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THE CASE FOR RELIEF FROM DUE-ON-SALE PROVISIONS: A NOTE TO HELLBAUM v. LYTTON SAVINGS AND LOAN ASSOCIATION

Hellbaum v. Lytton Savings & Loan Association[1] was decided by the court of appeal, district one, division four, on June 30, 1969; a petition for hearing to the California Supreme Court was denied on August 27, 1970. The case presented significant questions of first impression which remain obscure even after decision. Moreover, the confusion has persisted in the most recent decision on the matter.[2] The scope of this Note will include a critical analysis of the *Hellbaum* decision, a discussion of the respective theories pleaded, and finally, a suggestion on how relief might be obtained in future litigation.

I. Background

Plaintiffs brought an action in the Superior Court for Alameda County. The allegations of the complaint,[3] which must be assumed to be true upon demurrer,[4] are as follow: On or about March 23, 1964, Leland V. Thompson and Shirley M. Thompson, his wife, executed a promissory note in favor of defendant Lytton Saving & Loan Association in the amount of $274,000. Simultaneously the Thompsons executed a deed of trust naming Lytton as beneficiary to secure the note; the deed of trust was recorded against real property owned by the Thompsons in Alameda County.

The promissory note contained a standard printed prepayment fee clause.[5] In the event the obligors prepaid more than 20 percent of the original principal in any one year, the lender could demand payment of an additional sum equal to 180 days interest on the amount actually prepaid. This clause further made the fee expressly applicable to any provision for acceleration. The deed of trust executed to secure the promissory note provided that the entire balance of the obligation could be accelerated by the beneficiary [Lytton] upon any transfer of the property.[6]

1. 274 Cal. App. 2d 456, 79 Cal. Rptr. 9 (1969).

2. *See* text accompanying notes 29-30 *infra.*

3. 274 Cal. App. 2d at 458-59, 79 Cal. Rptr. at 10-11.

4. *See* Dino, Inc. v. Boreta Enterprises, 226 Cal. App. 2d 336, 339, 38 Cal. Rptr. 167, 168 (1964).

5. In Comment, *Secured Real Estate Loan Prepayment and the Prepayment Penalty*, 51 CALIF. L. REV. 923 (1963), the student author, advocating judicial protection from excessive prepayment penalties, notes that every theory for relief advanced by proponents has been rejected.

6. In Comment, *Debtor-Selection Provisions Found in Trust Deeds and the Ex-*

The plaintiffs, Henry W. Hellbaum and Barbara Hellbaum Bunten succeeded to the rights and obligations of the Thompsons. They subsequently entered into an agreement to sell the property for $295,000. Plaintiffs requested that Lytton permit their buyers to assume the existing obligation secured by the first deed of trust to Lytton in the amount of $263,748. Plaintiffs alleged that this application was made to Lytton because the parties were financially unable to pay both the prepayment fee as required by the promissory note and also the new loan fees. Defendant Lytton advised plaintiffs that it would permit the buyers to assume the obligation without requiring the prepayment fee only upon the condition that the buyers pay a 5 percent assumption fee; that is, 5 percent of the principal balance of the obligation. Plaintiffs alleged that the buyers were unable and unwilling to pay such an assumption fee and that after lengthy but fruitless negotiations with Lytton, the buyers withdrew their offer to purchase.[7]

Plaintiffs further alleged that at the time of the foregoing events Lytton knew that they had substantially improved their property.[8] Lytton also knew that the Hellbaums' financial condition was weak, and that unless a sale were effected, the borrowers would very likely default in principal and interest payments. Thus, the proposed transaction was, in fact, a "distress" sale.

