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Due on Sale and Due on Encumbrance Clauses in California

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DUE ON SALE AND DUE ON ENCUMBRANCE CLAUSES IN CALIFORNIA

I. INTRODUCTION

The decision by the Supreme Court of California in *LaSala v. American Savings & Loan Association,*[1] as well as the enactment by the California Legislature of Civil Code section 2949[2] are of vital importance to borrower and lender alike.[3] For the first time the court has distinguished between the enforceability of two real property security devices: the "due on sale clause" and the "due on encumbrance clause."[4] The due on sale clause is a provision in security devices which provides for acceleration of debt upon subsequent sale or transfer of the secured property as distinguished from the due on encumbrance clause which provides for acceleration upon further encum-

1. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

2. CAL. CIV. CODE § 2949 (West Supp. 1974).

3. The practical effect of the distinction between mortgages and deeds of trust is almost entirely non-existent. *See* R. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS § 2.7, at 11 (1970) [hereinafter cited as HETLAND]. To avoid confusion, the term security device will be substituted for both mortgage and deed of trust. In addition, the terms borrower and lender will be used in place of trustor, trustee, beneficiary, mortgagor and mortgagee.

4. The following is an example of an acceleration provision:

> AGREEMENT NOT TO ENCUMBER OR TRANSFER PROPERTY
> (For use with Property Improvement Loan)
> In consideration of any loan or advance made by Bank of Belmont Shore (hereinafter referred to as 'Bank') to the undersigned, either jointly or severally, the undersigned (hereinafter referred to as 'Borrower' whether one or more), jointly and severally promise and agree that until all such loans and advances and all other indebtedness or liabilities to the Bank shall have been paid in full, or until 21 years following the death of the last survivor of the undersigned, whichever shall first occur, they will pay all taxes, assessments and charges of every kind, imposed or levied, or which may be imposed or levied upon the hereinafter described real property prior to the time when any of such taxes, assessments or charges shall become delinquent and will not, without the consent in writing of Bank, first had and obtained, create or permit any lien or other encumbrances (other than those presently existing and/or securing the payment of loans and advances made to them by Bank) to exist on said real property, and will not transfer, sell, hypothecate, assign, or in any manner whatever dispose of said real property, or any interest therein or any portion thereof, which real property is situated in *San Luis Obispo* County, California. . . . [Description omitted.]
>
> It is further agreed and understood that if default be made in the performance of any of the terms hereof, or of any Instrument executed by Borrower in connection herewith, or in the payment of any indebtedness or liabilities now or hereafter owing to Bank, Bank may, at its election, in addition to all other remedies and rights which it may have by law, declare the entire remaining unpaid principal and interest of any obligations or indebtedness then remaining unpaid to the Bank due and payable forthwith.

Coast Bank v. Minderhout, 61 Cal. 2d 311, 313 n.2, 392 P.2d 265, 266 n.2, 38 Cal. Rptr. 505, 506 n.2 (1964).

brance or hypothecation of the property. Prior to *LaSala*, courts often used the phrase "due on sale or encumbrance clause" when in fact they meant to refer only to the due on sale clause. The *LaSala* court reaffirmed the validity of the due on sale clause as established by previous California cases, yet failed to declare the due on encumbrance clause valid per se, instead holding it valid in circumstances where it is reasonably necessary to protect the lender's security and invalid in those circumstances where it is used solely as a collateral revenue device.[5] Furthermore, the California Legislature in section 2949 of the Civil Code has set forth circumstances in which the exercise of the due on encumbrance clause is clearly prohibited.[6]

However, the *LaSala* decision and section 2949 by no means resolve the principal problems pertaining to the due on sale and due on encumbrance clauses. Still to be answered are questions concerning the various factors which led the court to distinguish the due on sale clause from the due on encumbrance clause, the effect of the new legislation on the usage of the due on encumbrance clause, the possible criteria for its valid exercise, and the circumstances in which the enforcement of the due on sale clause should possibly be curbed.

II. TREATMENT OF THE DUE ON SALE AND DUE ON ENCUMBRANCE CLAUSES BY THE CALIFORNIA COURTS

The history of cases in California considering the question of acceleration of debt by the lender upon sale or further encumbrance of the property which is security for that debt by the borrower is surprisingly brief. The first California appellate case to consider the validity of the due on sale or encumbrance clause was in 1964: *Coast Bank v. Minderhout.*[7] Justice Traynor writing for the majority held:

> In the present case it was not unreasonable for plaintiff [lender] to condition its continued extension of credit to the Enrights [borrower] on

5. 5 Cal. 3d at 882, 489 P.2d at 1125, 97 Cal. Rptr. at 861. *See, e.g.*, text accompanying note 23 *infra*.

6. CAL. CIV. CODE § 2949 (West Supp. 1974) provides:

> (a) No mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling may be declared in default, nor may the maturity date of the indebtedness secured thereby be accelerated, solely by reason of the owner further encumbering the real property or any portion thereof, with a junior mortgage or junior deed of trust.
>
> (b) As used in this section, "single-family, owner-occupied dwelling" means a dwelling which will be owned and occupied by a signatory to the mortgage or deed of trust secured by such dwelling within 90 days of the execution of such mortgage or deed of trust.

7. 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964).

> their retaining their interest in the property that stood as security for the debt. Accordingly, plaintiff validly provided that it might accelerate the due date if the Enrights encumbered or transferred the property.[8]

Thus, the court upheld the due on sale or encumbrance clauses against an attack on their validity as being a restraint upon alienation in contravention of both the common law and the California Civil Code.[9] However, the sole issue in *Coast Bank* was the validity of the due on sale provision and, therefore, the language as it related to the due on encumbrance clause was dictum.[10] Nevertheless, the succeeding cases until *LaSala* failed to distinguish between the due on sale and due on encumbrance provisions.

Three years after *Coast Bank*, a California court again considered the validity of the due on sale clause in *Jones v. Sacramento Savings & Loan Association*.[11] *Jones* assumed in a footnote, and without any independent reasoning, that the due on sale clause was valid in California.[12] In addition, the question of the validity of the due on sale clause was merely contiguous to the central issue which was the efficacy of subordination provisions in security agreements.[13]

The question of the validity of the due on sale clause was next addressed by the court of appeal in *Hassen v. Lytton Savings & Loan Association*[14] and *Wilson v. Inland Mortgage Co.*,[15] two unpublished

8. *Id.* at 317, 392 P.2d at 268, 38 Cal. Rptr. at 508.

