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Deficiency Judgment Limitations in California—A New Judicial Approach

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THE CALIFORNIA antideficiency statutes¹ have long been among the most inconsistent and unworkable provisions of the codes. In the first quarter of 1963, however, the California Supreme Court made them consistent and workable by its decisions in *Roseleaf Corp. v. Chierighino*² and *Bargioni v. Hill*.³

In these cases the court resolved important deficiency questions. Of perhaps greater significance, it treated the sections as interrelated provisions and attributed a coherent purpose to the legislature in its enactment of them. It thereby established a frame of reference to which unresolved deficiency questions may be related. It is now possible, for example, to predict with some assurance of accuracy that (1) the guarantor or surety of a purchase money obligation is not protected by the purchase money deficiency prohibition of section 580b; (2) the assuming grantee of a non-purchase money obligation will be protected by section 580b if he assumes the obligation as part of his purchase price; (3) an unsecured note for the balance of an otherwise secured purchase price will be collectable notwithstanding section 580b; and (4) the scope of the four deficiency sections is the same despite the verbal differences among them.⁴

Because analysis and prediction in terms of the frame of reference developed by the court in *Roseleaf* and *Bargioni* require repeated reference

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¹ The antideficiency statutes referred to are CAL. CODE CIV. PROC. §§ 580a, 580b, 580d, and 726. Three years ago, Professor Stefan A. Riesenfeld laid the groundwork upon which any examination of the California antideficiency legislation must be founded. Riesenfeld, *California Legislation Curbing Deficiency Judgments*, 48 CALIF. L. REV. 705 (1960). There is no point in repeating what Professor Riesenfeld did so excellently and so accurately. Instead, this inquiry will concentrate on the recent changes and clarifications, and what may be the developments still to come.

² 59 A.C. 45, 378 P.2d 97, 27 Cal. Rptr. 873 (1963).

³ 59 A.C. 133, 378 P.2d 593, 28 Cal. Rptr. 321 (1963).

⁴ Section 580a refers to an "obligation," § 580b to a "purchase price," § 580d to a "note," and § 726 to a "debt."

to the two cases, it seems advisable at the outset to summarize their facts.⁵

The plaintiff in *Bargioni* was a third party, purchase money lender; that is, he was not the seller. His note was secured by a junior trust deed on the purchased property. In holding that the plaintiff could not recover on the note after his security had been exhausted by the senior encumbrancer's foreclosure sale, the court held that a third party lender is barred by the 580b deficiency prohibition.

The defendant in *Roseleaf* bought a hotel from the plaintiff, paying for it in part with four promissory notes. One note was secured by a purchase money trust deed on the hotel. This note remained secured, apparently was not in default, and was not involved in the action. The other three notes were secured by trust deeds on other properties owned by defendant. These three trust deeds, which were junior to prior encumbrances held by strangers to the action, were left unsecured by the extrajudicial sales of the senior beneficiaries. Plaintiff's action was to recover upon the three notes. In holding that he was entitled to do so, the court held that plaintiff's action was neither barred nor limited by sections 580a, 580b, 580d, or 726.

I

SECTION 580b

A. Legislative Purpose

Section 580b prohibits a deficiency judgment against the buyer under a deed of trust, mortgage, or contract, given to secure any part of the purchase price of real property.⁶ That the statute prohibits a deficiency judgment on a purchase money encumbrance is clear; why it does so, what it is the legislature intended to accomplish, and what is a purchase money encumbrance are not so clear.

Most of the law review commentaries and the cases describe the legislative purpose of section 580b in terms of its depression purpose.⁷ Certainly it was intended to prevent the purchaser from losing his purchased

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⁵ In both cases the facts to be described in the text are simplified. For example, omitted is the factual issue in *Bargioni* of whether or not a broker, taking as his commission a note secured by a junior lien on the purchased property, is a third party lender of part of the purchase price. Because the court decided that he is, the essential facts can be stated in terms of this conclusion. Similarly, the ownership of the non-hotel properties in *Roseleaf* is described in terms of the effect rather than the details of the facts.

⁶ The section provides in part: "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 secure payment of the balance of the purchase price of real property."

⁷ See, e.g., commentaries collected in Riesenfeld, *California Legislation Curbing Deficiency Judgments*, 48 CALIF. L. REV. 705 nn.1 & 2 (1960).

property while remaining saddled with the future obligation to pay for it; to prevent the personal judgment against the one least able to absorb it; and to place the loss upon the creditor, who has at least the property or the bid price standing between him and bankruptcy. If the legislative purpose was simply to avoid wiping out the most hopeless of debtors and thereby avoid further aggravation of the troubled economy, it is at least arguable that the purchase money mortgagor was more likely to be within the economically troubled class than would be other mortgagors.

This 1933 statute was not limited to the depression period as were many other debtor relief statutes.⁸ Not having retroactive effect,⁹ it afforded no relief to the debtors who most needed it, those who had purchased at high predepression prices. Seemingly, therefore, it was depression legislation aimed at some depression other than the one existing at the time of its enactment. Perhaps the economic situation of the 1930's explains the legislature's extension of section 580b in 1949¹⁰ and the legislature's refusal to specifically limit the section to vendor money in 1961.¹¹ But before characterizing section 580b as pure depression legislation—which in the final analysis it probably is—one must first find some purpose acceptable to the court for continuing the section into today's economy.

Of the recent law review articles, the most penetrating quest for a legislative purpose concluded, in effect, that purchase money deficiency limitations were designed to discourage vendor financing because it might be irresponsible amateur financing.¹² But this is of little assistance in answering the California problems, because the conclusion was based upon what has turned out to be the wrong premise. Its authors assumed that third party money was not purchase money,¹³ and their search was for the collective legislative motives in limiting purchase money antideficiency protection to vendor financing.

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⁸ Some deficiency provisions, as well as the moratoria legislation, were so limited. A good description of what was done, and how it was clarified, is found in *Stockton Sav. & Loan Bank v. Massanet*, 18 Cal. 2d 200, 114 P.2d 592 (1941).

⁹ Although possibly it was by its terms only prospective, see, e.g., *Ware v. Heller*, 63 Cal. App. 2d 817, 148 P.2d 410 (1944); 21 CALIF. L. REV. 471, 474 (1933), the early cases based nonretroactivity upon constitutional grounds rather than upon construction of the statute as such, see *Riesenfeld*, *supra* note 7, at 707-08; Comment, 3 U.C.L.A.L. REV. 192, 200-01 (1956).

¹⁰ In 1949, the present second paragraph was added to § 580b. Cal. Stat. 1949, ch. 1599, p. 2846.

¹¹ A.B. 831, Cal. Leg., Reg. (Gen.) Sess. (1961), reported out of the judiciary committee without action, 4 CAL. ASSEMBLY J. 6119 (1961).

¹² Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1.

¹³ This was a reasonable assumption at the time. Many states had authoritative holdings to this effect; California had *Peterson v. Wilson*, 88 Cal. App. 2d 617, 199 P.2d 757 (1948). Although California cases had cast doubt upon *Peterson*, none were factually sufficient to show conclusively that the *Peterson* case did not represent the California position. See text accompanying notes 61-72 *infra*.

Since it is now clear that third party money is purchase money for 580b purposes,¹⁴ and it is equally clear that only money secured by an encumbrance upon the property purchased is within the statute's proscription,¹⁵ one must start from the opposite premise to find a judicially recognized purpose behind the California statute. The *Roseleaf* opinion, fortunately, limited the inquiry by reviewing reasons suggested in earlier decisions and concluded that all but two of the alleged purposes were either accomplished by the parallel fair-value deficiency provisions or were not purposes at all.¹⁶ In *Bargioni*, the court summarized the *Roseleaf* conclusion: "The purposes are to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability."¹⁷ The conjunctive between the overvaluation and the depression purposes is of critical importance.

Preventing overvaluation is simply subsidiary to the statute's real purpose. In referring to the overvaluation effect of section 580b, it seems evident that the court was describing the one secured transaction that is caught by 580b in a stable or rising economy even if the statute is given a construction no broader than required by its primary purpose: "in the event of a depression in land values, to prevent the aggravation of the downturn . . . ."¹⁸

Standing alone, the first purpose, preventing overvaluation, would lead to the opposite result under the *Roseleaf* facts; would compel that an unsecured note for part of the purchase price be uncollectable under section 580b; would bar an action against a guarantor of a purchase money instrument; and would compel an inquiry into the total consideration rather than into the secured consideration. Yet the statute does none of this.¹⁹

Starting with the depression cushion as 580b's purpose, the section becomes standby or cycle leveling legislation today just as it might have been when it was first enacted. With the exception of the rare case where a creditor has lent more than the value of the security, section 580b prevents few judgments that sections 580a or 726 (fair value) would not also prohibit in the stable or rising economy.

Assume property with a fair market value of \$100,000 encumbered by

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¹⁴ *Bargioni v. Hill*, 59 A.C. 133, 378 P.2d 593, 28 Cal. Rptr. 321 (1963).

¹⁵ *Roseleaf Corp. v. Chierighino*, 59 A.C. 45, 378 P.2d 97, 21 Cal. Rptr. 873 (1963).

¹⁶ The discarded "purposes" are summarized in text accompanying notes 37-39 *infra*.

¹⁷ 59 A.C. at 135, 378 P.2d at 594, 28 Cal. Rptr. at 322.

¹⁸ *Ibid.*

¹⁹ The separate secured note is discussed in text accompanying notes 77-85 *infra*; the separate unsecured note in text accompanying notes 86-102 *infra*; and the guarantor in text accompanying notes 103-27 *infra*.

an \$80,000 mortgage or deed of trust. If the fair market value of the property remains constant or rises (or even drops to \$80,000) the beneficiary is prevented by the fair market difference limitation of sections 726 or 580a²⁰ from obtaining a deficiency, regardless of how little the sale of the property actually brings. Thus, the fact that sections 726 and 580a limit the judgment while 580b prohibits it is a difference without distinction as long as the value of the security does not drop below the amount remaining outstanding on the debt at the time of the foreclosure. If the fair market value in the example drops below \$80,000 (or the amount of the indebtedness outstanding at the time of sale) the effects of the sections are different—sections 726 and 580a would allow a judgment for the difference between the market value and the lien, while section 580b would prohibit it altogether. Inasmuch as the drop in value would usually result from a general or local break in the economy,²¹ section 580b would have no extensive effect until the break occurs. It is then available to cushion the local or temporary downturn, and prevent its spread through the further aggravation of personal judgments against purchasers, or to cushion, in the same way, a general depression.

The legislative reluctance to repeal this depression legislation in today's economy might be found in legislative fear that, in the event of a recession, the section could not be re-enacted to apply retroactively, thereby again failing to protect prerecession purchasers and again failing to cushion the downturn.²² Leaving this depression legislation outstanding is quite innocuous. It has little independent effect because the fair-value sections compel the same result—the total prohibition of a deficiency judgment—as long as the economy is sufficiently healthy so that the value of the security does not drop below the amount secured. Section 580b can then serve its cycle

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²⁰ Section 580a originally had this effect following extrajudicial foreclosure, and is, therefore, relevant in a discussion of 580b's purpose. The subsequent enactment of § 580d, prohibiting a judgment after extrajudicial sale, left little area of operation to § 580a, particularly in view of the likelihood that 580d's "note" includes all evidences of debt other than the statute's second paragraph. Section 580d does not apply to the nonselling creditor, but since 580a doesn't either there is little of importance remaining in the statute as a result of § 580d.

²¹ It may occur, of course, through destruction of the security, but to conclude that § 580b is intended mainly to shift this insurable risk would be absurd. A secured creditor is likely to insist upon insurance for his benefit even in the absence of § 580b; the fact that he is secured shows that he prefers not to rely upon the buyer's personal solvency.

