured party may presently recover from the tenant but not from the landlord.⁶ If the liability of owners and occupiers of property for their negligence is to be harmonized with the remainder of tort law, the landlord in such a case should also be liable to the injured party as a joint tortfeasor, particularly since the landlord has a statutory duty to place and maintain residence property in livable condition.⁷

This provision redresses the lack of equal bargaining power between landlord and tenant in residential leases and imposes responsibility for repair on the party with the longer term interest in the property and the one most likely to be financially able to make repairs.⁸ Since the tenant is on the premises, the law also gives him the right to make repairs costing less than one month's rent and charge it against the rent.⁹ If *Rowland* is extended to the area of tenant-landlord suits for injuries to the tenant, these statutory provisions will have some effect in arguments relating to negligence, contributory negligence, and assumption of risk. But the rather rigid rules insulating the landlord from liability will be modified, and more cases will be permitted to go to the jury.

6. *Hanson v. Luft*, 58 Cal.2d 443, 24 Cal. Rptr. 681, 374 P.2d 641 (1962), *Gustin v. Williams*, 255 Cal. App.2d Supp. 929, 62 Cal. Rptr. 838 (1967). This was not the case in *Rowland*, as there was no allegation the landlord's failure to repair constituted negligence on his part.

7. Cal. Civ. Code § 1941.

8. There may be cases where the lessee of residential property has a longer term interest or a deeper pocket-book than the lessor but these situations have not been drawn to my attention.

9. Cal. Civ. Code § 1942.