9. *See* CAL. CIV. CODE § 711 (West 1970) which provides that "[c]onditions restraining alienation, when repugnant to the interest created, are void." The *Coast Bank* decision is of double significance, for not only did it establish the validity of the due on sale clause, but it also impliedly rejected the doctrine of invalidity of restraints upon alienation. *See generally* E. COKE, COKE ON LITTLETON § 463 (8th ed. 1822); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1115 (1956); Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 682, 186 P. 596, 597 (1919); Bonnell v. McLaughlin, 173 Cal. 213, 216, 159 P. 590, 591 (1916). *Coast Bank* held that the due on sale clause was a restraint upon alienation, but that it was "reasonable" and therefore permissible. The court appears to have adopted the so-called "Minority Doctrine" in regard to direct restraints upon alienation which, in contrast to the traditional view, asserts that not all restraints upon alienation are invalid, but only those which are unreasonable. Under the minority doctrine a restraint is reasonable if under the circumstances at issue the value of the advancement of the particular purpose behind its imposition outweighs its effect in terms of actually hindering the alienability of the particular property involved. *See* Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173 (1959); Manning, *The Development of Restraints on Alienation Since Grey*, 48 HARV. L. REV. 373 (1935); Sweet, *Restraints on Alienation*, 33 L.Q. REV. 236 (1917).

10. The *Coast Bank* acceleration provision is set out in note 4 *supra*.

11. 248 Cal. App. 2d 522, 56 Cal. Rptr. 741 (1967).

12. *Id.* at 527 n.3, 56 Cal. Rptr. at 745 n.3. The court merely cited *Coast Bank*.

13. *Id.* at 525-26, 56 Cal. Rptr. at 744.

14. Civil No. 30374 (Cal. Ct. App. 2d Dist., filed Jan. 8, 1968).

decisions which simply cited *Coast Bank* as settling the question of whether the due on sale or encumbrance clauses were valid or invalid as illegal restraints upon alienation. The court again offered no independent analysis of the question of the validity of the due on sale clause and, once more, the only matter at issue was acceleration of debt upon subsequent sale, not further encumbrance of the property.[16]

In *Hellbaum v. Lytton Savings & Loan Association*,[17] although chiefly concerned with the validity of a prepayment penalty, a court, for the first time since *Coast Bank*, offered justification for the continued support of the due on sale and due on encumbrance clauses stating that "the restraint is reasonably designed to protect the creditor's justifiable interest in maintaining the direct responsibility of the parties on whose credit the loan was made."[18]

In *Hellbaum*, as in *Coast Bank*, the acceleration clauses in question were considered to be legitimate devices insofar as they were necessary to safeguard the lender's security. No support of the due on sale or encumbrance clause was offered with respect to their characteristics as revenue raising devices.

But in *Cherry v. Home Savings & Loan Association*[19] an appellate panel, while again reaffirming the validity of the due on sale clause, held that the lender is not governed by an implied covenant of reasonableness in its use,[20] and thus drastically reformulated the rationale behind this type of provision. The court recognized that the lender takes a substantial risk that the security may depreciate in value (*i.e.*, would be allowed to deteriorate, and that this risk may be minimized by continuing to deal with a known borrower as opposed to an unknown party allowed to assume the original borrower's position.[21] The court

15. Civil No. 8636 (Cal. Ct. App. 4th Dist., filed Jan. 18, 1968).
16. *Id.* Civil No. 30374 (Cal. Ct. App. 2d Dist., filed Jan. 8, 1968).
17. 274 Cal. App. 2d 456, 79 Cal. Rptr. 9 (1969).
18. *Id.* at 458, 79 Cal. Rptr. at 11.
19. 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969).
20. *Id.* at 580, 81 Cal. Rptr. at 138.
21. *Id.* at 578-79, 81 Cal. Rptr. at 138. It is important to consider that the anti-deficiency provision in the California Code of Civil Procedure precludes any deficiency judgment on purchase money financing, not only against the original borrower, but also against any person buying the previously encumbered property even in the face of an express assumption of the debt.

> No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to the vendor to secure payment of the balance of the purchase price of real property, or under a deed of trust, or mortgage, on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling occupied, entirely or in part, by the purchaser.

also acknowledged that the possibility of the occurrence of these contingencies may justify the lender's acceleration of debt or waiver of acceleration in lieu of a raise in interest rates and/or additional points plus service charge.[22]

In addition, however, the court conceded the existence of other factors totally divorced from the lender's legitimate concern for the safety of his security:

> [L]oan agreements frequently permit a borrower to pay off a loan before it is due. When interest rates are high, a lender runs the risk they will drop and that the borrower will refinance his debt elsewhere at a lower rate and pay off the loan, leaving the lender with money to loan but at a less favorable interest rate. On the other hand, when money is loaned at low interest, the lender risks losing the benefit of a later increase in rates. As one protection against the foregoing contingency, a due-on-sale clause is employed permitting acceleration of the due date by the lender so that he may take advantage of rising interest rates in the event his borrower transfers the security.[23]

Thus *Cherry* offered a new factor—economic instability as it relates to the interest rate—as a legitimate justification for the exercise of the due on sale or encumbrance clause. It is submitted that this position is an extreme and unwarranted extension of the *Coast Bank* decision which, while recognizing that the due on sale clause was a restraint upon alienation, upheld the device exclusively because of the lender's genuine concern over the safety of his security. The *Cherry* decision impliedly assumes not only that the lender's concern over the safety of his security is a legitimate reason for a restraint upon alienation, but also that the lender's alternative concern that his profit margin be protected is a legitimate rationale for such a restraint. In light of strong traditional legal opposition to restraints upon alienation this conclusion seems questionable.[24] In essence the court sanctioned an unwarranted

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> Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof if no deficiency judgment would lie under the deed of trust or mortgage on real property.

CAL. CODE CIV. PRO. § 580(b) (West Supp. 1974); *see, e.g.*, Everts v. Matteson, 21 Cal. 2d 437, 132 P.2d 476 (1942).