²² Actually it could be enacted to apply retroactively. There appear to be no constitutional problems, see *Gelfert v. National City Bank*, 313 U.S. 221 (1941), 30 CALIF. L. REV. 71; Comment, 3 U.C.L.A.L. REV. 192, 201 (1956), even though many earlier California cases held that with the exception of parts of §§ 580a and 726, the retroactive application of the deficiency sections would be unconstitutional, e.g., *Hales v. Snowden*, 19 Cal. App. 2d 366, 65 P.2d 847, cert. denied, 302 U.S. 715 (1937); *Wilson v. Superior Court*, 8 Cal. App. 2d 14, 47 P.2d 331 (1935), hearing denied Aug. 22, 1935; *Bennett v. Superior Court*, 5 Cal. App. 2d 13, 42 P.2d 80 (1935), hearing denied April 25, 1935.

leveling function without intruding into real estate transactions in the stable market. This is probably what the court meant in *Roseleaf* and in *Bargioni* when it said that section 580b was intended as a stabilizing influence.

With the exception of "a *Brown v. Jensen* deficiency," a judgment sought by a nonforeclosing purchase money creditor,²³ the only inconsistency in the court's depression-cushion purpose—so minimal as to seem hardly inconsistent—is the other purpose suggested in both *Roseleaf* and *Bargioni*, overvaluation.

In the case of such gross overvaluation of the security that the creditor lends more than its value at the time of its purchase, section 580b is more than standby legislation. The fair-value sections would allow him a judgment for that part of the debt which exceeds the fair value of the security at the time of the sale, while section 580b would prohibit it altogether. Presumably, this is what the court meant when it mentioned the prevention of overvaluation as the other purpose of section 580b. But one must be wary in attaching significance to this purpose other than in the sense of an exception to 580b's standby, antidepression purpose.

Certainly the court was not implying that it will look to the total price and strike down an overvalued sale by applying section 580b to the cash, the exchange, the separate unsecured note, or the separately secured note. If it were, it would have reached the opposite result in *Roseleaf* and would have sent the case back for evidence of value; it would have disapproved *Christopherson v. Allen*,²⁴ which recently allowed recovery on an unsecured note for the balance of an otherwise secured purchase price; and it would have ignored the express verbal limitation of section 580b to the secured transaction. Overvaluation in the sense that the court was using it must have referred instead to the credit depressant. The total price per se is irrelevant except to the extent that lack of credit reduces the price. Only if more is secured by the purchase money encumbrance than the property is worth does it matter if the property is overvalued.

The likelihood of overvaluation in this sense is quite remote. Rarely would the creditor be willing to take security worth less than the amount lent even in the absence of section 580b. If he lends more than the property is worth, his incentive, if he could not obtain other security, would be to remain unsecured for part even without a 580b bar. As a partially unsecured creditor he would not be bound by the 726 "one form of action" requirement, and he could attach the equity in the purchased property or, of greater importance, other property, at the commencement of an action

²³ The error probably lies in *Brown v. Jensen*, 41 Cal.2d 193, 259 P.2d 425 (1953). See text accompanying notes 28-44 *infra*.

²⁴ 190 Cal. App.2d 848, 12 Cal. Rptr. 658 (1961). On the other hand, the court did not expressly endorse *Christopherson v. Allen*. See notes 86-102 *infra* and accompanying text.

to enforce the debt.²⁵ If instead he is undersecured, he remains a secured creditor and loses these advantages. That section 580b also encourages the creditor to remain unsecured rather than undersecured hardly qualifies as a major legislative motive when every incentive is in this direction anyway.²⁶ It thus seems apparent that the court's reference to the pricing purpose of the statute was simply judicial recognition of an incidental effect of the statute that does fit within its major purpose as standby, recession-cushion legislation.

The judicial statement of 580b's purpose and the scope defining applications of the statute in *Bargioni* and *Roseleaf* give a new basis for classifying what is, or is likely to be, prohibited or allowed by section 580b.²⁷

B. Judgments Prohibited by Section 580b

1. The Nonforeclosing Creditor

The one significant exception to what otherwise has become a consistent pattern of interpretation of the antideficiency sections is the "*Brown v. Jensen* deficiency." The nominally unrelated 580a problem of *Roseleaf* brought the inconsistency of the *Brown* case to the surface.²⁸

Brown held that a nonselling²⁹ junior purchase money encumbrancer was barred by section 580b; the sold-out junior lost not only his security but also his right to recover on the debt. The court found that since the purpose of section 580b was that the "security alone can be looked to for recovery of the purchase money debt,"³⁰ the statute's evident verbal limitation to a deficiency judgment after a sale was too narrow. This purpose, the *Brown* court held, compelled the barring of the sold-out junior creditor who sought, not what traditionally had been described as a "deficiency judgment," but rather a personal judgment on the unsecured note.³¹

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²⁵ CAL. CODE CIV. PROC. § 537.

²⁶ Consider also the possibility of his vendor's lien on the unsecured part of the price. See notes 86-102 and accompanying text.

²⁷ The text to follow is not a complete catalogue of 580b's effects. Many that are omitted here are discussed by Professor Riesenfeld, *supra* note 7, and in Comment, 3 U.C.L.A.L. REV. 192 (1956).

²⁸ Justice Spence's dissent in *Brown v. Jensen*, 41 Cal. 2d 193, 199, 259 P.2d 425, 428 (1953), was based on the complementary scope of the sections. He urged the same points that were the basis for the unanimous *Roseleaf* decision. For a contemporary argument against *Brown v. Jensen*, see 6 HASTINGS L.J. 248 (1955).

²⁹ "Nonselling" and "nonforeclosing" are used synonymously to refer to the creditor who was not the one having the judicial or extrajudicial sale that exhausted the security. Neither term refers to the original vendor-vendee relationship.

³⁰ 41 Cal. 2d at 198, 259 P.2d at 427.

³¹ The note was unsecured at the time of suit because the senior creditor had exhausted the security.

The *Brown* result has considerable appeal; it is not at all difficult to accept if one concentrates only upon section 580b. The language of section 580b as an isolated provision is not so clear as to dictate the conclusion that the legislature meant to limit the section to the foreclosing creditor. Moreover, the decision certainly compels reference to the property for recovery of the purchase price. Whether or not the specific result of *Brown* was unfortunate is a value judgment with reasonable arguments on either side. *Brown's* main difficulty is that it anticipated the legislature in making this value judgment.

The risk in interpreting any section of the antideficiency legislation without reference to the other sections of which it is part became clear when the *Roseleaf* case presented the 580a issue in the *Brown* context of the nonselling creditor. The *Brown* definition of "deficiency judgment" had no bearing on *Roseleaf's* 580d question because the reason for *Brown's* 580b definition, 580b's applicability to both forms of foreclosure, did not exist with respect to section 580d.³² The same justification for a different definition does not exist, however, in the 580a context.

Sections 580a, 580b, and the fair value provision of 726 were enacted at the same time to limit or prohibit deficiency judgments under *all* mortgages and trust deeds. While section 580b applied to a deficiency on the purchase money encumbrance, the fair-value limitations of sections 580a and 726 applied to deficiencies on non-purchase money encumbrances. Section 580b limited the purchase money encumbrancer to the property regardless of the form of foreclosure selected. Similarly, the combined effect of the fair-value provisions of sections 726 and 580a was to limit the non-purchase money encumbrancer to the fair value of the property regardless of the form of foreclosure selected.³³ If the issue is whether or not the respective statutes should be extended to a sold-out junior creditor, how can there be different results?

Brown applied section 580b to the sold-out junior, because doing so furthered the statute's supposed purpose of forcing the secured purchase money mortgagee to look to the property for satisfaction. By a parity of reasoning, the same application of the complementary fair-value provisions of sections 580a and 726 would further the same purpose of these sections

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³² The dissent in *Brown* nevertheless seems to have been correct in stating that the legislature intended to use the term in the same way in both sections—to exclude the nonselling creditor. But *Brown* having decided to the contrary upon reasons that do not relate to § 580d, the 580d aspect of *Roseleaf* need not be considered inconsistent with *Brown*. See note 143 *infra*.

³³ The reference to § 580a presupposes the context in which it appears; the section is applicable only where § 580d does not bar a judgment altogether. Since § 580d does not bar a sold-out junior, the inquiry is whether or not § 580a should limit him in the same way § 580d would. Since *Roseleaf* held it does not, perhaps § 580b should not either—the arguments with respect to both sections being identical.

—to force the non-purchase money mortgagee to look to the fair value of the property for satisfaction. The reason behind the *Brown* extension of section 580b to the sold-out purchase money creditor is equally applicable to the extension of the 580a and 726 fair-value limitation to the sold-out, non-purchase money creditor. As the dissenting opinion urged in *Brown*, “deficiency judgment” was used by the legislature to mean the same thing in all of the deficiency sections. As the unanimous opinion demonstrated in *Roseleaf*, this meaning excludes the sold-out junior.³⁴

Analytically, *Brown v. Jensen*’s 580b conclusion was controlling upon *Roseleaf*’s 580a issue. But the evident inequity to both debtor and creditor of extending section 580a to the nonselling junior, together with the obvious verbal inapplicability of the statute,³⁵ made its extension virtually impossible. That the *Roseleaf* court was correct in refusing to extend section 580a seems indisputable, but if *Brown* involved the same issue and the court here reached the opposite result, how valid is *Brown*?

Much of the *Roseleaf* opinion undermines *Brown v. Jensen*’s 580b extension. The *Roseleaf* opinion stated that the purpose of the fair-value limitation is to prevent double recoveries by nominal bid and large deficiency.³⁶ This is the same purpose that the *Brown* opinion attributed to the purchase money limitation in support of its holding that the nonselling

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³⁴ Surprisingly, the inapplicability of the fair-value sections to the nonselling creditor remained open until *Roseleaf*. In *Hillen v. Soule*, 7 Cal. App. 2d 45, 45 P.2d 349 (1935), the court held 580a’s three month limit inapplicable, but the case was a questionable precedent, until reinstated by *Roseleaf*, because it had been disapproved on the parallel 580b issue in *Brown v. Jensen*, 41 Cal. 2d 193, 259 P.2d 425 (1953). The cases considering § 580a and allowing further reference to additional property security without 580a compliance, e.g., *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955); *Hatch v. Security-First Nat’l Bank*, 19 Cal. 2d 254, 120 P.2d 869 (1942), were not actions for a “money judgment” as proscribed by the section. The cases allowing “money judgments” as the enforcement of additional security without 580a compliance, e.g., *Bank of America Nat’l Trust & Sav. Ass’n v. Hunter*, 8 Cal. 2d 592, 67 P.2d 99 (1937) (action against guarantor); *Mortgage Guar. Co. v. Sampsell*, 51 Cal. App. 2d 180, 124 P.2d 353 (1942) (assignment of rents clause), merely reached additional security though in nonproperty form, and were not “deficiency judgments,” that is, money judgments against the debtor.

³⁵ Section 580a provides in part:

[F]ollowing the exercise of the power of sale in such deed of trust or mortgage . . . the court may render judgment for . . . [the excess of the indebtedness over the fair market value of the security at the time of sale].

Any such action must be brought within three months of the time of sale under such deed of trust or mortgage.

No judgment shall be rendered in any such action until the real property or interest therein has first been sold pursuant to the terms of such deed of trust or mortgage, unless such real property or interest therein has become valueless.

(Emphasis added.)

³⁶ The court said: “Fair value provisions are designed to prevent creditors from buying in at their own sales at deflated prices and realizing double recoveries by holding debtors for large deficiencies.” 59 A.C. at 50, 378 P.2d at 99, 271 Cal. Rptr. at 875.

creditor was within the 580b bar. But in *Roseleaf* this purpose was found, and rightly so, to dictate the opposite result. Unlike the selling senior, the junior cannot protect himself without an additional investment; because he must first satisfy the senior, he cannot simply bid the amount of his lien. If the inapplicability of the fair-value sections to the nonselling junior depend upon the improbability of the junior's double recovery and upon the inequity of forcing his additional investment, the same improbability and the same inequity should result in the same inapplicability of the functionally identical section 580b. *Brown*, then, in requiring the junior to additionally invest upon pain of losing his personal claim against the debtor, must have been incorrect.

