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## Securities

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## SECURITIES\*

### ASSUMPTION OF INCUMBRANCES

The scope of the Statute of Frauds is extended to require that an assumption by a purchaser of real property of an indebtedness secured by mortgage or deed of trust be in writing.<sup>1</sup> Further, the new provision seems clearly to require that the assumption be in the conveyance, voiding any attempt to provide for it by a contemporaneous instrument—the agreement is invalid (inserting italics) “unless assumption of said indebtedness by the purchaser is specifically provided for *in the conveyance of such property.*”

The statute repeals the previously existing judicially established rule that the assumption of such an indebtedness may be implied.<sup>2</sup> This has seemed to be the law even where the conveyance reads that it is “subject to” the incumbrance.<sup>3</sup> The Statute of Frauds is so harsh in its application to individual cases that only a clearly established necessity can justify its extension. No such necessity is apparent here.

Even apart from the provision's utterly inexcusable defiance of the settled and beneficial rule that contemporaneous writings may be construed together, it seems that the provision is more likely to operate unjustly than justly. If seller and buyer agree that a property subject to an incumbrance of \$4,000 is worth \$10,000, and conveyance is delivered upon payment of \$6,000, is it not more likely to be in harmony with what would be the intention of the parties to hold that the buyer impliedly

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<sup>6</sup>Cal.Stats.(1937), c.570.

<sup>7</sup>Judge Leon R. Yankwich, of the United States District Court for the Southern District of California recently has ruled that, as to joint tenancy property, this right has existed since 1929. In re Sterling, reported in 12 L.A.News [N.S.], Oct. 9, 1937, p.1:6.

\*[The material on this topic was prepared by Joseph M. Cormack, Professor of Law, University of Southern California.]

<sup>1</sup>Cal.Stats.(1937), c.316 adds a 7th subdivision to Cal.Code Civ.Proc.(1937), §1973, and Cal.Civ.Code (1937), §1624.

<sup>2</sup>Banta v. Rosasco, 12 Cal.App.(2d) 420, 55 Pac.(2d) 601 (1936); and see Hopkins v. Warner, 109 Cal. 133, 138, 41 Pac. 868, 869 (1895).

<sup>3</sup>See White v. Schader, 185 Cal. 606, 611, 198 Pac. 19, 21, 21 A.L.R. 499, 503 (1921).

agreed to stand personally between the seller and the indebtedness, than to assume the contrary? It would seem to be a reasonable conclusion that the seller, having a piece of property with a market value of \$10,000, would not part with it in exchange for \$6,000, unless given every assurance possible by the buyer for protection against future liability in connection with the incumbrance. Rather than deal with a purchaser unwilling to give such assurances, it seems that the seller would hold out for \$10,000, the then value of the property. It is true that the seller might yield to the unwillingness of the buyer to trust him, or any bond or other assurance that he might be able to give, to take care of the payment of the incumbrance, but it is hard to see how it can be felt that there is any element of probability or certainty in that direction sufficient to justify the interposition by the Legislature of a Statute of Frauds provision. In any event, there should be no prohibition against placing the assumption in any instrument other than the conveyance.

#### WAIVER OF RIGHTS BY BORROWER

Any waiver by a borrower upon real property security of rights under a number of specially mentioned code sections, or relating in general terms to future legislation, is declared to be void.<sup>4</sup> In view of the historic principle that the right of redemption can not be waived, in whole or in part,<sup>5</sup> it seems that this provision does not effect any change in the law, either presently or prospectively. As with any statute that is not completely comprehensive (and what one is?), there is danger of application of the *expressio unis* canon of construction, producing unlooked for results, but in view of the traditional jealous guarding by courts of equity of the rights of those giving security, such a possibility seems remote in the present connection.

#### NOTICES OF SALE

The provisions of Section 692 of the Code of Civil Procedure, relating to notices, are made applicable to sales under powers in mortgages as well as sales under execution and under deeds of trust.<sup>6</sup>

At one place, where it was provided that notice should be posted "for twenty days," it is now required that the posting be (inserting italics) "*at least* twenty days before date of sale."<sup>7</sup> This change seems to be supererogatory. Although also unnecessary, it would have been more

<sup>4</sup>Cal.Civ.Code (1937), §2953, added by Cal.Stats.(1937), c.564.