22. 276 Cal. App. 2d at 579, 81 Cal. Rptr. at 138. A "point" is a payment of 1% of the loan amount required by the lender from the borrower if he is to obtain the financing in question. A service charge is a flat fee, which varies in amount depending upon the lender in question, that is charged to the borrower at the inception as a condition of the loan.

23. *Id.*

24. See note 9 *supra*.

shift of the risk of an unprofitable loan from the lender to the borrower. For apart from the separate question of the suitability of the individual who wishes to succeed to the original borrower's interest, the lender would not accelerate the loan upon a sale or transfer subsequent to a *decline* in the prime rate of interest[25] because he would almost certainly be unable to relend his money at a rate comparable to that of the initial loan. On the other hand, if the financial climate is favorable, nothing in the *Cherry* analysis prevents lender exploitation. This situation is especially onerous to the borrower. Although he could be obligated at the specified rate of interest, regardless of the rise or fall of the general interest rates, for the life of the loan (which in many cases may be 2 to 30 years), the lender knows that the *average* life of a home loan in California is between four and five years,[26] and, therefore, that in the majority of cases the lender will be obligated at the original fixed rate of interest only for that period.[27]

The next significant development occurred in *LaSala v. American Savings & Loan Association*,[28] in which the California Supreme Court,

25. The prime rate of interest is that rate of interest charged to those borrowers considered to be the most favorable credit risks. For an extensive discussion of the functioning of the prime interest rate, see MUNN'S ENCYCLOPEDIA OF BANKING AND FINANCE 597 (1962).

26. *See* Valensi, *The Due on Sale Clause—a Dissenting Opinion*, 45 L.A.B. BULL. 121 (1970).

27. The problems of the long term lender functioning in an inflationary economy can be extremely severe. For a discussion of the impact of rapid inflation on real estate development, *see* Lefcoe, *Monetary Correction and Mortgage Lending in Brazil: Observations For the United States*, 21 STAN. L. REV. 106, 109 (1968). The savings and loan associations are most adversely affected by rapid inflation because they function primarily as long term lenders, making loans with 20- to 30-year maturity dates. This is in contrast to such lenders as commercial banks which have a portfolio not only of long term loans but also of short term construction and personal purchase loans with less than a five-year maturity date. In 1969, it was estimated that the distribution of long term real estate financing was as follows:

Savings and Loans	50.3 percent
Mutual Savings Banks	9.3 percent
Commercial Banks	17.8 percent
Life Insurance Co.	18.3 percent
U.S. Government Agencies	4.1 percent

CALIFORNIA SAVINGS AND LOAN LEAGUE, CALIFORNIA SAVINGS AND LOAN DATA BOOK 14-15 (1970).

28. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971). In *LaSala*, the named plaintiffs, LaSala and Iford, executed secured deeds of trust subsequent to the existing senior encumbrance in favor of the defendant, American Savings and Loan Association. In the case of Mrs. Iford and her late husband, the initial financing consisted of a promissory note and deed of trust in the amount of $9,500 at 6.6 percent interest. Almost nine years later the Ifords executed a second deed of trust in the amount of $2,500 in favor of another lender. The LaSalas, under a similar first deed of trust and promissory note in the amount of $20,700 at an interest rate of 6 percent, subse-

for the first time, expressly distinguished the due on sale clause from the due on encumbrance clause, reaffirming the validity of the former but failing to sanction the latter.[29] The court recognized that in *Coast Bank* and *Cherry* (the two primary cases which examine the due on sale clause) the central rationale was that the lender should not be required to accept a person other than the borrower to whom it initially extended the loan as a new and unknown credit risk.[30] This reasoning does not support the due on encumbrance clause because neither the borrower nor the security is changed.[31] Further, any encumbrance placed on the property subsequent to the initial financing could not affect the priority of the senior encumbrance.[32] Although the court recognized the alternative considerations offered by the lender in support of the continued validity of the due on encumbrance clause (namely, that a junior encumbrance may portend even greater risks to the lender than a sale of a fee interest because the borrower increases his liabilities and changes his credit position so as to threaten default through the use, for example, of such devices as a "rents and profits clause"[33] or mortgagee in possession[34]), it nevertheless held

quently executed a second deed of trust in favor of a different lender for the sum of $3,800. After plaintiffs executed second deeds of trust they received a form letter from American Savings and Loan Association notifying them of American's right to accelerate under the due on encumbrance provision in the first deeds of trust. Both form letters offered to waive the right to accelerate in return for a payment of a waiver fee and an increase in the rate of interest. In the case of the Ifords the waiver fee was $50 and an increase in the interest rate to 8.75 percent. The LaSalas were asked to accede to a fee of $150 and a rate increase to 9 percent. Plaintiffs brought a class action alleging that the due on encumbrance clause constituted an invalid restraint upon alienation. The superior court held that by reason of the offered waiver the named plaintiffs, Iford and LaSala, no longer represented the class and dismissed the action. The Supreme Court of California reversed. *Id.* at 868-70, 489 P.2d at 1114-15, 97 Cal. Rptr. at 850-51.

29. *Id.* at 869, 489 P.2d at 1115, 97 Cal. Rptr. at 851.

30. *Id.* at 879, 489 P.2d at 1122, 97 Cal. Rptr. at 858.

31. *Id.* at 880, 489 P.2d at 1123, 97 Cal. Rptr. at 859.

32. CAL. CIV. CODE § 2897 (West 1970).

33. The rents and profits clause in the junior security device entitles the junior creditor to rents and profits from the security in certain circumstances, generally a default by the borrower. Depriving the borrower of rents and profits from his property increases the risk of his default on the lender's senior security device. For a thorough discussion of the operation of rents and profits clauses, see HETLAND, *supra* note 3, §§ 2.12-2.21, at 17-24.

34. In the situation of the mortgagee in possession the senior lender faces the threat that the junior might try to obtain repayment of the obligation through rental or other depleting usage of the property which would in turn increase the risk of the borrower's default on the senior security device. 5 Cal. 3d at 881, 489 P.2d at 1124, 97 Cal. Rptr. at 860. *See* Hetland, *supra* note 3, §§ 2.10-2.11, at 14-17; CAL. CIV. CODE § 2927 (West Supp. 1974).

that the exercise of the due on encumbrance clause can be legitimized only if the borrower's subsequent encumbrance in fact endangers the lender's security.[35] The court did not attempt to precisely define the specific conduct or circumstances which would constitute a threat to the lender's security (except to mention the instances of the mortgagee in possession of a second lien which is in effect a sale and of a loan which leaves little or no equity in the property), but it clearly disaffirmed the use of the due on encumbrance clause as a revenue raising device.[36]

Thus, *LaSala's* failure to delineate the specific circumstances justifying acceleration has left the law in an uncertain state. A rendition of those circumstances is clearly needed.