In searching for the legislative motive behind section 580b, the *Roseleaf* court examined and discarded the possibilities suggested by *Brown*. One, to prevent the nominal creditor purchase coupled with a large deficiency, is accomplished by the fair-value statutes and does not explain 580b's separate treatment of the purchase money borrower.³⁷ Another, to make certain that the security alone can be looked to for recovery, is simply a statement of 580b's effect based upon the assumption that it applies.³⁸ The third, to place the overvaluation risk upon the lender, who knows the value of the property better than the buyer, often is untrue and certainly is "doubtful" as a reason for section 580b.³⁹

Since *Brown* extended 580b to the nonselling junior in order to further the legislative purpose of the section, the case lost its vitality when it was stripped of the legislative purpose upon which it was based. The current judicially recognized depression-cushion purpose of section 580b⁴⁰ requires a consistent application, or a consistent inapplication, of 580b and of the fair-value sections to the nonselling creditor; *Roseleaf* held that they do not apply.

The standby purpose of section 580b presupposes that the fair-value sections bar deficiencies in the healthy economy, leaving 580b to cushion a downturn where values drop and the fair-value sections fail. *Roseleaf* could have been consistent with *Brown*, therefore, only by holding that the fair-value limitations of sections 580a and 726 apply to the nonselling creditor, just as *Brown* held that section 580b did. Had the court so held, there would have been no major exception to the hypothesis that section 580b has little effect in the healthy economy beyond the effect of sections 580a and 726. But the language of sections 580a and 726, and the difficulty of

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³⁷ 59 A.C. at 52, 378 P.2d at 101, 27 Cal. Rptr. at 877. And as mentioned earlier in the text, if this is an additional purpose for 580b, it should have led *Brown* to the opposite result, as it did *Roseleaf*.

³⁸ 59 A.C. at 52, 378 P.2d at 101, 27 Cal. Rptr. at 877.

³⁹ *Ibid.*

⁴⁰ See text accompanying notes 6-27 *supra*.

so applying them, precluded that application—just as the language of section 580b made its extension awkward even in *Brown*.⁴¹

An overruling of *Brown* is a prerequisite to the total symmetry of the three statutes. The reasons which impelled the *Brown* result were discussed, discarded, and replaced in *Roseleaf* by reasons leading to the opposite conclusion. Analytically, *Brown* should be dead.

But not only did the court not expressly overrule *Brown*, it impliedly followed *Brown* three weeks later in *Bargioni*.⁴² It remains quite possible nevertheless that *Roseleaf* will be the precedent for overruling *Brown*. *Bargioni* was not the proper vehicle for a re-examination of *Brown*. The court evidently was anxious to resolve the important third party money question presented by *Bargioni*; it could do so only by assuming the *Brown* extension of section 580b to the nonforeclosing junior. Moreover, the parties in *Bargioni* could not have argued the *Brown* issue in terms of *Roseleaf* because their briefs were filed and their arguments were heard before the *Roseleaf* decision came down.

Brown has been law for ten years. While it seems unlikely that much in the way of "vested rights" could depend upon the continued extension of the defense, unforeseen results of a change can be best avoided by changing gradually through a series of cases.⁴³ Each case gives notice of the direction—and the direction indicates the result to come. Perhaps, too, no single case is sufficiently compelling to lead to the votes necessary for an overruling opinion. The possibility that *Brown* is to be gradually discarded is reinforced by the fact that the court made no effort in *Bargioni* to redeem *Brown*, failing even to cite it or to refer expressly to 580b's application to a sold-out junior. If anything, by more specifically describing the purpose of section 580b in terms of a purpose largely inconsistent with *Brown*,

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⁴¹ The court in *Brown* had to construe the statute's description of the prohibited 580b judgment as one following a "sale" by concluding that "sale" also meant "no sale" where destruction or senior exhaustion of the security made a sale useless. In the absence of *Brown*, a senior creditor also could recover a judgment if the security is destroyed. But since this is an insurable risk, it seems unlikely that the legislature meant "no sale" even in this context. Compelling insurance of an insurable risk, which a prudent creditor would demand in any event, seems to have nothing to do with 580b's purpose.

⁴² The court did not mention *Brown* in the *Bargioni* case, but the plaintiff in *Bargioni*, while a third party lender, was a sold-out junior suing on the note as was the plaintiff in *Brown*. *Brown*'s application of § 580b to a sold-out junior was a necessary part of *Bargioni*.

⁴³ The California Supreme Court, particularly Justice Traynor, who wrote the *Roseleaf* decision, has often used this technique. A good example was the judicial denial of the land contract vendor's unconscionable forfeiture remedies. The change was accomplished gradually through a series of cases, even though any one of them was factually appropriate for the total change had the court wished to do it all at once. Compare *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367 (1949); *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13 (1950); *Freedman v. The Rector*, 37 Cal.2d 16, 230 P.2d 629 (1951), with *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713 (1898), and those cases following *Glock* up to 1949.

the *Bargioni* opinion deepened the wedge. If a gradual change is what the court had in mind, the *Bargioni* case, decided three weeks after *Roseleaf*, was not the appropriate vehicle.

On the other hand, it is possible that the court decided, or will in the future decide, to leave *Brown* as an inconsistent exception to the rest of the deficiency sections. The *Roseleaf* arguments that undermine *Brown* could be explained as not intentionally undermining a past decision but as the reasoned basis for the correct result under the specific facts presented in *Roseleaf*. Certainly this possibility is sufficiently great that one would be ill-advised to assume at the planning level that *Brown* is no longer law. But if the question arises when it is too late to avoid the issue, it seems that this is a point well worth litigating.⁴⁴

2. The Land Contract Vendor

The vendor under an installment land contract has never been subject to the "one form of action" limitation of section 726.⁴⁵ He has available to him, therefore, the whole spectrum of contract and mortgage remedies.⁴⁶ Because he is not limited by section 726, he is in the same position as the sold-out junior mortgagee or beneficiary.

The land contract vendor had the right, as did the sold-out junior prior to *Brown*, to recover a personal judgment against the debtor.⁴⁷ The protection that the mortgage or trust deed debtor received from having the property first sold to apply toward the indebtedness was duplicated for the contract vendee by the judicially developed ant forfeiture rules.⁴⁸ The contract vendor and the sold-out junior were thus equivalents for *Brown v. Jensen* purposes—neither was barred by section 726, neither had had nor

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⁴⁴ The possibility that *Brown v. Jensen* will be overruled will become a probability if S.B. 950, Cal. Leg., Reg. (Gen.) Sess. (1963), is enacted. While the bill is intended mainly to assure that construction loans are not within § 580b, it also amends the first paragraph of 580b to make it conform to the other deficiency sections. The statute would no longer provide "No deficiency judgment shall lie in any event after any sale . . ." but would omit the italicized language. Compare the court's reliance in *Brown v. Jensen* on the language to be omitted—"any sale" and "in any event."

⁴⁵ *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791 (1898).

⁴⁶ With the exception of the power of sale procedures of CAL. CIV. CODE §§ 2924-24c. The legislature, however, may give him a remedy similar to the power of sale. See CAL. ASSEMBLY INTERIM COMMITTEE ON FINANCE & INSURANCE, PRELIMINARY REPORT ON LAND SALE CONTRACTS 36 (1962).

⁴⁷ Only if he selected a remedy resulting in a judicial sale would he have faced a 580b bar prior to *Brown*. This judicial sale would often result from a specific performance action, where the court would render an alternative decree giving the buyer the option of taking title or having the property sold. See, e.g., *Cohn v. Valentine*, 88 Cal. App. 430, 263 Pac. 846 (1928); *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791 (1898); cf. *Laske v. Lampasona*, 89 Cal. App. 2d 284, 200 P.2d 871 (1948).

⁴⁸ Note 43 *supra*.

could have a "sale," and neither sought recovery that was duplicated by the value of the security.⁴⁰ In applying the 580b bar to one, *Brown* necessarily applied it to the other.

Brown left the contract vendor with a quiet title action, coupled with restitution of any payments in excess of actual damages, as his only effective remedy.⁵⁰ The old forfeiture remedies, having been abolished upon equitable considerations, are not part of the 580b question. But an action for the price in excess of the value of the property, an action for damages measured by rental value, and an action for specific performance were all eliminated by *Brown's* 580b bar. Each ultimately resulted in a personal judgment against the buyer and thereby allowed access to something other than the security. Each, in other words, was in all respects identical to the recovery denied the sold-out junior in *Brown*.

Perhaps *Roseleaf* points towards overruling *Brown*; perhaps instead *Roseleaf* points towards confining *Brown* to its facts. Either alternative would have the same effect on the contract vendor in that either would reinstate his nonforfeiture remedies. Nevertheless, *Brown* remains the law;⁵¹ *Roseleaf* has done nothing that directly changes the land contract vendor's position of a few years ago.⁵² In contemplating the possibility that *Brown's* inconsistency may lead to its limitation or its abolition, however, one should not overlook its land contract ramifications. The contract vendor's case is the easiest of all because it does not require that *Brown* be overruled; it necessitates only limiting *Brown* to its facts. This *Roseleaf* may have done by leaving *Brown* at best as an exception to the anti-deficiency system.

3. The Assuming Grantee

A person buying property that is encumbered by a prior purchase money security device retains the 580b protection of the original mortga-

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⁴⁰ The contract vendor described in the text would be one seeking damages, the price, or specific performance. Because the security's value would be applied toward any recovery he might obtain, the security in effect would be exhausted as part of his action just as it had been exhausted for the sold-out junior who would have no remaining security to apply.

⁵⁰ He has other remedies, but none get him anywhere. See Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 (1960).

⁵¹ But see note 44 *supra*.

⁵² The situation as it existed in 1960 is described in Hetland, *supra* note 50. However, the concern there expressed over the potentially untenable position of the vendor under a non-security contract is now obviated by *Caplan v. Schroeder*, 56 Cal. 2d 515, 364 P.2d 321, 15 Cal. Rptr. 145 (1961). It was the court's recognition in *Caplan* of the difference in the contracts, and the recognition of the possibility of an enforceable liquidated damages clause in the non-security contract, that made the difference. While the result of the case might appear to be a reapplication of the *Freedman* rule to the marketing contract, it was not. Factually, the *Caplan* contract contained a clause that, although good as earnest money in most states, would be unenforceable as liquidated damages in virtually every jurisdiction.

gor or trustor notwithstanding an express assumption of the indebtedness.⁵³ There is nothing inherent in an assumption agreement that differentiates it for 580b purposes from the original indebtedness. The rights of the lender are not diminished; the assuming grantee, having used the money as part of the purchase price, is within the class singled out for protection by the statute; and the security is an encumbrance upon the property purchased. While the remote vendee's 580b protection can thus be explained in terms of identity of purpose, it usually is expressed in terms of a break in the chain of liability under California's equitable subrogation theory.⁵⁴ It all comes down to the same thing—the assumption of a purchase money obligation is no different from buying subject to the lien; the security is the sole fund for satisfaction in either case.

If the assumed debt was not a purchase money obligation but was assumed as part of the purchase price, there is a different problem. In the first place, the equitable subrogation theory no longer prevents an action by the original creditor against the assuming grantee.⁵⁵ Secondly, there is the questionable argument that the rights of the lender are impaired if he cannot recover from the grantee, even though he retains the right to a personal judgment against the original trustor.⁵⁶ Thirdly, an early case which suggested the denial of 580b protection to one assuming a non-purchase money obligation as part of his purchase price is still the main precedent on this question.⁵⁷

Nevertheless, it seems likely that today's assuming grantee will have 580b protection whether or not he assumed what originally was a purchase money obligation. If the creditor consented to the assumption, or even if he had the right to call the loan upon sale and by failing to do so impliedly consented, it seems reasonable to consider him a third party purchase money lender vis-à-vis the assuming grantee.⁵⁸ In this event, his right to a personal judgment would be limited to his claim against the original

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⁵³ *Stockton Sav. & Loan Bank v. Massanet*, 18 Cal. 2d 200, 114 P.2d 592 (1941), which is commonly cited for this holding, seems to fall somewhat short of doing so—the loan in that case was refinanced and the lender became technically the vendor. But the same issue has been clearly resolved in the 580a context. *Everts v. Matteson*, 21 Cal. 2d 437, 132 P.2d 476 (1942).