Subsequent to the cessation of purchase negotiations, plaintiffs de-

tent of Their Enforceability in the Courts, 35 S. CAL. L. REV. 475 (1962), the student author remarks that generally, acceleration provisions provide that upon a default the entire principal balance becomes immediately due and payable at the option of the lender-beneficiary. However, another form of acceleration clause of increasing usage by lenders under deeds of trust in California is a provision providing that if title passes from the original borrower under the trust deed without the consent of the lender, the transfer constitutes a default and the entire principal balance becomes immediately due and payable at the discretion of the lender. A typical due-on-sale provision reads as follows: Should trustor (borrower) sell, convey, transfer or dispose of, said property, or any part thereof, without the written consent of beneficiary (lender) being first had and obtained, then beneficiary shall have the right, at its option, to declare all sums secured hereby forthwith due and payable. *Id.* at 475 n.2, *citing* CALIFORNIA LAND SECURITY AND DEVELOPMENT (Cal. Cont. Educ. Bar ed. 1960).

7. 274 Cal. App. 2d at 457-58, 79 Cal. Rptr. at 10. It is important to note that the purchase transaction involved here operated in the context of a comparatively "tight" mortgage-money market. Consequently, there was no practical opportunity for the buyer to persuade some other savings and loan association to commit to loan $268,000. Thus, the situation we are contemplating presumes that Hellbaums' prospective purchaser could not obtain his own refinancing, and that the economic feasibility of the proposed sale depended upon Lytton's grant of permission to transfer the existing loan.

8. Brief for Petitioner at 2. In Scarbery v. Bill Patch Land & Water Co., 184 Cal. App. 2d 87, 104, 7 Cal. Rptr. 408, 418 (1960), the court gave relief to a defaulting obligor partly on the ground that said obligor had "substantially improved" obligee's real property security.

faulted for nonpayment of principal and interest upon the obligation secured by Lytton's first deed of trust. Lytton initiated foreclosure proceedings and the property was sold at a trustee's sale.[9]

The Hellbaums then brought this action for damages in the amount of $31,000,—the difference between the amount which would have been realized on the proposed sale and the amount owed under the secured promissory note. The amount of damages claimed represented the Hellbaums' equity interest in the real property security.

The trial court sustained Lytton's general demurrer to the complaint without leave to amend.[10] It was decided that since the legal issues raised by the complaint were concededly of first impression in California,[11] they should be resolved by the appellate courts prior to a trial on the merits. The court of appeal held that borrowers had failed to state any cause of action and affirmed the judgment of the trial court.[12] Petition for hearing to the California Supreme Court was denied.

The appeal presented the following issues of first impression: 1. Is the lender's imposition of the due-on-sale provision and accompanying prepayment fee reasonable when he has no objection to a purchaser willing to assume the obligation? 2. Is the requirement of an assumption fee in lieu of exercising the due-on-sale provision and accompanying prepayment fee reasonable when the amount of the fee bears no reasonable relationship to the expenses incurred by the lender?[13] 3. Does the arbitrary imposition of either requirement constitute an unenforceable penalty or forfeiture? 4. Does the arbitrary imposition of either requirement constitute an unreasonable and unlawful restraint on alienation according to California law?[14]

It is important to note, in this regard, that two separate theories for relief were pleaded: first, that either fee charged, whether assumption or prepayment, is a penalty under the circumstances; and second, that the combination of a fee and the acceleration provision constitutes an unreasonable restraint on alienation.

9. 274 Cal. App. 2d at 458, 79 Cal. Rptr. at 10.

10. *Id.*, 79 Cal. Rptr. at 11.

11. Brief for Petitioner at 2.

12. 274 Cal. App. 2d at 459-60, 79 Cal. Rptr. at 11.

13. In the *Hellbaum* case, there is essentially no difference in legal effect between the assumption fee and the prepayment fee. Neither had a reasonable relationship to Lytton's administrative costs of the transfer or to the security risks involved. This is especially true since Lytton made no objection to Hellbaum's transferee. *Id.* at 458, 79 Cal. Rptr. at 10.

14. A fifth issue, alleging negligence on the part of Lytton in processing the prospective buyer's application for loan assumption, was summarily dismissed by the court of appeal. 274 Cal. App. 2d at 560, 79 Cal. Rptr. at 11. This issue will not be resurrected here.