III. CONSIDERATIONS FOR RETAINING ACCELERATION PROVISIONS

Any attempt to establish a formula or criteria for a valid exercise of the due on encumbrance or the due on sale clause must proceed with the recognition that these devices are valuable and legitimate tools of lending institutions. Proposals to circumscribe or structure their use must treat fairly not only the interests of the general public, but also those of a vital industry. The problem presented by the use of due on sale and due on encumbrance clauses, unlike other related devices such as "escalator clauses,"[37] arises principally because of the inherent duality of their character. They can function on the one hand as legitimate security devices for the lender and on the other as hidden revenue raising devices.[38] To prohibit their use in all circum-

35. 5 Cal. 3d at 881-82, 489 P.2d at 1124-25, 97 Cal. Rptr. at 860-61.

36. *Id.* The court stated that leaving lenders absolute discretion to exercise the acceleration clause creates a serious potential for abuse, especially its use as a threat to compel a waiver fee.

37. Escalator clauses are provisions in security devices which provide solely for an upward adjustment of the interest rate paid on a loan to keep pace with inflation. There is no equivalent provision that would decrease the interest rate in time of deflation. The use of escalator clauses was generally discontinued in the mid-1960's as a result of intense borrower pressure in the form of picketing and national press coverage. NEWSWEEK, Oct. 17, 1966, at 80.

38. 5 Cal. 3d at 882, 489 P.2d at 1124-25, 97 Cal. Rptr. at 860-61. Concern that the due on sale and due on encumbrance clauses were not merely protective devices, but in addition were *hidden* revenue raising devices in that they were most often buried in various portions of the security agreement rather than set out openly along with such traditional cost factors as interest rates, monthly payment rates, prepayment penalties, and late payment charges resulted in the enactment of important legislation.

> No clause in any deed of trust or trust or mortgage on property containing four or fewer residential units or on which four or fewer residential units are to be

stances would clearly be detrimental to the interests of both borrower and lender. The lender would forfeit a device which affords added protection through the safeguarding of collateral which is security for the borrower's debt. The borrower would suffer because the lender would be encouraged to explore alternatives which could significantly reduce consumer access to the housing market.

First, because the lender would be denied the use of the due on sale and/or encumbrance clauses, even in those circumstances where their exercise would be legitimate (as, for example, in the face of a

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> constructed or in any obligation secured by any deed of trust or mortgage on property containing four or fewer residential units or on which four or fewer residential units are to be constructed that provides for the acceleration of the due date of the obligation upon the sale, conveyance, alienation, lease, succession, assignment or other transfer of the property subject to the deed of trust or mortgage shall be valid unless the clause is set forth, in its entirety in both the body of the deed of trust or mortgage and the promissory note or other document evidencing the secured obligation. This section shall apply to all such deeds of trust, mortgages, and obligations secured thereby executed on or after July 1, 1972.

CAL. CIV. CODE § 2924.5 (West Supp. 1974).

The circumscribed scope of section 2924.5, in that it applies only to "property containing four or fewer residential units," is further evidence of the legislature's awareness of consumer rights. *See, e.g.*, the Unruh Act, CAL. CIV. CODE §§ 1801 *et seq.* (West 1970) and the Automobile Sales Finance Act, CAL. CIV. CODE §§ 2981 *et seq.* (West Supp. 1974). It is clear that section 2924.5 was enacted with the unsophisticated investor in mind and with the knowledge that the large scale real estate investor or developer is generally well able to fend for himself. An example of the abuse of the due on encumbrance clause by the lender is evident in the manner in which it was included in the standard security instrument employed by Glendale Federal Savings. Glendale Federal's acceleration clause read as follows:

> Should the trustor, or any successor in interest to trustor in such property, drill or extract or enter into a lease for the drilling for or extraction of oil, gas or other hydrocarbon substances or any mineral of any kind or character, or sell, convey, encumber or alienate said property, or any part thereof, or any interest therein, or be divested of his title, or any interest therein, in any manner or way, whether voluntarily or involuntarily, beneficiary shall have the right at its option to declare any indebtedness or obligation secured hereby, irrespective of the maturity date specified in any note evidencing the same, immediately due and payable. . . .

Valensi, *The Due on Sale Clause—A Dissenting Opinion*, 45 L.A.B. BULL. 121-22 (1970). Although it seems straightforward and clear, this clause was in one-point type, appeared not on the face of the trust deed, but rather on the reverse side along with 25 alternative provisions under the heading "Do Not Record" and at the conclusion of a clause which in its inception appears to deal with oil and gas leases. *See* Valensi, *The Due on Sale Clause—A Dissenting Opinion*, 45 L.A.B. BULL. 121 (1970). In addition, it has been estimated that perhaps one borrower in a hundred discusses with the lender the prepayment provision of notes signed in connection with the purchase of real property. Comment, *Secured Real Estate Loan Prepayment and the Prepayment Penalty*, 51 CALIF. L. REV. 923, 924 (1963). In light of this, and considering the general public's even greater lack of sophistication with regard to the due on sale and due on encumbrance clauses as opposed to prepayment penalties, it can safely be estimated that less than one out of a hundred borrowers understand the consequences or have knowledge of a clause providing for acceleration of debt upon sale or further encumbrance of the property which is security for a debt.

real threat to the lender's security), the risks inherent in all loans, even the most secure, would consequently be increased. Therefore, a higher cost to the borrower for the privilege of being extended credit would be justified. This would result in fewer people being able to "afford" the financing to purchase a home.

Second, the lender might tighten the criteria that the borrower would be required to initially satisfy in order to qualify for an extension of credit. This in turn would level off or decrease the volume of business done in the construction industry, which is extremely sensitive to changes in general lending policy as well as fluctuations in the availability of capital in the money market.[39] Of perhaps more lasting significance and greater importance, is that it would place the ability to purchase a home in fee out of the reach of an even greater percentage of the population. This result is obviously inconsistent with the well established governmental policy of promoting individual home ownership.[40]

Thus standards are needed which would permit the lender to validly accelerate the debt when the situation dictates—*i.e.*, when his security is endangered—but which would prohibit acceleration in the absence of a bona fide security threat.