⁵⁴ *E.g.*, *Page v. W.W. Chase Co.*, 145 Cal. 578, 79 Pac. 278 (1904); *Dail v. Campbell*, 191 Cal. App. 2d 416, 12 Cal. Rptr. 739 (1961). Since the original debtor is not liable, there is a break in the chain of liability which protects a grantee under equitable subrogation.

⁵⁵ Since the original debtor does not have 580b protection, there is no break in the chain.

⁵⁶ The original trustor would become a surety by operation of law. *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531 (1920). Undoubtedly the creditor would retain his right to recover against the original trustor, although the latter, now a surety, probably would not have a right over against his principal, the assuming grantee. See notes 103–27 *infra* and accompanying text.

⁵⁷ *Banta v. Rosasco*, 12 Cal. App. 2d 420, 55 P.2d 601 (1936).

⁵⁸ If there is express or implied consent, the situation is similar to *Stockton Sav. & Loan Bank v. Massanet*, 18 Cal. 2d 200, 114 P.2d 592 (1941). The fact that the lender would not be the assuming grantee's vendor is immaterial in view of *Bargioni's* application of 580b to third party money.

grantee in the latter's new capacity as surety.⁵⁹ *Bargioni* extended section 580b to the third party lender, and *Roseleaf* pointed toward surety liability notwithstanding section 580b.⁶⁰ There would, therefore, seem to be no modern reason not to protect the grantee who assumes as part of a purchase price with the express or implied consent of the lender.

If the creditor had no control over the assumption, his ability to collect from the assuming grantee may well depend upon the factual significance of the original debtor's removal from the land in the first case in which the question arises. In the abstract, the creditor seems not to be particularly prejudiced by the extension of 580b protection to the assuming grantee. The assuming grantee is a purchaser and nominally within the protected class; the security is upon the purchased property, and the creditor retains the right to recover from the trustor upon whom he presumably relied, if personal credit was of importance to him. *Bargioni* removed the possibility of his exclusion as a third party lender and *Roseleaf* suggested no policy that would exclude him on other grounds.

Depending therefore upon the factual pressures in the first case to raise the issue, it seems a better than even chance that the assuming grantee of a non-purchase money encumbrance will be entitled to 580b protection and will be immune from a judgment in favor of either the creditor or the original debtor. Regardless of the factual setting, this should be true if the creditor consented to the assumption.

4. Third Party Money

In the other states having legislation similar to California's section 580b, purchase money advanced by someone other than the vendor is not "purchase money" within the meaning of the antideficiency statutes.⁶¹ While the question had remained open in California from the statute's enactment in 1933 until *Bargioni* in 1963, the clearest case on the point prior to *Bargioni* indicated that the third party lender was not subject to the statute's bar.⁶² But neither the cases so holding nor the writers have been able to offer any persuasive reason why the third party lender should be excluded.⁶³ The absence of a good reason to so limit the statute made

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⁵⁹ See note 56 *supra*.

⁶⁰ Notes 103-27 *infra* and accompanying text.

⁶¹ In Montana the statute is expressly limited. MONT. REV. CODE ANN. § 93-6008 (1947). In the other states limitation is by judicial construction. See Currie & Lieberman, *supra* note 12, at 17-18.

⁶² *Peterson v. Wilson*, 88 Cal. App. 2d 617, 199 P.2d 757 (1948).

⁶³ For example, *Peterson v. Wilson*, *supra* note 62, relying upon *Ladd & Tilton Bank v. Mitchell*, 93 Ore. 668, 184 Pac. 282 (1919), suggested that unless third party lenders were excluded, home buyers might not be able to obtain loans, thus injuring rather than benefiting the class to be benefited. Currie & Lieberman, *supra* note 12, at 17-25, suggested many sensible possibilities but admitted that all had inconsistencies and that they were themselves not overly persuaded. Riesenfeld, *supra* note 7, at 711-16, correctly predicted the opposite result in California.

Bargioni's opposite result easily predictable.

Several California cases contained dicta tending toward one result or the other, but none answered the question.⁶⁴ Typical, perhaps, was the dicta in *Brown v. Jensen*, the court in part of the opinion describing a purchase money security as one given "to the vendor,"⁶⁵ in another part describing a deed of trust given to a bank as a "purchase money trust deed."⁶⁶ In recent years the supreme court wisely chose not to decide the issue by fortuitous dicta in cases where it was not directly involved;⁶⁷ and the legislature, although pressed to do so,⁶⁸ has refused to clarify the issue.

In *Bargioni* the supreme court decided that the identity of the lender makes no difference. In every situation where vendor money would be purchase money, so too is third party money. It seems evident that *Bargioni's* result is correct in terms of the cycle leveling, depression purpose of section 580b recognized in *Roseleaf*, a purpose which requires concentration upon the identity of the borrower rather than upon the identity of the lender.

Bargioni answered the purchase money question under the purchase money antideficiency statute in the same way as the court long has answered it under the purchase money priority statute.⁶⁹ One priority prerequisite, however, probably will be changed somewhat in the deficiency context. The requirement that the lender assure that the specific money lent gets to the seller in order to have the benefit of the priority provision may not apply as strictly to the deficiency prohibition. Thus if the lender gives the funds to the buyer and the buyer in turn to the seller, the lender would lose his priority protection because the buyer theoretically could have used other money to purchase the property.⁷⁰ For 580b purposes, however, the requirement is likely to be less technical. If this change in form could result in escaping section 580b at the cost only of losing the negligible purchase money priority benefits, lenders doubtless would adopt

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⁶⁴ While *Peterson v. Wilson*, *supra* note 62, was the clearest, even it used an alternative basis for the decision. The others include *Stockton Sav. & Loan Bank v. Massanet*, 18 Cal. 2d 200, 114 P.2d 592 (1941); *Lucky Invs., Inc. v. Adams*, 183 Cal. App. 2d 462, 7 Cal. Rptr. 57 (1960); *Algeri v. Tonini*, 159 Cal. App. 2d 828, 324 P.2d 724 (1958).

⁶⁵ 41 Cal. 2d at 197, 259 P.2d at 426-27.

⁶⁶ *Id.* at 195, 259 P.2d at 425.

⁶⁷ In *Roseleaf*, for example, the court avoided citing dicta, which can be found in the cases dealing with the identity of the lender, in support of its decision dealing with the requisite identity of the property. See, e.g., *Peterson v. Wilson*, 88 Cal. App. 2d 617, 631, 199 P.2d 757, 765 (1948).

⁶⁸ Most recently, A.B. 831, Cal. Leg., Reg. (Gen.) Sess. (1961). See also note 44 *supra*.

⁶⁹ For purposes of CAL. CIV. CODE § 2898, which gives some priority to a purchase money encumbrance, third party money has always been purchase money. *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266 (1898); *Mercantile Collection Bureau v. Roach*, 195 Cal. App. 2d 355, 15 Cal. Rptr. 710 (1961).

⁷⁰ *Van Loben Sels v. Bunnell*, *supra* note 69.

it if they had a practical method of assuring that the buyer would buy and the lender would be secured. This would be a transparent waiver of a nonwaivable deficiency statute.⁷¹ Although the 580b test, like the priority issue, will undoubtedly depend upon the lender's intent that the money be used to pay the purchase price,⁷² it probably will not be limited by the narrow method of showing this intent that was developed under the priority statute.

C. Judgments Allowable Under Section 580b

In holding that section 580b bars a judgment only upon notes secured by the purchased property, *Roseleaf* removed the disquieting spectre of ever greater intrusion by section 580b into the real estate transaction. But it would be folly to assume that *Roseleaf* indicates a new pro-lender treatment of the 580b question⁷³ or a possibility that the court will be sympathetic to avoidance schemes.

Section 580b may not be waived at the time of the purchase;⁷⁴ nor may it be waived by indirection. Two notes representing the same consideration will not be protected from section 580b any more than they have been from sections 580d and 726.⁷⁵ Refinancing "gimmicks" aimed at an illusory change from the purchase money format will still fall under the statute's bar.⁷⁶ *Roseleaf* did not sanction an avoidance device; it merely refused to extend section 580b beyond the *secured* transaction to which the statute is limited by its language. Anything not part of the secured transaction and anything beyond the statute's purpose are outside of section 580b. There are legitimate credit arrangements even for a purchase price that are beyond section 580b, and thus do not avoid it at all. The *Roseleaf* transaction was one of these.

1. The Separately Secured Note.

Assume a total purchase price of real property of \$100,000, \$25,000 payable in cash, \$25,000 by a note secured by property other than that

⁷¹ Although § 580b is not within the no waiver statute, CAL. CIV. CODE § 2953, the statute is nonwaivable, *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955); *Lucky Invs., Inc. v. Adams*, 183 Cal. App. 2d 462, 7 Cal. Rptr. 57 (1960).

⁷² In *Bargioni*, Justice Traynor said that the third party lender is barred by § 580b, "provided the financier intended the loan to be used to pay all or part of the purchase price." 59 A.C. at 135, 378 P.2d at 594, 28 Cal. Rptr. at 322. Cf. *Algeri v. Tonini*, 159 Cal. App. 2d 828, 324 P.2d 724 (1958).

⁷³ *Bargioni's* clarification of the third party money question is an excellent example that this is not the case.

⁷⁴ See note 71 *supra*.

⁷⁵ Cf. *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955) (§ 580d); *Schwerin v. Shostak*, 213 A.C.A. 42, 28 Cal. Rptr. 332 (1963) (§ 726).

⁷⁶ Cf. *Schwerin v. Shostak*, *supra* note 75; *Lucky Invs., Inc. v. Adams*, 183 Cal. App. 2d 462, 7 Cal. Rptr. 57 (1960).

purchased, and \$50,000 by a note secured by the purchased property. The creditor may apply all of his security and may do so piecemeal because the parcels secure separate debts.⁷⁷ *Roseleaf's* 580b clarification is that the creditor also may have a deficiency judgment on the \$25,000 note to the extent that the specific property securing it is inadequate.⁷⁸ There are, however, many variations upon this basic transaction and not all of them will escape the 580b bar. A consideration of the section's provisions in terms of the *Roseleaf* result may help in delineating the excluded area.

Because the independent note is part of a total purchase price, it might seem that the deficiency judgment the creditor seeks is one resulting from the "purchaser's failure to complete his contract of sale" as prohibited by section 580b. But here, as in any case where the contract calls for a conveyance of land, the *contract* is complete when the deed is delivered. The performance called for by the contract is the deed by the seller and payment (in whatever form they agree upon, including a deed of trust or mortgage) by the buyer. Thus, the purchaser completes his contract when he closes the escrow or gives the note and security device called for by the contract; all further rights and obligations flow from the deed, the notes, and the security device without reference to the completely performed contract.⁷⁹

Nor was *Roseleaf's* separate note going toward the purchase price "given to secure payment of the balance of the purchase price of real property" as that phrase is used in section 580b. This is the area where distinguishing the excluded from the included is likely to seem difficult. But by concentrating upon the uniform construction of all of the deficiency sections and treating the issue in terms of section 726's "one form of action" limitation, the distinction becomes quite simple. The question is the procedural question of section 726: How many "debts" are there for procedural purposes? Because the one "debt" for purposes of section 726

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⁷⁷ By judicial sale: *Stockton Sav. & Loan Soc'y v. Harrold*, 127 Cal. 612, 60 Pac. 165 (1900); *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200 (1889). By extrajudicial sale: *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955); *Hatch v. Security-First Nat'l Bank*, 19 Cal. 2d 254, 120 P.2d 869 (1942). Piecemeal foreclosure would be permissible via nonjudicial sale even if the parcels were security for the same debt. *Hatch v. Security-First Nat'l Bank*, *supra*.