Cal.Civ.Code (1937), §§2924, 2924b & 2924c, and Cal.Code Civ.Proc. (1937), §§580a & 726, are specifically referred to.

<sup>5</sup>2 Jones, Mortgages (8th ed: 1928), 788-794, §§1326, 1328-1332.

<sup>6</sup>Cal.Stats.(1937), c.502, p.1490; see *supra*, pp.23-24.

<sup>7</sup>Cal.Code Civ.Proc.(1937), §692, at the beginning of subd. 3, amended by Cal.Stats.(1937), c.502. The new wording already appeared at the end of the same subdivision.

to the point to have provided that the twenty days should be the period *last preceding* the date of sale.

Any person may file with the clerk a written request for notice of sale in any case in which a judgment has been entered in accordance with Section 668 of the Code of Civil Procedure.<sup>8</sup> This is a beneficial addition.

#### APPRAISAL WITH DEFICIENCY JUDGMENTS

Section 726 of the Code of Civil Procedure is revamped to provide that mortgaged property shall be appraised after the foreclosure sale, rather than, as previously provided, at the trial prior thereto.<sup>9</sup> The new procedure is workable, which the former was not, as it could not be told before the sale what the market value at that time would be.

Following admiralty practice, determination is to be made at the trial as to the defendants personally liable. Within three months after the foreclosure sale the plaintiff may request appraisal proceedings. A minor correction is effected, in that the costs are included in figuring the amount of the deficiency judgment.

A nice question arises as to the status in this connection of instruments executed between the effective dates of the 1933 legislation of this character<sup>10</sup> and the present provision.<sup>11</sup> The older legislation was inapplicable to pre-existing instruments;<sup>12</sup> but if the new amendment involves only a remedial change it would seem to be applicable to instruments executed in the intervening period.

#### MORATORIA

The "temporary" moratoria are extended.<sup>13</sup> Judging from the emergency clauses, the "exceptionally depressed conditions" are to be with us in the same manner as the California "unusual" weather.

<sup>8</sup>Cal.Code Civ.Proc.(1937), §692a, added by Cal. Stats.(1937), c.502. This no doubt was suggested by the provisions in regard to notices in connection with mortgage and trust deed sales in Cal.Civ.Code (1937), §2924b, added in 1935.

<sup>9</sup>Cal.Stats.(1937), c.353.

<sup>10</sup>Aug. 21, 1933.

<sup>11</sup>Aug. 27, 1937.

<sup>12</sup>Wilson v. Superior Court, 8 Cal.App.(2d) 14, 47 Pac.(2d) 331 (1935); Hales v. Snowden, 88 Cal.App. Dec.655, 65 Pac.(2d) 847 (1937); Miller v. Hart, 89 Cal. App. Dec.266, 66 Pac.(2d) 755 (1937); cf. Central Bank of Oakland v. Proctor, 5 Cal.(2d) 237, 54 Pac.(2d) 718 (1936).

<sup>13</sup>Cal.Stats.(1937), c.167, is the "Mortgage and Trust Deed Moratorium of 1937." The latest date referred to is July 1, 1939. Like the preceding similar act, it applies only to instruments executed on or before Feb. 1, 1935. Apart from dates, and references to other moratory enactments, the provisions of the earlier act are unchanged. Cal.Stats.(1937), c.5, effected a temporary extension in 1937.

Cal.Stats.(1937), cc.538 & 21 relate to chattel mortgages, the latest date referred to being the same.

Cal.Stats.(1937), cc.307 & 9, deal with special assessment bonds. The latest date referred to is Sept. 15, 1939; see, *supra*, pp.101-102.

## RERECORDATION OF CHATTEL MORTGAGES BY CERTIFICATE

Chattel mortgages may be rerecorded through the use of a simple certificate.<sup>14</sup> In the case of certain instruments rerecordation is not required.<sup>15</sup>

## LIENS

VEHICLE LIENS<sup>15a</sup>

The provisions in regard to labor and material liens in excess of one hundred dollars have been recast,<sup>16</sup> and consent of the legal owner is required before the commencement of work.<sup>17</sup>

After sixty days of unpaid storage or safe-keeping under contract with one not the legal owner, the burden is placed upon a garage or repair shop to ascertain the name of the legal owner, and give him written notice.<sup>18</sup> At the end of the first thirty days of storage, if the ownership is unknown, a garage must report the presence of the vehicle to the sheriff's office.<sup>19</sup> The provision also remains that at the same time, whether or not the name of the registered owner is unknown, the garage must report the fact to the Department of Motor Vehicles, which is required to notify the legal owner.<sup>20</sup> Simplification by future amendment would seem to be in order.