IV. A Proposed Standard for Valid Acceleration Upon Further Encumbrance

In attempting to establish a workable formula under which an exercise of the due on encumbrance clause would be permissible, the simplest and most obvious alternative would be the implementation of a minimum equity to debt ratio. Under this plan, the ratio be-

39. Although the use of due on sale and encumbrance clauses is generally confined to long term real estate financing, forfeiture of their use would have an impact on the construction industry in that the consequential increased selectivity (reflected in higher costs) in granting long term financing by the lender would in theory prohibit the granting of a significant portion of short term construction loans as well, for institutions such as commercial banks predicate such loans on the builders' ability to finance the completed building and thereby satisfy the cost of the initial construction loan.

40. *See, e.g.*, INT. REV. CODE OF 1954, § 1034 which provides for nonrecognition of capital gain realized on the sale of a personal residence if that gain is used to purchase a new home. Gain will be realized only to the extent that the adjusted sales price of the old residence exceeds the cost to the taxpayer of the new residence. *See also* Servicemen's Readjustment Act of 1944 (G.I. Bill), 38 U.S.C. §§ 1803, 1810, 1812, 1813-14 (1970); 12 U.S.C. § 1464 (1970) ("(a) In order to provide . . . for the financing of homes, the Board is authorized . . . to provide for . . . 'Federal Savings and Loan Associations). . . .'"

tween the borrower's equity in the property and the amount of debt owed to the lender at the inception of the loan would be the absolute minimum standard to which the borrower must adhere in the acquisition of any subsequent financing. For example, suppose the property at issue has an appraised value of $120,000 at the time of the initial financing and the borrower puts $20,000 down while acquiring a loan for the remaining $100,000. At this point, the ratio of equity to debt acceptable to the lender would be 1:5. If after any subsequent financing the ratio between the overall debt and equity remains equal to or better than the original ratio acceptable to the lender, there could be no justification for acceleration of the debt, for the proportion of the borrower's interest in the property in comparison to the lender's risk (represented in terms of the outstanding debt) would necessarily be equal to or better than the ratio acceptable to the lender at the inception of the loan. Therefore, the lender should remain at least as secure as he was originally.

By way of illustration, using the previous figures, suppose the borrower satisfies $60,000 of the outstanding loan thereby acquiring an equity of $80,000 and establishing an adjusted debt of $40,000. At this point the ratio of equity to debt is 2:1—a significant improvement over the ratio of 1:5 acceptable to the lender at the outset. If, at this point, the borrower acquires secondary financing in the amount of $10,000, thereby reducing his equity from $80,000 to $70,000 and increasing his debt from $40,000 to $50,000, he would establish an adjusted equity to debt ratio of 7:5—a ratio which, even after secondary financing, would still be more favorable to the lender than the 1:5 that was initially acceptable. In this situation, there would be no greater threat to the lender's security even after the secondary financing than there was originally. The risk that the borrower would allow the property to depreciate or default on the debt would be no greater than at the loan's inception. In view of the borrower's record of payment since that time, the lender would be even more secure after the secondary financing than he was initially. Clearly, no acceleration of debt would be justified.

As long as the value of the property remains constant the use of an equity to debt ratio as a standard for permissible acceleration in the due on encumbrance situation poses no significant difficulties. However, a major disadvantage arises when the added element of the property value appreciation is considered. By anchoring any subsequent encumbrance to the initial equity to debt ratio the borrower is deprived of the benefit of any increase in the value of his property.

In effect, the borrower is penalized for making a good investment. Assuming the facts of the previous example, suppose the property in question appreciates from its original value of $120,000 to $250,000, and after establishing an equity of $80,000 with an adjusted debt of $40,000 on the initial financing, the borrower attempts to make full use of his property and acquires secondary financing in the amount of $70,000. He would thereby create a combined equity to debt ratio of 1:11 which would justify acceleration of debt by the lender. Although it is true that through the use of a "further encumbrance" the borrower has reduced his hard cash investment in the property to $10,000, he still has a "paper" investment, or equity, of $130,000. Although this "paper" profit would presumably not be as valuable to the borrower as an equal amount of hard, out-of-pocket cash, it should still insure enough borrower interest in the property to protect it from any appreciable threat of neglect. Therefore, contrary to the result under the equity to debt ratio, there would be no justification for any acceleration of debt by the lender.

This result under the equity to debt plan is particularly unsatisfactory in view of the enhanced value that property necessarily assumes over and above its outright sale and use value, *i.e.*, as collateral with its consequent ability to provide an essential and readily available source of cash.

Because of the inherent deficiency of any equity to debt ratio with regard to any subsequent appreciation of property which is security for a debt, a more advantageous alternative would appear to be offered by the adoption of a loan to value formula. In applying this formula, the loan to value ratio originally acceptable to the lender is evaluated against the total due on the balance of the original loan plus the amount of the subsequent loan in relation to the appraised value of the property at the time of the subsequent loan. For example, assume the borrower acquires initial financing of $100,000 on property worth $120,000. At that point, the loan to value ratio acceptable to the lender is 5:6. The borrower then liquidates $60,000 of the outstanding debt thereby establishing an adjusted debt of $40,000 and creating a loan to value ratio of 1:3. If at this point the borrower acquires secondary financing in the amount of $20,000, he would create a total loan to value ratio of 1:2, which is still more favorable than the 5:6 acceptable to the lender at the inception of the original loan. In this situation, under a loan to value ratio (contrary to the result under the present practice) no acceleration of debt would be justified, for the borrower would have at least an equal if not greater interest in the property than at the inception of the loan.