⁷⁸ If, unlike *Roseleaf*, the \$25,000 separate note of the hypothetical is secured by a first lien upon the separate property, the judgment would have to result from a judicial foreclosure and would be limited to the difference between the debt and the fair market value. CAL. CODE CIV. PROC. § 726. But § 580b would not bar it.

⁷⁹ There has been no question about this for decades. *E.g.*, *Bryan v. Swain*, 56 Cal. 616 (1880). In addition, the 1935 "contract" amendment to § 580b extended the statute's bar only to contracts used as a security device. See *Goldsworthy v. Dobbins*, 110 Cal. App. 2d 802, 243 P.2d 883 (1952); *Kerrigan v. Maloof*, 98 Cal. App. 2d 605, 221 P.2d 153 (1950). Therefore, even if the buyer's default in *Roseleaf* had been a breach of the contract, *i.e.* if the buyer had refused to deliver the trust deeds, the seller's action for damages would not have been affected by § 580b. See, *e.g.*, *Royer v. Carter*, 37 Cal. 2d 544, 233 P.2d 539 (1951).

has been fairly well defined over the years, the identical "purchase price" problem of section 580b is easier to resolve in terms of precedent.

The court relied upon the complementary scope of sections 726 and 580b in holding that 580b did not bar the seller's action on the separate notes: "The purchaser will not lose the property he purchased yet remain liable for the purchase price. To apply section 580b here would mean that the Chierighinos would acquire the hotel at less than the agreed price."⁸⁰ The buyer could not acquire the hotel, however, if the creditor was compelled to sell it before suing on the notes. The court's observation is applicable, in other words, only where section 726 does not require exhaustion of all security as a prerequisite to a deficiency, *i.e.* only where the multiple securities are not security for one "debt."

Had there been a single note and two items of security in the hypothetical with which this section commenced, 726 would have compelled exhaustion of both securities as a prerequisite to a deficiency,⁸¹ and the *Roseleaf* reasoning would not apply. Similarly, duplicate notes for the same amount represent but one "debt" under section 726,⁸² "a note" under section 580d,⁸³ and "a purchase price" under section 580b.⁸⁴ Moreover, if a creditor secures one note by the purchased property and secures another representing the same consideration by other properties, section 726 would compel exhaustion of all security just as section 580b would bar a deficiency after it has all been exhausted.⁸⁵

Only when the separate notes or the other separate evidences of the debt represent different consideration, will the *Roseleaf* result apply. The 726 impediment is removed. More importantly, the separate note in no sense is secured by the purchased property. Unlike the single-debt, multiple-security transaction, the creditor with two economically separate notes has no recourse to the purchased property as security for the note secured by other property. This note is not part of the purchase money security transaction.

2. The Separate Unsecured Note

If the creditor takes one note secured by the purchased property and another note, unsecured, for the balance, the latter is collectable notwith-

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⁸⁰ 59 A.C. at 53, 378 P.2d at 101, 27 Cal. Rptr. at 877.

⁸¹ *E.g.*, *Stockton Sav. & Loan Soc'y v. Harold*, 127 Cal. 612, 60 Pac. 165 (1900); *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200 (1889); *Appel v. Hubbard*, 155 Cal. App. 2d 639, 318 P.2d 164 (1957).

⁸² *Cf.* *Schwerin v. Shostak*, 213 A.C.A. 42, 28 Cal. Rptr. 332 (1963).

⁸³ *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955).

⁸⁴ *Compare* *Lucky Invs., Inc. v. Adams*, 183 Cal. App. 2d 462, 7 Cal. Rptr. 57 (1960), with *Roseleaf Corp. v. Chierighino*, 59 A.C. 45, 378 P.2d 97, 27 Cal. Rptr. 873 (1963).

⁸⁵ See note 81 *supra*. If the creditor chose to exhaust it piecemeal by nonjudicial foreclosure, § 580d would also bar his judgment. *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955).

standing section 580b. But to so state the proposition may be misleading. Arguably, it may not be as simple as it appears for the seller⁸⁶ to have a separate unsecured note for part of the purchase price that is not "secured" by the purchased property.

Civil Code section 3046 gives the vendor a lien for that part of the purchase price which remains unpaid and is not otherwise secured.⁸⁷ This section, in other words, gives the vendor a lien on the purchased property for the "unsecured" note.⁸⁸ There are, of course, some benefits to the seller that result from this. Since he would avoid the 726 "one form of action" impediment notwithstanding his vendor's lien,⁸⁹ the seller could decide at the time of default whether he is a "secured" or an unsecured creditor. He could elect to sue on the note without a 726 or 580b bar or, alternatively, foreclose his vendor's lien as a lien junior to his specific purchase money encumbrance,⁹⁰ subjecting himself to section 580b only in the event of the latter choice. Despite these advantages—which in the final analysis are more apparent than real—the unsecured note is not a 580b avoidance device. The vendor's lien should not bring it within the 580b secured transaction.

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⁸⁶ As opposed to the third party lender. The problem of this section is a problem for the selling creditor. Unquestionably the third party lender may use a separate unsecured note and recover on it.

⁸⁷ CAL. CIV. CODE § 3046 provides: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

⁸⁸ The vendor's lien probably would attach to the unsecured note for part of the price even though another note for the balance of the price is secured. *Mills v. Mills*, 147 Cal. App. 2d 107, 305 P.2d 61 (1956); cf. *Edison Sec. Co. v. Ventura Guar. Bldg. & Loan Ass'n*, 10 Cal. App. 2d 555, 52 P.2d 608 (1935). This is within the language of CAL. CIV. CODE § 3046 and is no different from a vendor's lien on an unsecured note for part of the price when the balance has been paid in cash or by other consideration. *Selna v. Selna*, 125 Cal. 357, 58 Pac. 16 (1899). The cases holding the taking of security to be a waiver of the lien refer to security for the same consideration as that upon which the vendor claims his lien; the waiver is based upon this demonstration of intent not to rely upon the statutory lien. See, e.g., *Finnell v. Finnell*, 156 Cal. 589, 105 Pac. 740 (1909); and other cases collected in 50 CAL. JUR. 2D *Vendor and Purchaser* §§ 112-14 (1959).

⁸⁹ The separate note is a separate "debt" for purposes of § 726. In addition, the creditor would not have the necessary "mortgage" or its equivalent to be within § 726. A vendor's lien is not a mortgage, specific lien, or express lien, but is more of a personal privilege to the vendor. *Palo Alto Bldg. Co. v. Jones*, 81 Cal. App. 2d 725, 185 P.2d 25 (1947); *Schwartz v. Mead*, 116 Cal. App. 606, 3 P.2d 48 (1931).

⁹⁰ If the creditor wants the benefit of the vendor's lien, he would undoubtedly foreclose it first; otherwise foreclosure of his senior encumbrance would destroy his junior vendor's lien. Even if he forecloses his vendor's lien first, he would have to avoid purchasing at his junior sale (relying instead upon outside bidding) or the title he acquires would merge with his senior lien and he would end up with nothing other than the property. His senior lien would disappear by merger, leaving him only with a claim barred by § 580b. Cf. *Sheldon v. La Brea Materials Co.*, 216 Cal. 686, 15 P.2d 1098 (1932); *Stockton Sav. & Loan Soc'y v. Harrold*, 127 Cal. 612, 60 Pac. 166 (1900).

The only case considering the separate unsecured note for part of the price, where the balance of the price was secured by a purchase money trust deed, held that the separate note was collectable notwithstanding section 580b.⁹¹ Nevertheless, it is not entirely safe to assume that this case, *Christopherson v. Allen*, is law—even though it should be and probably will turn out to be. The vendor's lien apparently was not called to the court's attention in *Christopherson*.⁹² Except for the vendor's lien possibility, the separate unsecured note in *Christopherson* was manifestly the same issue as the separately secured note in *Roseleaf*. *Christopherson* was the only clear precedent for *Roseleaf*'s 580b result, and it appears from the briefs in *Roseleaf* to have been called to the court's attention. Yet it was not cited by the court. The best explanation for its omission is that the court was unwilling to include the separate unsecured note in its 580b clarification until the issue, in terms of whatever differences may exist between it and the *Roseleaf* issue, is specifically posed.

If the vendor's lien were a satisfactory substitute for a mortgage or deed of trust, it seems evident that the separate unsecured note would be part of the same "debt,"⁹³ the same "note,"⁹⁴ and the same "purchase price."⁹⁵ Because the total indebtedness would be secured by the purchased property for the benefit of a single creditor, the effect of the transaction would be the same as multiple participation in any form, including a series of notes for a single debt. There is no economic justification for breaking a single price into two notes, securing one by a first trust deed, and the other by a second, on the same property. If the creditor's purpose is to have separately transferable obligations with or without the same priority, his purpose is the same as it would be with participation or series notes secured by a single encumbrance upon the property.⁹⁶ A junior and senior lien on the same property to secure parts of the same loan for the benefit of the same creditor amount to participation notes except

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⁹¹ *Christopherson v. Allen*, 190 Cal. App.2d 848, 12 Cal. Rptr. 658 (1961).

⁹² The argument instead was in terms of "avoidance" through execution on the purchased property to satisfy the judgment on the separate note—but if there are no priority problems involved, this is about the same thing. *Christopherson* dealt with an exchange of property with cash to boot; the vendor's lien would apply to the boot as a part of the price otherwise unsecured. Cf. *Proctor v. Arakelian*, 208 Cal. 82, 280 Pac. 368 (1929).

⁹³ CAL. CODE CIV. PROC. § 726.

⁹⁴ CAL. CODE CIV. PROC. § 580d.

⁹⁵ CAL. CODE CIV. PROC. § 580b.

⁹⁶ This is true even if the creditor wants different priority for the different notes. California's pro-rata rule is operable only in the absence of an agreement between note holders to the contrary; the creditor could transfer subject to any of the pro-tanto priority possibilities. *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883 (1884); *Petit v. Blenkiron*, 16 Cal. App.2d 751, 61 P.2d 527 (1936); OSBORNE, MORTGAGES §§ 243, 244 (1951). CAL. CODE CIV. PROC. § 728 provides the procedure for foreclosure of a single debt falling due at different times.

to the extent the changes in form might avoid the antideficiency provisions. The separate junior and senior lien device has no independent purpose; it is designed solely to evade the deficiency limitation. The creditor's impediments under this patent evasion device would be identical to those barring a deficiency under a single note and single purchase money trust deed. The economic and remedial identity of the transactions would mean that in each there is but one "debt"—or "a purchase price."

Because the vendor's lien is not a satisfactory substitute for the specific encumbrance of a junior trust deed or mortgage, however, the possibility of the statutory lien's existence should not force the equation of the vendor's separate unsecured note to the vendor's note secured by a junior lien on the same property. The vendor's lien, arising only by statutory implication, cannot be expressed in a written form—or else it is likely to be a mortgage rather than a vendor's lien.⁹⁷ Since there is nothing to record and since it is not a lien on the property against a subsequent bona fide purchaser or encumbrancer,⁹⁸ it is a singularly tenuous security interest. The vendor's lien cannot be transferred by the creditor and disappears upon assignment or negotiation of the debt.⁹⁹ The mechanical problems of foreclosing it without losing its advantages, when the same creditor has a prior specific lien on the property, make it quite fortuitous that a creditor might be able to do so.¹⁰⁰

Because the partially unsecured creditor with a statutory lien lacks the advantages of a junior consensual encumbrance, the reasons behind denying independent debt status to the latter do not exist with respect to the former. If the court were ultimately to hold the separate unsecured note to be barred by section 580b because of the "security" of the vendor's lien, it would also have to hold the unsecured note for the total price to be within the statute for the same reason. The vendor's lien then would make the totally unsecured vendor a secured creditor, denying him the right to a judgment and forcing him to look only to the "security."¹⁰¹ This would be incredible; *Christopherson v. Allen* seems manifestly correct.