II. The Fee as a Penalty

An unenforceable penalty has been defined as "any provision by which money or property would be forfeited without regard to the actual damage suffered. . . ."[15] California has long maintained the invalidity and unenforceability of penalty provisions.[16] An unbroken line of judicial decisions has held that payment by a defaulting vendee of any sum in excess of the actual damage sustained by the other party as a result of the default constitutes a penalty or forfeiture and will not be countenanced by the law.[17] Because of the "distress" situation, the borrower's position here is essentially indistinguishable from that of a defaulting vendee. To allow the lender to exact a fee under the circumstances of the *Hellbaum* case is to sanction a penalty where the vendee's only "default" is a desire to transfer the security.

The proposed purchaser was apparently satisfactory to Lytton.[18] The lender could not fairly be asked to extend credit to an insolvent borrower. Consequently, if Lytton were permitted to escalate the interest rate of the loan to the current market rate, and if he were com-

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15. Ebbert v. Mercantile Trust Co., 213 Cal. 496, 499, 2 P.2d 776, 777 (1931).

16. CAL. CIV. CODE § 3369 provides, in part: "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case. . . ." Cf. CAL. CIV. CODE § 3300.

The current case trend granting affirmative equitable relief to defaulting parties from contracts resulting in an imposition of penalties has been called the "Vendee's Era," because the vendee under a land contract has been the most frequent recipient of relief. J. Hetland, *The California Land Contract,* 48 CALIF. L. REV. 729, 732-36 (1960).

17. *See e.g.,* Caplan v. Schroeder, 56 Cal. 2d 515, 364 P.2d 321, 15 Cal. Rptr. 145 (1961). In Freedman v. The Rector of St. Mathias Parish, 37 Cal. 2d 16, 20-21, 230 P.2d 629, 631-32 (1951), where Justice Traynor quotes Williston: " 'Few questions in the law have given rise to more discussion and difference of opinion than that concerning the right of one who has materially broken his contract without legal excuse to recover. . . . A satisfactory solution is not easy, for two fundamental legal policies seem here to come in conflict. On the one hand, it seems a violation of the terms of a contract to allow a plaintiff in default to recover. . . . On the other hand, to deny recovery often gives the defendant more than fair compensation for the injury he has sustained and imposes a forfeiture on the plaintiff. The mores of the time and place will often determine which policy will be followed. But the second of these opposing policies has steadily increased in favor in recent years.' (5 Williston on Contracts (rev. ed.) § 1473, p. 4118)."

Continuing, Justice Traynor, to admonish courts adopting a contrary view to recognize their permission of unjustifiable penalties for breach of contract, quotes Professor Ballantine: " 'The law, while looking with righteous abhorrence on forfeitures, and washing its hands of their enforcement, after the manner of Pontious Pilate, yet has been reluctant to intervene with affirmative relief or to formulate any consistent principle condemning the validity of cut-throat provisions which in their essence involve forfeitures. Although the law will not assist in the vivisection of the victim, it will often permit the creditor to keep his pound of flesh if he can carve it for himself.' (Ballantine, Forfeiture For Breach of Contract, 5 Minn. L. Rev. 329, 341)."

18. *See* note 13 *supra.*

pensated for administrative costs of the loan transfer, no damage would be sustained. Under these circumstances, any fee in excess of transfer costs would clearly operate as a "penalty."

Cognizant of this argument, Lytton contended in its demurrer that the prepayment fee provision in question was consideration for the privilege of prepaying the loan.[19] The court of appeal accepted this construction and held that the provision could not be a penalty or forfeiture because prepayment did not constitute a default; it was merely a method of "alternative performance" of the obligation.[20]

It is submitted that the court of appeal's analysis begs the question. It ignores the ostensibly compensable character of the prepayment penalty provision,[21] the peculiar hardship circumstances which have effectuated it, and most important, the reasonableness of the alleged "alternative performance." A sum totally unrelated to any detriment sustained by the lender, charged coincident with the borrower's act of transferring the real property security—which act imports no prejudice to the lender—can hardly be considered reasonable.