In considering the effect of appreciation of the property upon the loan to value ratio, it is clear that, unlike the equity to debt plan, the loan to value ratio permits the borrower to make full use of any subsequent appreciation of the property in question. Yet, an additional factor is introduced which prohibits the acceptable functioning of a strict loan to value ratio as a valid standard for permissible acceleration. Again, assume the basic facts of the previous situation: property the value of which at the outset is $120,000, an initial loan of $100,000 (creating a loan to value ratio of 5:6) and a subsequent debt adjustment to $40,000 (establishing a 1:3 loan to value ratio). At this point, consider the effect of a 108 percent appreciation of the property to $250,000. The borrower then acquires secondary financing of $110,000 thereby establishing a combined loan debt of $150,000 resulting in a 3:5 loan to value ratio which is more favorable than the 5:6 loan to value ratio acceptable to the lender initially and, therefore, would not justify any acceleration of the debt by the lender.

Although the borrower in this case has succeeded in taking advantage of the appreciation of his property while still adhering to the minimum 5:6 base ratio required (which could not be done under the equity to debt plan), he has simultaneously decreased his investment in the property of "hard-out-of-pocket" cash from a high of $80,000 to absolutely zero. He has, in fact, been able, through the use of a junior encumbrance, to reacquire not only his initial $80,000 capital investment but also an extra $30,000 while simultaneously maintaining his position in the property. Although the ratio of loan to value falls within the permissible limits, the lender is infinitely less secure, for the borrower has absolutely no unrecouped monetary interest remaining in the property and, therefore, the lender faces a legitimate threat to the security in the form of waste, depreciation, or default on the debt—exactly the circumstances which the court in *LaSala* held warranted acceleration.

Therefore, while it is clear that the equity to debt ratio is inadequate because of its inability to allow the borrower to utilize any subsequent appreciation in the property, the strict loan to value ratio is equally deficient. Although it allows the borrower the benefit of property appreciation, it fails to require a continuing minimum capital investment by the borrower as an adequate safeguard to the lender.

In view of the inherent disadvantages involved in an implementation of either the debt to equity ratio or the loan to value ratio, a more satisfactory approach would be to employ a modified loan to value plan which would use as its base minimum standard the ratio of original loan to value, but would not allow the borrower to resist acceleration in the event he fell below his original equity. The implementation of such a modified loan to value plan should provide a formula which treats the interest of both the borrower and the lender equitably in that it allows the borrower the benefit of a percentage of the appreciation of his property while at the same time protecting the lender's security by requiring a continuing minimum investment on the part of the borrower to insure a continuing interest in the well being of the property.

V. THE RECENT LEGISLATION PERTAINING TO THE DUE ON ENCUMBRANCE CLAUSE

The passage by the California Legislature of Civil Code section 2949,[41] at first glance, appears to be a clear victory for the individual borrower because it absolutely prohibits the use of the due on encumbrance clause with regard to the single family owner occupied dwelling, but the long range impact of this restriction could severely tarnish the "victory."

Limiting the scope of the prohibition to single family owner occupied dwellings augurs several disquieting inferences and consequences.[42] First, the closely circumscribed scope of section 2949 suggests the negative inference that the legislature is ratifying and supporting the use of the due on encumbrance clause in all other situations. Although this inference is tempered by the accompanying legislative note which states that "[t]his act shall not be deemed to limit or restrict the scope of *LaSala v. American Savings & Loan Association*,"[43] it is unlikely that the court will entirely disregard the fact that the legislature chose not to restrict the use of the due on encumbrance clause in any situation other than the single family residence.

Second, by more narrowly defining permissible lending practices with regard to single family dwellings, the legislature is contributing to a tighter home financing policy because the alternative objects of property finance, such as office buildings and apartment houses, pro-

41. *See* note 6 *supra*.
42. See text accompanying and following notes 37-40 *supra*.
43. Ch. 698, § 3, [1972] Cal. Stat. 1278 (enactment of CIV. CODE § 2949).

vide greater financial benefits. During a period when little money is available for real estate investment, financing owner occupied single family dwellings will be curtailed first, longest, and hardest because of the additional disadvantages under the statute. Further, although the legislature created this distinction in order to protect the borrower, it made no attempt to anticipate the consequences; there is no provision to regulate the various alternatives which the lender may follow as a result of being denied the use of the due on encumbrance clause in single family dwellings.

The most obvious result is that long term financing for property within the scope of section 2949 may become more difficult to acquire. The lenders may conclude that, given the increased risk due to the prohibition against acceleration of debt upon further encumbrance and the present inherent difficulties accompanying long term financing in an inflationary economy, it would be to their advantage to resort exclusively to a series of short term loans with up to 5-year maturity dates. A series of short term loans would pose less threat to the lender by virtue of the shorter extension of credit involved, but would be detrimental to the borrower because of the uncertainty of the availability of future funds at a cost which would enable him to borrow when he must.

Another of the lender's reactions might be to adopt a variable interest rate clause which, while advantageous to the lender in many respects, would afford little concurrent benefit for the borrower in that it would permit the interest rate on the loan balance to fluctuate in relation to cyclical economic changes as reflected by an external index.[44] The only concurrent benefit to the borrower is that the lender, knowing that the interest rate payable on the loan would be adjusted to keep pace with inflation, would probably accede to a lower initial rate of interest.

Therefore, although it is clear that some regulation of the due on encumbrance clause was necessary, the solution offered by the legislature could result in a cure that kills the patient as well as the disease.

VI. A RE-EXAMINATION OF THE LEGITIMATE SCOPE OF THE DUE ON SALE CLAUSE

In considering the implications inherent in the exercise of the due on sale clause, it is vital to continue to distinguish, as in the due on

44. *See* Note, *The Variable Interest Rate Clause and Its Use in California Real Estate Transactions,* 19 U.C.L.A.L. REV. 468 (1972); CAL. CIV. CODE § 1916.5 (West Supp. 1974).

encumbrance situation, its quality as a revenue raising device from its legitimate exercise by the lender in a situation which portends a threat to the security. In spite of the potential for abuse, an outright prohibition of the exercise of the due on sale clause would be a serious error that would result in the same unfortunate consequences as those resulting from a prohibition of the lender's exercise of the due on encumbrance clause.[45]

Rather than prohibiting the use of the due on sale provision, an attempt should be made to more clearly define the situations in which its use should be sanctioned. *Coast Bank,* in adopting the "Minority Doctrine of Restraints Upon Alienation,"[46] held that the due on sale provision is a reasonable restraint upon alienation and therefore permissible.[47] A restraint on alienation is reasonable when under the circumstances the importance of advancing the purpose of its imposition outweighs its effect in hindering the alienability of the particular property involved.[48] In *Coast Bank,* Justice Traynor stated that the justification for the imposition of the due on sale clause was the lender's reasonable precondition to a continued extension of credit that the borrower retain his interest in the property.[49]

In determining the circumstances under which the lender should be allowed to protect himself by accelerating the borrower's debt, it should be clear that, contrary to the position taken by various writers,[50]

45. See text accompanying and following notes 37-40 *supra.*

46. See note 9 *supra.*

47. 61 Cal. 2d at 317, 392 P.2d at 268, 38 Cal. Rptr. at 508.