Since the supreme court has left open the *Christopherson* transaction, however, caution dictates that one avoid the vendor's lien. The third party lender taking a separate unsecured note for part of the price has no problem because he has no vendor's lien. The vendor taking the same note should expressly waive his vendor's lien, either in the note or by separate

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⁹⁷ *Dingley v. Bank of Ventura*, 57 Cal. 467 (1881). See also note 89 *supra*. Any written encumbrance not otherwise classifiable is presumed to be a mortgage. CAL. CIV. CODE § 2924.

⁹⁸ CAL. CIV. CODE § 3048, *Schut v. Doyle*, 168 Cal. App. 2d 698, 336 P.2d 567 (1959).

⁹⁹ CAL. CIV. CODE § 3047. See cases collected in 50 CAL. JUR. 2d *Vendor & Purchaser* § 109 (1954).

¹⁰⁰ See note 90 *supra*.

¹⁰¹ In other words, § 580b would bar any other remedy.

agreement. Since the lien's benefits are negligible, the seller should get rid of it.¹⁰²

3. *The Guarantor and Surety*

Now that the supreme court has discarded avoidance of overvaluation as 580b's major purpose,¹⁰³ there remains no reasonable argument in favor of extending 580b protection to a guarantor. Under the theory that the purpose of section 580b is to encourage sellers to lower the price, everything that would allow the buyer greater credit, thus enabling him to pay more, would come within the statute. *Roseleaf's* separate notes, the cash consideration, separate property security, a guarantor's obligation—anything other than the purchased property that tends to assure the lender that the loan will be repaid—would fall under 580b's protective shield. The danger of relying upon this "purpose" is well illustrated by a recent law review comment which concludes that a guarantor has 580b protection—because allowing recovery would not discourage a high selling price.¹⁰⁴

As a practical matter, the idea that prohibiting a deficiency has any significant effect on the selling price seems rather farfetched. To say that an institutional lender will lend substantially less if it cannot recover a deficiency presupposes that the lender relies more upon the borrower's

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¹⁰² If he is aware of the lien and is unwilling to waive it, the argument that he wants to see how things turn out before he decides whether or not he is secured takes on some substance. If he expressly refuses to waive it, perhaps he wants the tenuous security it affords—perhaps, then, he wants to be secured, even though unsatisfactorily, on his unsecured note. If so, a court might find that he assumed the 580b impediment of the secured creditor notwithstanding the arguments against 580b's extension.

¹⁰³ Suggested, but in more reasonable form, in Currie & Lieberman, *supra* note 12; adopted in *Brown v. Jensen*, 41 Cal. 2d 193, 197, 259 P.2d 425, 427 (1953); and utilized recently in Comment, 15 STAN. L. REV. 121, 123 (1962). In *Roseleaf*, Justice Traynor said in answer to the suggestion that the financier's knowledge of value would lower the price: "[I]t is doubtful whether that was the reason for barring deficiency judgments in purchase-money security transactions." 59 A.C. at 52, 378 P.2d at 101, 27 Cal. Rptr. at 877.

¹⁰⁴ Comment, 15 STAN. L. REV. 121, 123 (1962), states, "[S]ection 580b affords some measure of protection to buyers by forcing vendors to sell property near its fair market value," citing Currie & Lieberman, *supra* note 12. The comment then continues,

Even if reimbursement [to the guarantor] were not available, the vendor could charge prices above the fair market value of the property, since the gratuitous guarantor is frequently not an expert in either real estate or financing . . . . In any event, recovery here would negate the section's present function in maintaining reasonable real estate prices.

Comment, 15 STAN. L. REV. 121, 126-27 (1962).

Although reliance upon a questionable purpose seems to have been largely responsible for the questionable result, the research represented by the quoted comment is excellent. It was written prior to the *Roseleaf* description of 580b's purpose, and it is quite possible that its author would find a different result in view of *Roseleaf*. The citation here is not intended to be critical but to demonstrate where the overvaluation purpose may lead.

personal solvency than upon the value of the security. But the making of an unsecured loan is quite a different transaction from the making of a secured loan. If the loan is to be secured, the institutional lender probably will look for a safe margin in its security. That section 580b prevents it from treating part of its secured loan as an unsecured loan would seem to have little bearing on the margin of value it would require in order to consider itself reasonably secured.¹⁰⁵

Similarly, the seller will charge as much as he can notwithstanding section 580b. If he cannot get additional security and chooses not to take a separate unsecured note, the seller certainly has nothing to lose by taking a purchase money trust deed for that part of the price which exceeds what he could sell for elsewhere. Because of section 580b he can look only to the property for satisfaction in case of default whether he has charged too much or not. That his encumbrance may be valueless leaves him in no worse position than if he had not had it in the first place. More often than not, the higher price would be advantageous—not all purchasers default. It is, therefore, difficult to understand how section 580b tends to keep the selling price down.

Nevertheless, whether or not the idea ever made sense is now beside the point. In *Roseleaf* the court discarded it as an independent purpose of section 580b. Consequently, the solution to the guarantor question need not be impeded by this theory.

Many cases have touched the periphery of the guarantor-surety problem. Those which held that the antideficiency legislation was no barrier against the guarantor before the legislative abolition of the distinction between guarantors and sureties¹⁰⁶ are obsolete, if at all, only in the sense that today's creditor may have to exhaust the principal's security before proceeding against the surety.¹⁰⁷ Even this is by no means clear.¹⁰⁸

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¹⁰⁵ To the extent that the security value of the property indicates its true value, the security value is unlikely to be changed by the fact that § 580b denies the lender a judgment after the application of the security.

¹⁰⁶ The distinction was abolished by CAL. CIV. CODE § 2787 in 1939. The cases holding that one who before 1939 became a guarantor was not protected by the deficiency sections, include *Bank of America v. Hunter*, 8 Cal.2d 592, 67 P.2d 99 (1937); *Security-First Nat'l Bank v. Chapman*, 41 Cal. App. 2d 219, 106 P.2d 431 (1940); cf. *Everts v. Matteson*, 21 Cal. 2d 437, 132 P.2d 476 (1942).

¹⁰⁷ If this is the case, it is not because of 726's "one form of action" provision as such, but because a surety, which includes a guarantor, CAL. CIV. CODE § 2787, may compel the creditor to first sue the principal debtor. CAL. CIV. CODE § 2845, *Miller*, 119 Cal. App. 2d 712, 260 P.2d 215 (1953). Since the only form of action which can be brought against the debtor is a 726 foreclosure, the security must first be exhausted. See also CAL. CIV. CODE §§ 2849, 2850. But see note 108 *infra*. CAL. CIV. CODE § 2809, providing that a surety's obligations can be no greater than the principal's, has long been and will remain inapplicable to the transaction in question. *E.g.*, *Loeb v. Christie*, 6 Cal. 2d 416, 57 P.2d 1303 (1936).

¹⁰⁸ Several cases decided since the enactment of CAL. CIV. CODE § 2787 have followed *Loeb v. Christie*, *supra* note 107. See, *e.g.*, *Kelley v. Upshaw*, 39 Cal. 2d 179, 246 P.2d 23 (1952);

The cases allowing recovery against the original mortgagee or beneficiary after he has negotiated and guaranteed the note are factually distinguishable.¹⁰⁹ Nevertheless, they lend support in the broad sense to guarantor liability without guarantor recourse to the principal. Similarly, the cases exonerating a guarantor because of section 580b when he is in fact a principal¹¹⁰ imply guarantor liability. If both are protected by section 580b, there would seem to have been little purpose in those cases in distinguishing between them. There is no purpose in ascertaining that the defendant's alleged guarantor status was simply a sham to avoid the 580b protection to which the defendant was entitled as principal if guarantor status does not avoid section 580b.

Additional property security can be exhausted notwithstanding the antideficiency sections.¹¹¹ Additional security in the form of a rent assignment provision in a purchase money encumbrance may be applied to the debt.¹¹² Certainly, therefore, the purchase money creditor should be able to accept and enforce additional security in the form of an independent guarantee. There seems to be no better argument in favor of protecting the guarantor than there is for protecting other property. Both are simply additional security.

The argument for guarantor deficiency protection does not lie in the possibility that the guarantor could enforce the obligation against the principal and thus obviate the antideficiency legislation; such a possibil-

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Bank of America v. Pauley, 119 Cal. App. 2d 355, 259 P.2d 714 (1953); *Eisendrath v. Bank of America*, 118 Cal. App. 2d 434, 258 P.2d 13 (1953). The possibility that in these cases the court simply overlooked the statute, as has been suggested, see Comment, 3 U.C.L.A.L. Rev. 192, 203 (1956), seems most unlikely in view of the extensive research evident in each of the opinions. A more likely possibility is that the guarantor's agreement gave the creditor the right to proceed directly against the guarantor, an agreement that is enforceable. See, e.g., *Kelley v. Upshaw*, *supra* at 192, 246 P.2d at 30; *cf. Mortgage Fin. Corp. v. Howard*, 210 A.C.A. 633, 636-37, 26 Cal. Rptr. 917, 919 (1962). The most appealing possibility is that the court concluded that immediate recourse against the guarantor is within the exception to CAL. CIV. CODE § 2787 as "necessary in order to give effect to provisions specially relating thereto."

It seems not to matter if the guarantor first pays the total debt and then is subrogated to the lien, CAL. CIV. CODE § 2849, or instead is compelled to bid at least the fair value of the security to protect himself from an excessive judgment. Since he cannot recover from the principal, he winds up under either alternative with the property or its value and unreimbursable liability to the creditor for anything more. Perhaps in following *Loeb v. Christie*, *supra* note 107, the courts decided that the prior action and subrogation to the lien is not only a more expeditious way to reach the same result, but also often may benefit the surety who may not have had the foresight to protect himself by assuring a fair market value bid when the creditor sold the principal's property security.

¹⁰⁹ *Katz v. Haskell*, 196 Cal. App. 2d 144, 16 Cal. Rptr. 453 (1961); *Stephenson v. Lawn*, 155 Cal. App. 2d 669, 318 P.2d 132 (1957).

¹¹⁰ The most recent example is *Riddle v. Lushing*, 203 A.C.A. 921, 21 Cal. Rptr. 902 (1962).

¹¹¹ *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955); *Hatch v. Security-First Nat'l Bank*, 19 Cal. 2d 254, 120 P.2d 869 (1942).

¹¹² *Mortgage Guar. Co. v. Sampsell*, 51 Cal. App. 2d 180, 124 P.2d 353 (1942).

ity does not exist. The courts consistently strike down schemes aimed at avoiding the deficiency legislation by illusory changes in form.¹¹³ A flimsy avoidance device based upon an intermediate surety would have no chance of success.

Nor does the fact that the guarantor cannot recover from the principal support the argument for the guarantor's protection. It is not at all unique to find a surety who is liable where he has no recourse against the principal debtor. The code provides for such liability where the debtor has a defense of which the surety is aware when he assumes liability.¹¹⁴ The surety would know of the debtor's 580b defense in the same sense that he would know of the debtor's right to rely upon the statute of limitations,¹¹⁵ or upon any other statutory defense. While they may be otherwise inapplicable, the cases holding the negotiating creditor liable upon a guarantee¹¹⁶ demonstrate that section 580b similarly can be a defense for the debtor without exonerating the surety.