It seems clear that the exaction of either a prepayment fee in conjunction with the exercise of the due-on-sale provision, or, an assumption fee in lieu thereof, is unwarranted in the *Hellbaum* situation. Such a requirement imposes a harsh burden,[22] seemingly without justification in law or commercial experience. The court should have exposed these requirements for what they truly are—penalties.

III. The Fee as a Restraint on Alienation

There is, however, a second objection to the decision of the court of appeal. The requirement of a prepayment fee in the *Hellbaum* situation, coincident with the exercise of the due-on-sale provision, apparently violates section 711 of the California Civil Code which provides that restraints on alienation of property are invalid.

Independently, neither requirement is a restraint on alienation *per se* for neither impedes the transfer of property. But upon the bor-

19. Brief for Respondent at 17-22.

20. *See* 274 Cal. App. 2d at 459, 79 Cal. Rptr. at 11, where the court of appeal states that "there was no breach of contract until appellants [Hellbaum] ultimately defaulted [for nonpayment of principal and interest]. The proposed accelerated payment or transfer upon approval by the lender would in either case have represented not a breach but an alternative means of performing the loan contract." *See also* 51 CALIF. L. REV., *supra* note 4, at 931, where the author points out that a "penalty" fee can be construed as either damages fixed by contract in anticipation of breach, or as merely an alternative means of performance, but adds that "[t]he distinction involves drawing a fine line."

21. *See* 51 CALIF. L. REV., *supra* note 4, at 932.

22. The fee demanded by Lytton was 5 percent of the principal balance—approximately $13,000.

rower's transfer and the lender's exercise of the due-on-sale provision, they become effective restraints by substantially increasing the cost of the transfer. This additional burden is born primarily by the borrower and deters him from transferring the property. Thus, the fee acts as a restraint on alienation. When the borrower is already in a distress situation like Hellbaum, the burden is an even greater deterrent. This contention, however, was rejected by the court of appeal; it held that the case of *Coast Bank v. Minderhout*[23] was controlling.

A. The Coast Bank Decision

In *Coast Bank*, the California Supreme Court dealt directly with the question of the validity of the due-on-sale provision in a mortgage. The court held that it was not unreasonable for the plaintiff to condition its continued extension of credit to the defendants on retention of their interest in the security property. Accordingly, the restraint was held valid.[24]

In *Hellbaum*, the court confuses the fundamental difference between the respective "justifiable interests" of the lenders. In *Hellbaum*, the lender was not merely protecting its "justifiable interest" by conditioning extension of credit on retention of an interest in the security property. The lender was willing to have the Hellbaums' transferee assume the debt.[25] Even though he approved of the Hellbaums' buyer, however, he required an unreasonable assumption fee. Thus the lender was effectively penalizing the Hellbaums for transferring the security.

By sustaining the validity of a payment incident to exercise, or forebearance from exercise of the due-on-sale provision, the court of appeal holds that the right of the lender to exact a fee upon transfer of the real property security is no different than acceleration standing alone.[26] Moreover, the court holds that the lender has the same "justifiable interest" in imposing an assumption fee upon transfer of the security as it does in requiring the payment of the principal obligation and

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23. 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964).

24. *Id.* at 317, 392 P.2d at 268, 38 Cal. Rptr. at 508. In *Coast Bank*, Justice Traynor adopted the minority doctrine with respect to the validity of restraints on alienation of property: that restraints on alienation of property are invalid only if unreasonable. *See* Bernard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1177 (1959); Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 398-400, 406 (1935); Sweet, *Restraints on Alienation*, 33 L.Q. REV. 236, 246-53 (1917). The lower court in *Coast Bank* had maintained that all restraints on alienation, reasonable or not, are void. — Cal. App. 2d —, 32 Cal. Rptr. 584, 586 (1963) (opinion of Judge Lillie), *vacated*, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964).