48. See note 9 *supra.*

49. 61 Cal. 2d at 317, 392 P.2d at 268, 38 Cal. Rptr. at 508.

50. *See* Kolber, *The "Due-on-Sale" Clause in California,* 44 L.A.B. BULL. 64 (1968). Mr. Kolber has advocated a model acceleration clause which would read substantially as follows:

> Should Trustor or any successor in interest to Trustor in such property sell, convey, transfer, encumber, or alienate said property, or any part thereof, or any interest therein, or drill or extract or enter into a lease for the drilling or extraction of oil, gas or other hydrocarbon substances or any mineral of any kind or character therefrom, or from any part thereof, or be divested of his title or any interest therein in any manner or way, whether voluntary or involuntary, Beneficiary shall have the right, at its option, to declare any indebtedness or obligations secured hereby, irrespective of the maturity date specified in any note or written agreement evidencing the same, immediately due and payable, and no waiver of this right shall be effective unless in writing and signed by Beneficiary. Waiver of the right granted to Beneficiary by this paragraph as to one transaction or occurrence shall not be deemed to be a waiver of the right as to any subsequent transaction or occurrence.

Id. at 64 n.1. It is clear that permissible acceleration as provided for by the proposed model due on sale clause in such instances as the granting of oil, gas, or mineral leases should not be permitted, for such acceleration would be inconsistent with the traditional preservation of the rights concomitant with absolute ownership of property not all transfers or sales should trigger permissible acceleration. The only transfers justifying acceleration should be those which fall within the scope of *Coast Bank,* that is, those which pose a threat to the lender's security by reason of the borrower no longer retaining an "interest in the property." Therefore, in contrast to various due on sale clauses now in use,[51] a transfer in form, but not in substance, should not justify debt acceleration.

For example, is there a greater threat to the lender, justifying a permissible restraint upon alienation, in a transfer from the original borrower to a wholly owned corporation? None is evident, yet such a transfer would clearly result in permissible acceleration under the due on sale or encumbrance clauses used by such lenders as Glendale Federal Savings,[52] and could arguably have a similar consequence under the acceleration clause contained in the *Coast Bank* case.[53] Similarly, a transfer in trust would not necessarily portend a greater threat to the lender, yet such a transfer could trigger debt acceleration. A broad due on sale clause such as has been suggested,[54] would also trigger unwarranted acceleration in numerous other situations, such as a transfer to the heirs upon the death of the borrower.[55]

These results are consistent with neither the general historical policy of the law prohibiting restraints upon alienation, nor with the minority doctrine of restraints upon alienation.[56] In these situations either the particular purpose behind the restraint (*i.e.,* that the lender be assured of continued borrower interest in the property) is not jeopardized, or the lender has accepted the risk (for example, of the borrower's death) so that he would not be justified in accelerating the debt.

Therefore, although at present such a "harmless transfer" could arguably justify acceleration of debt, such consequences should not be permitted. A correct application of the minority doctrine of restraints upon alienation as established in regard to the due on sale clause by *Coast Bank* would dictate that the restraint in question only be permitted

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as well as with the reasoning of Justice Traynor in *Coast Bank. See generally* Valensi, *The Due on Sale Clause—A Dissenting Opinion,* 45 L.A.B. BULL. 121 (1970).

51. See notes 4 and 38 *supra.*

52. See note 38 *supra.*

53. See note 4 *supra.*

54. See note 50 *supra.*

55. To allow acceleration of debt upon transfer to an heir would be tantamount to restraining a borrower from willing away his property at death—clearly an unreasonable restraint. Because death is inevitable for any human borrower it should be considered a risk of the lender's doing business.

56. See note 9 *supra.*

in those circumstances when there is in fact a justifiable threat to the lender's interest, *i.e.*, when the borrower fails to maintain a continuing interest in the property. Where no threat of this contingency exists, the due on sale clause should not be enforceable.

Nor should conclusive weight be attached to the argument that since the lender loaned money to a particular borrower in reliance on his credit, it would be unfair to compel the lender to continue to extend credit to another individual who might not be as good a risk. The lender extended credit to the initial borrower not because of the quality of his personality or because he was pure of heart, but rather because of demonstrated economic facts. The lender considered the net worth, income, liabilities, and age, as well as other relevant factors concerning the potential borrower before granting an extension of credit. Because the due on sale clause is a restraint upon alienation, which has traditionally been viewed by the law with suspicion, it should be interpreted and given effect only in the narrowest possible terms and circumstances. The lender's legitimate interest justifying this restraint upon alienation is not that one particular borrower maintain an interest in the property but only that the borrower who is maintaining an interest in the property and who is liable on the outstanding debt be as acceptable a credit risk as the initial borrower. Ideally, if the assuming borrower were an acceptable credit risk, there would be no necessity for an implementation of the due on sale clause, nor should there be any requirement of a waiver fee which is at present almost invariably demanded.[57]

Under the present system the determination of whether a potential borrower is a greater or lesser credit risk (justifying either acceleration of debt or a waiver fee) is subject to the lender's unfettered discretion. Instead, because this system invariably leads to abuse, a definite formula should be adopted—a so-called "suitability standard"—under which all relevant factors in the granting of a loan would be considered, such as age, net worth, net income, liabilities, marital status, children, etc. This would incorporate all the factors presently considered, but in a formalized system. If under this system the assuming borrower is a greater credit risk than the initial borrower, the lender

57. Generally, the waiver of acceleration of debt by the lender (apart from satisfaction with the buyers credit standing) involves the express assumption of the loan by the buyer, the payment of a waiver fee, an increase in the interest rate to current levels, a reduction of principal, and the giving of some type of additional security for the loan. *See* Kolber, *The Due on Sale Clause in California*, 44 L.A.B. BULL. 64 (1968).

would be justified in accelerating the debt. If not, since there would be no greater appreciable threat, there should be no implementation of the due on sale clause and no waiver fee.