Whether or not a guarantee is the same independent obligation that it was held to be before the statutory abolition of the surety-guarantor distinction, it remains additional security in the form of a contractual undertaking. Presumably the guarantor undertook some detriment when by his guarantee he caused the loan to be made.¹¹⁷ The creditor's motivation for requiring a guarantee often must be that he is unwilling to accept the risk of inadequate security that section 580b and the fair-value limitations place upon him. Providing that the creditor does not shift the risk back to the debtor and still remain secured, there seems to be nothing to

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¹¹³ Examples of unsuccessful avoidance schemes include *In re Wilton-Maxfield Management Co.*, 117 F.2d 913 (9th Cir. 1941); *Schwerin v. Shostak*, 213 A.C.A. 42, 28 Cal. Rptr. 332 (1963); *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955); *Lucky Invs., Inc. v. Adams*, 183 Cal. App. 2d 462, 7 Cal. Rptr. 57 (1960).

¹¹⁴ CAL. CIV. CODE § 2810.

¹¹⁵ See, e.g., *Bloom v. Bender*, 48 Cal. 2d 793, 313 P.2d 568 (1957); *Gaffigan v. Lawton*, 1 Cal. 2d 722, 37 P.2d 79 (1934).

¹¹⁶ *Katz v. Haskell*, 196 Cal. App. 2d 144, 16 Cal. Rptr. 453 (1961); *Stephenson v. Lawn*, 155 Cal. App. 2d 669, 318 P.2d 132 (1957).

¹¹⁷ This is sufficient consideration. CAL. CIV. CODE § 2792; cf. *Mortgage Fin. Co. v. Howard*, 210 A.C.A. 633, 26 Cal. Rptr. 917 (1963). Although the surety described in the text is the contractual guarantor (either compensated or uncompensated), the same arguments apply to the surety by operation of law—the mortgagor or trustor who becomes a surety upon the assumption of the encumbrance by a grantee. See, e.g., *Braun v. Crew*, 183 Cal. 728, 192 Pac. 531 (1920). If the mortgagor is unwilling to accept the obligations of the contractual guarantor, he can refuse to allow his grantee to purchase by assumption of, or subject to, the existing encumbrance and can insist upon a refinancing. If the buyer cannot or will not refinance, the original mortgagor is using the existing encumbrance to make his sale. Having voluntarily taken an additional benefit, there seems to be no good reason why he has not also voluntarily taken all of the additional obligations imposed upon any other guarantor. Whether or not the contractual and implied surety are treated the same way may depend, however, upon whether or not it is the specific terms of a guarantor's contract that control.

prevent his shifting it to a third person who is willing, with or without compensation, to undertake it.¹¹⁸

Roseleaf confined the scope of section 580b to the debtor's obligation secured by the purchased security. The guarantor's obligation is not within this delineation. It is not secured by the purchased security and it is not the debtor's obligation.¹¹⁹ It is simply additional security.¹²⁰ It is not, therefore, part of the purchase money secured transaction.

Parallel construction of the other sections, coupled with their verbal inapplicability, demonstrate the similar inapplicability of the fair-value limitations. There are, nevertheless, appealing arguments for the proposition that the guarantor should be protected by these deficiency barriers. For example, it seems evident that by not reducing his claim to the excess above the property's fair value,¹²¹ the creditor stands to recover more than is owing. The same is true, however, when the creditor fails to reduce his claim to fair-value excess before applying additional property security toward the debt.¹²² The main difficulty with applying the sections to additional security in either form is not that it does not make sense, but rather that the legislature has not done so.

Certainly the courts should not anticipate the legislature in extending the antideficiency statutes. In the absence of legislative relief, the guarantor must understand that his obligation includes protecting himself by bidding the property up to its fair market value. Since he guaranteed the entire obligation, it does not seem unconscionable to compel him to be

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¹¹⁸ The recent Mortgage Guarantee Insurance Act, CAL. INS. CODE §§ 12640.01-19, is legislative recognition of the compensated risk shifting. The act seems to contemplate a guarantee for the benefit of both mortgagor and mortgagee against what normally would be the deficiency. See particularly CAL. INS. CODE §§ 12640.02(a), 12640.09, 12640.095, 12640.19. Under the act the guarantor apparently would pay within specified percentages and be subrogated to the lien. Thus, he would end up paying any excess over the property's value to the mortgagee and would not have a right of reimbursement from the mortgagor.

¹¹⁹ *Murphy v. Hellman Commercial Trust & Sav. Bank*, 43 Cal. App. 579, 586, 185 Pac. 485, 488 (1919). See also *Palm Springs S. & S. Inc. v. Bering*, 213 A.C.A. 196, 199, 28 Cal. Rptr. 526, 528 (1963) (dictum); Comment, 3 U.C.L.A.L. REV. 192, 201-02 (1956). Nor, because the surety would have no right to reimbursement, will it become the principal debtor's obligation.

¹²⁰ The cases so holding are either prior to the abolition of the distinction between guarantors and sureties, e.g., *Loeb v. Christie*, 6 Cal. 2d 416, 57 P.2d 1303 (1936); *Murphy v. Hellman Commercial Trust & Sav. Bank*, *supra* note 119 (guarantor and surety both additional security), or did not mention the statute abolishing the distinction, e.g., cases cited note 108 *supra*. But if abolishing the distinction somehow means that the guarantor is no longer additional security, what is he?

¹²¹ As required by CAL. CODE CIV. PROC. §§ 508a, 726, for a non-purchase money deficiency.

¹²² The creditor may continue to exhaust all property security after nonjudicial sale of one parcel of the security without reducing his claim to the difference between the debt and the fair market value of the property sold; application of additional security is not a deficiency judgment against the debtor within § 580a. *Hatch v. Security-First Nat'l Bank*, 19 Cal. 2d 254, 120 P.2d 869 (1942).

ready to accept the property security or its fair market value by bidding, just as subrogation would have forced him to do under the old procedure.¹²³

Perhaps this is the reason the legislature has not extended deficiency protection to the guarantor. Possibly the legislature has chosen to leave available a method for the lender to reasonably assure himself that he will be satisfied in cash rather than property. That this method may allow the creditor some excess recovery, if the guarantor chooses not to bid up to fair market value, seems an inevitable concomitant. The only leverage toward the guarantor's bid, unless prior suit and subrogation to the lien remain to accomplish the same thing,¹²⁴ is the possibility of his losing more than he would lose if he took the property. While this may or may not have any bearing on the legislative purpose, the undesirability of possible excess recovery is not so clear that the judiciary is likely to assume that some legislative purpose requires expanding the statutes to prevent it.

While it seems clear that the guarantor and surety will derive no protection from the antideficiency legislation, it seems equally clear that the court will insist upon the bona fide rather than sham guarantee as a prerequisite. A guarantee by one who turns out to be the principal debtor will be unavailing. Thus, a separate guarantee by the assuming grantee,¹²⁵ a guarantee of a partnership debt by one who is a general partner,¹²⁶ a guarantee of an obligation of a nominal or sham principal,¹²⁷ or any illusory separation of obligations will result, as they have in the past, in deficiency protection for the nominal guarantor.

The cases have consistently pointed toward guarantor liability. By defining the scope of 580b's operation in terms that exclude the guarantor from its coverage, *Roseleaf* seems to have made this liability a certainty.

II

SECTION 580d

A. Legislative Purpose¹²⁸

In 1933 the legislature made judicial foreclosure available to the trust

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¹²³ This "old" procedure may well remain the modern procedure. See note 108 *supra*.

¹²⁴ See note 108 *supra*.

¹²⁵ E.g., *Everts v. Matteson*, 21 Cal. 2d 437, 132 P.2d 476 (1942).

¹²⁶ E.g., *Riddle v. Lushing*, 203 A.C.A. 921, 21 Cal. Rptr. 902 (1962).

¹²⁷ *In re Maxfield Management Co.*, 117 F.2d 913 (9th Cir. 1941).

¹²⁸ The legislative purpose of § 580d is fully described by the court in the *Roseleaf* opinion. The illustration of its purpose here is not to add to the court's analysis, but instead to close the inquiry into the interrelation of the deficiency statutes. The section provides in part:

No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust.

deed beneficiary,¹²⁹ affording him the choice of sale under the power or foreclosure by action. While his right to a deficiency was identically limited under either choice by the parallel fair-value provisions of sections 726 and 580a,¹³⁰ also enacted in 1933, judicial foreclosure was disadvantageous from the creditor's standpoint because it carried with it the debtor's statutory right of redemption.¹³¹ The beneficiary's disadvantage in facing the statutory right of redemption was more than the additional expense and additional delay involved; it was also the probable loss of the chance to obtain both the property and a substantial deficiency judgment, an opportunity that was open to him under nonjudicial sale prior to 1939 when section 580d was enacted as a substitute for the statutory right of redemption.¹³²

Assume, for example, that the beneficiary's note was in the amount of \$20,000 and that it was secured by a first deed of trust on property with a fair market value of \$20,000 at the time of foreclosure sale. If the beneficiary could have bid in at his extrajudicial sale for \$10,000, a not unreasonable hypothesis in the 1930's, he would have had property worth \$20,000 plus an opportunity to obtain a deficiency judgment for any amount he could have shown to be fair market difference up to \$10,000. In view of the uncertainty involved in proof of market value, the beneficiary would have had a reasonable chance of showing a fair market value of something less than the \$20,000 hypothesized.¹³³ If he did not show less, he nevertheless would have had property worth \$20,000; if he could show less, he would have had the property and would have been a judgment to the good.

Had the beneficiary selected judicial foreclosure with its attendant statutory right of redemption, the risk he would have run in bidding-in for \$10,000 would have decreased the probability of his doing so. If the property he had taken for \$10,000 was actually worth \$20,000, there would have been considerable risk, particularly in the waning years of the depression, of a junior creditor redeeming or of someone purchasing the mort-

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¹²⁹ CAL. CODE CIV. PROC. § 725a. Judicial foreclosure was available to the trust deed beneficiary before the 1933 enactment of § 725a, but only under limited circumstances. See *Lincoln v. Superior Court*, 2 Cal. 2d 127, 39 P.2d 405 (1934); *Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley*, 217 Cal. 644, 20 P.2d 940 (1933).

¹³⁰ Both sections limit a deficiency to the difference between the fair value of the security at the time of its sale and the amount of the debt. Section 726 does so following the judicial sale; § 580a, following the nonjudicial sale.

¹³¹ The redemption period following the judicial sale is either three months or one year, depending in part upon whether or not the creditor takes a deficiency. CAL. CODE CIV. PROC. § 725a.

¹³² Section 580d was first enacted as 580c in 1939, Cal. Stat. 1939, ch. 586, p. 1991, and re-enacted as 580d in 1940, Cal. Stat. 1941, ch. 29, p. 83. See *Riesenfeld*, *supra* note 7, at 706-07.

¹³³ CAL. CODE CIV. PROC. § 726 sets out the appraisal procedure. The evidence of value is not limited, however, to the opinion of the court appointed appraiser. See 21 CALIF. L. REV. 471, 472 (1933).

gagor's statutory right of redemption and redeeming as a successor in interest.¹³⁴ The junior, the mortgagor, or the latter's successor in interest would then have redeemed for the \$10,000 bid price,¹³⁵ leaving the beneficiary with \$10,000 in cash rather than property worth \$20,000—coupled, of course, with the same obligation to show a fair market value of less than \$20,000 as a prerequisite to a deficiency judgment.¹³⁶ By bidding \$10,000 at his judicial sale, the beneficiary would have traded a lien on property worth \$20,000 for \$10,000 plus a possible judgment for some amount between zero and \$10,000; a substantially different recovery than the \$20,000 property plus the same deficiency judgment, which he could have anticipated had he used the nonredeemable, extrajudicial sale.

The statutory right of redemption shifted the incentive from a low bid to a realistic bid, somewhere close to the fair market value of the security.¹³⁷ If the legislative goal was to provide for a parity of remedies, as seems apparent from its having established judicial foreclosure for the deed of trust¹³⁸ at the same time that it enacted a fair market value deficiency limitation following either kind of foreclosure,¹³⁹ this goal was not reached by the 1933 legislation.