25. *See* notes 13 & 18 & text accompanying note 18 *supra*.

26. Hellbaum v. Lytton Sav. & Loan Ass'n, 274 Cal. App. 2d 456, 459, 79 Cal. Rptr. 9, 11 (1969).

prepayment fee upon transfer to one other than the original borrower. It is submitted that neither the assumption fee, nor its correlative—acceleration under the due-on-sale provision and imposition of the prepayment fee—is tantamount to acceleration standing alone, nor is the "justifiable interest" of the lender the same in both situations. The holding of the court of appeal, that *Coast Bank* governs *Hellbaum,* even ignores the express language of the *Coast Bank* decision:

> It is open to doubt whether such a promise [not to transfer] would be a reasonable restraint when, as in this case, plaintiff [lender] had the additional protection of a security interest and the right to declare the entire debt in the event of default [nonpayment of principal and interest].[27]

It has been noted that section 711 of the California Civil Code invalidates restraints on alienation. *Coast Bank* modified this provision to permit "reasonable" restraints in the lender-borrower situation where the lender has a "justifiable interest." The fees exacted by the lender in *Hellbaum,* however, bore no meaningful relation to the damage sustained by the lender and were in the nature of a penalty. Thus, the fees were "unreasonable" and under the *Coast Bank* holding should have been held invalid.

There is no justification in law or public policy for imposition of a penalty-type restraint upon alienation of the security. The articulated reasoning of the court of appeal points up the basic misconception of its decision: Since the lender incurs costs in making a long-term loan, it therefore has a "justifiable interest" to motivate a long term debtor to forebear from early payment of the principal obligation.[28] But, does this imply that the lender has a "justifiable interest" to motivate a long-term debtor to forebear from an acceptable transfer of the security? Yet this is precisely the result of charging a penalty payment incident to exercise of the due-on-sale provision in the *Hellbaum* situation. Whatever interest a lender may have in protecting himself against transfer of the security to insolvent persons, and whatever interest in repayment of the principal obligation should the security be transferred, the lender has no "justifiable interest" in penalizing the borrower for transferring the real property security to a qualified purchaser.

If the lender sustains damage, he is entitled to compensation. Nothing prevents a complete determination of this question at the time of transfer. Otherwise, to extract a fee without regard to damage is to unreasonably restrain the capacity of the borrower to dispose of the real property security.

The *Hellbaum* decision was followed in *Cherry v. Home Savings*

27. Coast Bank v. Minderhout, 61 Cal. 2d 311, 317, 392 P.2d 265, 268, 38 Cal. Rptr. 505, 508 (1964).

28. Hellbaum v. Lytton Sav. & Loan Ass'n, 274 Cal. App. 2d 456, 459, 79 Cal. Rptr. 9, 11 (1969).

& Loan Association,[29] the most recent case dealing with the question of whether the lender was justified in exacting a payment incident to exercise of its due-on-sale provision. There the court upheld the right of the lender to charge a $471 assumption fee. That decision has led a preeminent saving and loan authority to comment: "*Cherry v. Home Sav. & Loan Ass'n*, and *Hellbaum v. Lytton Sav. & Loan Ass'n* indicate that the courts will not stop a beneficiary from threatening to accelerate under its due-on-sale clause unless the new purchaser agrees to pay points to assume the loan. . . ."[30] Thus, the unfortunate conclusion follows that *Hellbaum* is the law in California.

IV. An Equitable Approach

Although this writer is of the opinion that the Hellbaums should have obtained relief on the theories pleaded, it is submitted that equity clearly possesses the power to grant relief. When Lytton conditioned its grant of permission to sell the security upon the payment of a fee, Hellbaum could have petitioned a court exercising equity powers to enjoin the operation of Lytton's due-on-sale provision. Then Hellbaum would have been legally free to consummate the purchase transaction without payment of the fee.