<sup>14</sup>Cal.Civ.Code (1937), §2957(6), as amended by Cal.Stat.(1937), c.227.

<sup>15</sup>Cal.Civ.Code (1937), §2957(6), as amended by Cal.Stat.(1937), c.227. The exceptions are (inserting italics):

(1) When "made pursuant to an order, *judgment*, or decree of a court of record."

(2) When "made to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of *Corporations*."

(3) When "made by a *public utility* subject to the provisions of the Public Utilities Act."

<sup>15a</sup>For further discussion of the 1937 legislation relating to liens on motor vehicles, consult the topic "Vehicle Code," *infra*, pp. 182-185.

<sup>16</sup>The provisions are moved from §426(b) to §425(b) of the Vehicle Code. Cal.Stats.(1937), c.229.

<sup>17</sup>Vehicle Code (1937), §425(b), as amended, and transferred from §426(b), by Cal.Stats.(1937), c.229. The provision applies in connection with "work or services rendered or performed." The question, which should be held hypercritical, is possible whether this limits its application to those portions of the bill relating to personal services, excluding charges for materials, and what might be termed the static, or property, elements of storage and safe-keeping. In support of a negative answer, see *Kron Livery & Undertaking Co. v. Weaver*, 280 S.W. 54, 55 (Mo.App. 1926), and cases discussed.

A thief can not create a lien in any amount. *General Exchange Ins. Corp. v. Pellissier Square Garage*, 2 Cal.Supp. 281, 69 Pac.(2d) 236 (1937).

<sup>18</sup>Vehicle Code (1937), §438(d), added by Cal.Stats.(1937), c. 229. A definition of repair shop is inserted. Vehicle Code (1937), §76, added by Cal.Stats.(1937), c. 229.

<sup>19</sup>Vehicle Code (1937), §439, which is left unchanged. This does not apply to repair shops, or to safe-keeping as distinguished from storage.

<sup>20</sup>Vehicle Code (1937), §439, which is left unchanged. This does not apply to repair shops, or to safe-keeping as distinguished from storage.

## INNKEEPER'S LIEN

The lien is extended to apply to every sort of personal property.<sup>21</sup>

## JEWELER'S LIEN

Jewelers are given a lien<sup>22</sup> of the sort yearned for by many members of the legal profession. It is to be hoped that the timidity of the latter, born of an inferiority complex due to knowledge of unpopularity, will not deprive them permanently of the benefits of such a lien.

## MARITIME LIENS

These are now covered by the Harbors and Navigation Code.<sup>23</sup>

## WAREHOUSE RECEIPTS

The scope of the uniform act has been extended to include animate chattels, and goods in the custody of warehousemen, as distinguished from storage.<sup>24</sup>

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<sup>21</sup>Cal.Civ.Code (1937), §1862, as amended by Cal.Stats.(1937), c.355. Sale can be had only after one year.

<sup>22</sup>Cal.Civ.Code (1937), §3052a, added by Cal.Stats.(1937), c.279.

<sup>23</sup>Cal.Stats.(1937), c.368. The second chapter of the third division of the code is devoted to liens. §§428-432 relate to distribution of losses. The second article of the third chapter of the third division covers salvage. §§811-814, 817-818, relate to the powers of the master to bind the ship. §864 has to do with the seaman's lien. The following sections of Cal.Civ.Code (1935), repealed by the Harbors and Navigation Code, may be said to have lien elements: §§2052, 2079, 2148-2155, 2374-2377, 2380-2381, 2388-2389, 3017-3040, 3055-3056 & 3060.

<sup>24</sup>Warehouse Receipts Act (1909), §58, as amended by Cal.Stats.(1937), c.895.

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\*[The material on this topic was prepared by Sheldon D. Elliott, Assistant Professor of Law, University of Southern California.]

<sup>1</sup>Certain chapters, namely, those relating to aid to needy children, old age security, and aid to needy blind, were omitted from the main draft of the Code as introduced and as finally enacted. Also, the chapter relating to county aid and relief to indigents was deleted from the bill in the course of its passage. These chapters were introduced and passed in separate, supplementary, bills.