Although such suitability standards are at present foreign to the lending industry, there is precedent for their use in other types of commercial activity. An example of the use of such suitability standards is contained in the requirements of the California Corporations Code in regard to the minimum standards of a suitable investor in both real estate syndication[58] and oil and gas syndication.[59] Other examples may be located in the Securities Exchange Act of 1934 which requires suitable recommendations by registered securities brokers and dealers who are not members of a national securities association,[60] and in the *Rules of Fair Practice* of the National Association of Securities Dealers which requires virtually the same duty of its members.[61]

The adoption of such suitability standards with regard to the exercise of the due on sale clause would lead to far more equitable treatment of the borrower as well as continued protection of the lender.

CONCLUSION

Although the California Supreme Court in *LaSala* wisely determined

58. *See* RULES CAL. CORP. COMM'R § 260.140.114 (Ballantine & Sterling 1968):

> The proposed investors in a real estate syndication should have a financial responsibility measured by annual income and liquid net worth which is suitable to the proposed investment. Where the mortgage or purchase contract calls for increased payments in later years, the balloon payments should not be beyond the apparent resources of the proposed investors.

59. See RULES CAL. CORP. COMM'R § 260.140.122 (Ballantine & Sterling 1968):

> The proposed investors in an oil and gas syndicate should have a financial responsibility measured by annual income and net worth which is suitable to the proposed investment. The investor should be in a tax bracket which will permit him to realize a reasonable income tax benefit from the proposed investment whether the program is successful or unsuccessful. In the case of qualification by coordination, the application should be accompanied by an undertaking by the issuer and underwriter to limit sales in California to an identified class meeting these standards, together with a statement of the method to be employed in meeting this requirement.

60. See 17 C.F.R. § 15b10-3 *adopted by* Securities Exchange Act Release No. 8135 (Oct. 2, 1967). Briefly, Rule 15(b)10-3 requires the broker to determine whether or not a particular transaction recommended to a customer is suitable for him. Under the rule, when recommending a transaction to a customer, the broker or dealer and his associated persons are expected to make reasonable inquiry concerning the customer's investment objectives and his financial situation and needs. Information concerning his financial situation and needs would ordinarily include information concerning the customer's marital status, the member and age of his dependents, his earnings, the amount of his savings and life insurance, his security holdings, and other assets. *See also* H. MARSH & R. VOLK, PRACTICE UNDER THE CALIFORNIA CORPORATE SECURITIES LAW OF 1968 305-06 (1969).

61. *See* NATIONAL ASSOCIATION OF SECURITIES DEALERS, RULES OF FAIR PRACTICE art. III, § 2, in CCH NASD MANUAL ¶ 2152 (1967).

that the enforceability of the due on encumbrance clause should depend on a demonstration that the lender's security is endangered, the court in dictum indicated that it was unwilling to require a comparable showing to justify enforcement of the due on sale clause.[62] In fact, the court flatly stated that, "[W]e have concluded that the lender may insist on the *automatic* performance of the due-on-sale clause because such a provision is necessary to the lender's security."[63] As has been previously argued, to assume that such a provision is always *necessary* to the lender's security is demonstrably false. The lender's security is endangered *if and only if* the new buyer's credit standing is inferior. Indeed, it is entirely conceivable that a sale could enhance the lender's security.

There is greater force to the suggestion in *LaSala* that due on sale clauses do not restrict alienation because "the borrower . . . generally receives cash sufficient to pay off his obligation."[64] Even if this condition were "generally" true, it hardly seems to justify "automatic" triggering of the due on sale clause in *all* situations; moreover, the "fact" that sellers "generally" receive cash sufficient to pay off the obligations says nothing about how long it takes them to attract buyers to accept higher prices. *LaSala* suggests that a buyer should not "obtain an advantage because of the fortuitous fact that his seller originally purchased during a period of low interest."[65] In doing so, *LaSala* misses the point. The point is that the seller should be permitted the advantage of conveying the property to a buyer of acceptable credit standing and to deny the seller that advantage is to restrain alienation.

On balance, *La Sala* has left the law in an unsatisfactory condition. It has recognized that the lender's security should be the touchstone in due on encumbrance enforceability decisions, but it has failed to delineate the situations in which the lender's security is threatened. But by recognizing the importance of security in the due on encumbrance situation, it has taken an important step. Regrettably the court has strongly intimated[66] that it is unprepared to take the next logical

62. 5 Cal. 3d at 883, 489 P.2d at 1126, 97 Cal. Rptr. at 862. *See also* Tucker v. Lassen Sav. & Loan Ass'n, 34 Cal. App. 3d 579, 584-85, 110 Cal. Rptr. 73, 76-77 (1973).

63. 5 Cal. 3d at 883, 489 P.2d at 1126, 97 Cal. Rptr. at 862.

64. *Id.* at 880 n.17, 489 P.2d at 1123 n.17, 97 Cal. Rptr. at 859 n.17.

65. *Id.*

66. Indeed, in Tucker v. Lassen Sav. & Loan Ass'n, 34 Cal. App. 3d 579, 110 Cal. Rptr. 73 (1973), the court of appeal held that the *La Sala* dicta has the "force of declaring existing law." *Id.* at 584, 110 Cal. Rptr. at 77. In view of the tenuous character of the assumption that the implementation of the due on sale clause is always neces-

step—to recognize that security should be the exclusive criterion regulating the implementation of the due on sale clause.

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sary to protect the lender's security, it is difficult to accept the contention that the *LaSala* dicta has the force of law. Query, what should be the "force" of the *LaSala* dicta in view of the *Tucker* trial court's finding that the security of the lender "was not impaired . . . ." *Id.* at 581, 110 Cal. Rptr. at 75. *Tucker's* rigid adherence to the *LaSala* dicta yields a finding that security is endangered only by virtue of a studious disregard of the trial court's own finding. Thus the plaintiffs in *Tucker*, having already demonstrated that the security was not endangered in their case, are told that the due on sale clause can be executed anyway because the California Supreme Court had observed, in a case not presenting the problem, that the enforcement of the due on sale clause is necessary to preserve security. There is precedent for such reasoning. J. HELLER, CATCH-22 47 (1961).