This result would seem appropriate since the balance of equities was weighted in favor of Hellbaum. At the time of the proposed purchase transaction the principal and interest payments, along with taxes, were current. Hellbaum had made substantial repairs and improvements to the realty, enhancing the value of the lender's security interest.[31] In addition, Hellbaum stood to forfeit his $31,000 equity interest[32] should he default and Lytton choose to foreclose. As was noted above, this condition did occur and was followed by the Hellbaums' forfeiture. Thus, it is submitted, elements of hardship were present which would justify equitable relief.

In *Bisno v. Sax*,[33] where the borrower was under a similar hardship, the lender's trustee's sale was enjoined and the borrower was relieved of his default for nonpayment of principal and interest. Thus, the court clearly demonstrated equity's power to grant relief:

> That a court of equity will relieve the debtor from the enforcement of an acceleration clause when confronted with genuinely equitable grounds therefor seems to be settled law. See annot., 70 A.L.R. 993, 1000. (1930). This is true whether the court considers an acceleration of maturity as a penalty or not.[34]

29. 276 A.C.A. 668, 81 Cal. Rptr. 135 (1969).
30. J. Hetland, California Real Estate Secured Transactions § 4.56 (1970).
31. See note 8 & accompanying text *supra*.
32. Brief for Petitioner at 5-6.
33. 175 Cal. App. 2d 714, 346 P.2d 814 (1959).
34. *Id.* at 726, 346 P.2d at 821-22 (emphasis added). The court continues: "A

In *Trowbridge v. Malex Realty Corp.*,[35] a New York appellate division opinion, defendant owner was relieved from default in the payment of interest on a first mortgage; the second mortgage, which was under foreclosure, provided that 10 days default in paying the interest on the first mortgage would constitute ground for acceleration of the debt secured by the second. The court adopted the view that acceleration is a penalty or a forfeiture.[36] It pointed out that "[a]t the time of the trial, nothing was past due on account of the bond and mortgage in suit, and there were no arrears in interest on the first mortgage and all taxes and assessments had been paid."[37] Further, it said that "[a]s to the power of a court of equity to grant relief from a mere technical default in payment where such default is not willful, there can be no doubt. . . ."[38]

Finally, the court noted:

> "[t]here can be no doubt but that the clause for the payment of such interest was 'for the benefit of the security and its complete preservation.' And where it so clearly appears, as it does in the case at bar, that the plaintiff has been fully indemnified, equity should relieve the defendant from a mere technical default. . . ."[39]

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nisi prius judge pertinently observes in Bard v. Rabinfried Realty Co., 126 Misc. 427, [213 N.Y.S. 44, 45]: '[W]hatever the holding may be on this matter of definition, the courts have shown a tendency to get away from the general rule, and in a number of cases have relieved mortgagors from their defaults on the basis of doing equity.' Likewise, in Caspert v. Anderson Apartments, 196 Misc. 555, 557-58, 94 N.Y.S.2d 521, 525 (1949): 'There is no undeviating rule that equity must enforce the covenants of a mortgage regardless of surrounding circumstances. The whole system of equity jurisprudence presents an excellent example of the triumph of equitable principles over strict and inflexible dogmas of the common law. Pomeroy on Equity Jurisprudence, Section 382, Fifth Edition. The growth of the jurisdiction of equity is founded on cases which have broken away from rigid and irrevocable enforcement of agreements.'" *Id.* at 726-27, 346 P.2d at 822.

35. 198 App. Div. 656, 191 N.Y.S. 97 (1921).

36. *Id.* at 665, 191 N.Y.S. at 103.

37. *Id.* at 666, 191 N.Y.S. at 103-04.

38. *Id.* at 662, 191 N.Y.S. at 101.

39. *Id.* at 666, 191 N.Y.S. at 103. In *Bisno v. Sax*, 175 Cal. App. 2d 714, 727-28, 346 P.2d 814, 822 (1959), the California court expressed a favorable opinion of the Trowbridge case. The court, relying on a Columbia Law Review article, said: "In a note upon 'Equitable Relief From Operation of Acceleration Clauses in Mortgages' (22 Columbia Law Review, 266, 267), the author reviews the *Trowbridge* case, and remarks: 'At first blush, the decision seems somewhat startling: the court refuses to give effect to the express provision of the agreement. Such action, however, is not unusual. Equity frequently refuses to recognize the express contractual provisions for the security of a loan where their enforcement would not be consonant with substantial justice. Thus equity protects the mortgagor's equity of redemption and refuses to allow him to contract away his right to redeem.' After referring to other cases he says, at page 268: 'In all the above cases, the stipulations not enforced concerned security. Their non-enforcement was due to the fact that the creditor was amply safeguarded without the need of subjecting the debtor to a forfeiture . . . Both upon principle and

Judge Ashburn, writing for the majority in *Bisno v. Sax*,[40] quotes Mr. Justice Cardozo in *Graf v. Hope Building Corporation*,[41] and then lucidly expounds the theme that equity's power to relieve a borrower in hardship circumstances is the policy in California:

> California recognizes that: 'Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention.' (*Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 331 [44 P.2d 547].) In the same spirit it is said in *Wuest v. Wuest*, 53 Cal. App.2d 339, 346 [127 P.2d 934]: "Living as we do in a world of change, equitable remedies have necessarily and steadily been expanded to meet increasing complexities of such changing times, and no inflexible rule has been permitted to circumscribe the power of equity to do justice. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirement of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.' (1 Pom. Eq. Jur., 4th ed., p. 125, § 111.)"[42]

V. Conclusion

It is respectfully submitted that the view expressed in *Bisno* is the sound view and worthy of adoption as the law in California with respect to the operation of due-on-sale acceleration provisions. The remedy proposed would impose on a lender in the *Hellbaum* situation the burden to show cause why he should not be enjoined from accelerat-

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authority, therefore, the decision in Trowbridge v. Malex Realty Corp. is correct. The mortgagor should be relieved from what amounts to a forfeiture where he is not wilfully in default and where the mortgagee is not damaged.'" *Id.* at 727-28, 346 P.2d at 822.

40. 175 Cal. App. 2d 714, 346 P.2d 814 (1959).

41. "There is no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal ad misericordiam, however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course. . . . To all this, acceleration clauses in mortgages do not constitute an exception. They are not a class by themselves, removed from interference by force of something peculiar in their internal constitution. In general, it is true, they will be enforced as they are written. . . . However fixed the general rule and the policy of preserving it, there may be extraordinary conditions in which the enforcement of such a clause according to the letter of the covenant will be disloyalty to the basic principles for which equity exists. . . . The restriction, however, is not obdurate, for always the gravity of the fault must be compared with the gravity of the hardship. . . . Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path." *Id.* at 728, 346 P.2d at 822-23 *quoting* Cardozo 254 N.Y. 1, 171 N.E. 884 (1930), (dissenting).

42. Bisno v. Sax, 175 Cal. App. 2d 714, 728-29, 346 P.2d 814, 823 (1959).

ing the principal obligation. The court might consider, in this regard, whether the lender's security would be damaged if the proposed transfer was permitted. At least three factors should be considered: First, whether there are reasonable objections to the proposed purchaser of the security; second, whether the interest rate is in accord with current market rates; and third, whether the real estate security is in need of physical repair. An affirmative reply to the first factor would be sufficient to deny relief to the borrower even in the *Hellbaum* situation. Affirmative replies to the second or third factors warrant just compensation to the lender. The consideration of these factors, however, would afford the court full opportunity to make a fair settlement between the parties to the loan contract in accordance with the circumstances of the individual case. It is hoped the California Supreme Court will give the matter its customary thorough examination at the next opportunity.

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