By enacting section 580d in 1939, the legislature placed the remedies on a substantial par. To do so, it had the choice of affording the debtor the same statutory right of redemption after nonjudicial sale that he enjoyed with judicial foreclosure, or of denying the creditor a deficiency judgment following extrajudicial sale. Either of these alternatives would likely have assured that the property would satisfy a realistic share of the indebted-

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¹³⁴ It is immaterial whether one purchases the debtor's interest before or after the sale for purposes of becoming a successor in interest under the redemption provisions. CAL. CODE CIV. PROC. § 702, *Call v. Thunderbird Mortgage Co.*, 58 A.C. 555, 375 P.2d 169, 25 Cal. Rptr. 265 (1962); *Corporation of America v. Eustace*, 217 Cal. 102, 17 P.2d 723 (1932). Although *Call* may have overruled *Eustace sub silentio* on another point, both cases are authority for the text.

¹³⁵ The purchase price plus costs, interest, etc., is the redemption price. CAL. CODE CIV. PROC. § 702.

¹³⁶ Like § 580a after nonjudicial sale, the 726 fair-value provision limits the deficiency to the difference between the debt and the fair market value following judicial sale. Even if the beneficiary could show some difference value and thereby recover a judgment, a redemption by a junior creditor or by a successor in interest would prevent him from later recovering via a judgment lien on the redeemed property, a deficiency judgment not being a lien during the redemption period and thus not a lien against the property in the hands of a successor in interest. See *Black v. Gerichten*, 58 Cal. 56 (1881); *Simpson v. Castle*, 52 Cal. 644 (1878).

¹³⁷ This presupposes a nondepressed economy so that money for a bargain redemption is available. Perhaps this is why § 580d was not enacted until 1939, even though it was proposed in 1933. See A.B. 1290, Cal. Leg., Reg. (Gen.) Sess. (1933). See also 21 CALIF. L. REV. 471, 473 n.4 (1933).

¹³⁸ Cal. Stat. 1933, ch. 642, § 7 (codified in CAL. CODE CIV. PROC. § 725a).

¹³⁹ Cal. Stat. 1933, ch. 642, § 4 (codified in CAL. CODE CIV. PROC. § 580a); Cal. Stat. 1933, ch. 793, § 1 (codified in CAL. CODE CIV. PROC. § 726).

ness. In selecting the latter alternative, in the form of section 580d, the legislature established a balance between the remedies without depriving the creditor of the opportunity to choose a remedy that could result in an immediate nonredeemable title.

*B. The Nonselling Creditor*¹⁴⁰

The district court of appeal held that the *Roseleaf* plaintiff's action was barred by section 580d.¹⁴¹ Viewed in the light of what the history of the legislation indicates must have been its purpose, it seems clear that the opposite conclusion of the supreme court was correct; section 580d does not apply to a sold-out junior. It does not bar a junior creditor, in other words, who has not himself had the nonjudicial sale which exhausted the security. A redemption substitute should bar no one other than a creditor whose lien is foreclosed; certainly it should not impair the remedy of one who himself would have had the right to redeem.¹⁴² To have applied 580d to the nonselling junior would have distorted the symmetry of remedy which was the legislative motivation behind the parallel enforcement devices—a legislative purpose recognized by the supreme court in *Roseleaf*.¹⁴³

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¹⁴⁰ The "nonselling" creditor is used interchangeably with the "nonforeclosing" creditor. Both refer to the creditor who has not had a judicial or extrajudicial sale.

¹⁴¹ 206 A.C.A. 677, 685, 24 Cal. Rptr. 29, 33 (1962). The district court of appeal decided that 580d's reference to "such mortgage or deed of trust" included a mortgage or deed of trust other than that under which the sale occurred. This can be explained in part by the fact that the court relied upon a different version of 580d than that quoted in note 128 *supra*. The court quoted the statute as prohibiting a judgment after sale under the power "contained in such a mortgage or deed of trust" rather than "such mortgage or deed of trust." *Id.* at 682, 685, 24 Cal. Rptr. at 31, 33. (Emphasis added.) The additional word "a" appears in the *Deering Codes* although not in any other published version. Evidently the district court of appeal used the *Deering Codes*. The ditto of the supreme court's original opinion, at page 11, contains the correct version of 580d, "such mortgage," as does the opinion in the *California Reporter*. 27 Cal. Rptr. at 877. But what is represented to be the supreme court's opinion in *Advance California Reports* includes the erroneous "such a mortgage." 59 A.C. at 53.

¹⁴² A junior lien creditor has a statutory right of redemption from the senior's judicial sale, CAL. CODE CIV. PROC. § 701, if he does not foreclose his lien in the same action and thereby become a selling creditor, *San Jose Water Co. v. Lyndon*, 124 Cal. 518, 57 Pac. 481 (1899).

¹⁴³ The extension of § 580b to the nonforeclosing junior in *Brown v. Jensen*, 41 Cal. 2d 193, 259 P.2d 425 (1953), upon which the district court of appeal relied, would not control the 580d question even if *Brown v. Jensen* were a correct interpretation of § 580b—which it may well no longer be. See notes 28–44 *supra* and accompanying text.

Section 580b prevents a deficiency judgment on a purchase money obligation regardless of the enforcement device chosen by the creditor. Since from the inception of the transaction § 580b left the foreclosing creditor no recovery other than the security, it was not a great extension of the statute to apply it in *Brown* to the nonselling creditor as well. The 580b "deficiency judgment" thereby became a personal judgment on the debt against the debtor under any circumstances—it became, as the court held, any difference between the debt and the value of the security whether or not the creditor had access to any part of the security.

In the nonpurchase transaction, however, the total prohibition of remedy does not exist.

C. No Deficiency Upon a "Note"

There remains, in view of 580d's reference to a "note," what might be an imbalance between the judicial and nonjudicial foreclosure notwithstanding the parity of remedies described by the court in *Roseleaf*.¹⁴⁴ Whether or not there is this imbalance is one of the few unanswered questions concerning the scope of the 580d prohibition.

Section 580d prohibits a deficiency judgment following extrajudicial foreclosure only when the encumbrance secures a "note." This, arguably, leaves other forms of indebtedness reducible to a deficiency judgment against the debtor with neither the judicial sale's redemption protection nor the nonjudicial sale's antideficiency prohibition.¹⁴⁵ The unanswered question, however, is what is a "note"?

At least one district court of appeal decision has held the section to be limited literally to a "note"; limited, in fact, to a negotiable note.¹⁴⁶ The only supreme court case to consider this question, *Freedland v. Greco*,¹⁴⁷ although holding that the section was at least broad enough to include two notes when they represented the same indebtedness, left open the question of how broadly 580d's "note" should be construed by observing that "obligation," "debt," etc., used in other antideficiency sections *may* be broader than a "note." Whether or not those terms are broader, and if so how much broader, was not at issue in *Freedland*, and was, therefore, not resolved. *Roseleaf's* recognition of the interrelation of the sections, however, makes it a better than even chance that 580d's "note" means all evidences of indebtedness other than those specifically excluded by the

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If he chooses judicial foreclosure, the creditor may recover a personal deficiency judgment. CAL. CODE CIV. PROC. § 726. The reason underlying the *Brown v. Jensen* 580b deficiency definition—580b's total preclusion of recourse to anything other than the property—does not exist where the transaction was not a purchase money transaction. Absent the reason for the *Brown* definition, the definition has no validity. Even if *Brown* is still law, its relation to the nonselling junior under 580d would only be one of misleading semantics; it actually would have no bearing at all.

¹⁴⁴ The 1933 enactment of CAL. CODE CIV. PROC. § 580b in no way affected the parity of remedies described by the court in *Roseleaf*, because § 580b was a true antideficiency statute prohibiting a deficiency judgment regardless of the form of remedy under which it was sought. Similarly, the moratoria legislation of 1935 being, as it was, applicable to all remedies, had no effect upon the parity of remedy. See Comment, 30 CALIF. L. REV. 172 (1942).

¹⁴⁵ If § 580d does not bar a deficiency upon other evidence of debt, the 580a fair-value limit would apply. But so too would the 726 fair-value limit in the judicial context. It is the redemption substitute effect of 580d's deficiency prohibition that would be missing and would leave an imbalance of remedy.

¹⁴⁶ *Willys Co. v. Pierce*, 140 Cal. App. 2d 826, 296 P.2d 25 (1956). The court found "note" to be limited to a negotiable note by accepting the definition in CAL. CIV. CODE § 3266. But this section, on its face, seems limited to the negotiable instrument provisions in which it is found and would thus not apply to § 580d.

¹⁴⁷ 45 Cal. 2d 462, 289 P.2d 463 (1955).

second paragraph of that section.¹⁴⁸

If the second paragraph of section 580d is not simply a definition of the exclusion of the first, it is partially redundant. While the first paragraph provides, "no . . . deficiency upon a note . . .," the second paragraph says that the "section shall not apply to . . . bonds." (Emphasis added.) If all forms of indebtedness other than notes are excluded in any event, there would seem to be little purpose for the legislature's specific exclusion of a particular form of bond. Since the moratoria legislation of 1935 contained a similar exclusion of corporate and public utility evidences of indebtedness,¹⁴⁹ it seems quite likely that section 580d was intended to contain only the same exclusions, not an exclusion of all non-note private transactions.¹⁵⁰

The legislative purpose in enacting section 580d was to protect the debtor when the creditor's nonjudicial sale has withdrawn the protection of a statutory right of redemption. This purpose is most effectively carried out by excluding only the specific exceptions of 580d's second paragraph from the statute's prohibitions. Arguably, however, the 580d "note" limitation represents legislative reluctance to interfere with the extraordinary, and economically dissimilar, non-note secured transaction. It is possible that the section's proponents believed that those forms of indebtedness that could not be classified as some form of a note¹⁵¹ were likely to be sufficiently unique to deserve exclusion from blanket coverage. The strongest possibility, because it most completely carries out the redemption-substitute purpose ascribed to section 580d by *Roseleaf*, is that 580d's "note" is as broad as the "obligations" and "debt" of the other sections except in the corporate and public utility context. It is clear, in any event, that there is no reason consistent with 580d's redemption-substitute purpose that would dictate artificially confining the prohibition to the *negotiable* note.¹⁵²

Roseleaf also answered the reciprocal "note-debt" question; 580d's "note" is no broader than 726's "debt." By its holding that section 580d barred the junior creditor's action on his note following the senior's nonjudicial sale, the district court of appeal necessarily held that the barred

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¹⁴⁸ The second paragraph provides:

The provisions of this section shall not apply to any deed of trust, mortgage or other lien given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or which is made by a public utility subject to the provisions of the Public Utilities Act.

¹⁴⁹ See Comment, 30 CALIF. L. REV. 172, 174 n.6 (1942).

¹⁵⁰ On the other hand the legislature could have provided that only the transactions of the second paragraph are excluded from the first, if that is what it meant. There is some redundancy no matter how the statute is interpreted.

¹⁵¹ E.g., an oral obligation, an open account, rent, as well as bonds and corporate evidences of debt.

¹⁵² To which it was limited by *Willys Co. v. Pierce*, 140 Cal. App. 2d 826, 296 P.2d 25 (1956).

"note" need not represent the "debt" that was partially satisfied by the foreclosing creditor's sale. This holding was based on the conclusion that *Freedland v. Greco*,¹⁵³ supported somewhat fortuitously by *Brown v. Jensen*,¹⁵⁴ extended 580d's bar to any note, whether or not it was part of the selling creditor's debt.

In *Freedland v. Greco*, a single creditor took two duplicate notes representing the same consideration; one was secured by a non-purchase money trust deed, the other by a chattel mortgage upon part of the purchased property.¹⁵⁵ First he sold the interest in the real property under the power of sale in his trust deed; he then brought an action to judicially foreclose the chattel mortgage and to obtain a deficiency for the balance remaining after the second foreclosure. The note secured by the chattel mortgage was physically a separate note from that secured by the real property; the deficiency sought was a deficiency upon the chattel mortgage note; yet the creditor's deficiency properly was barred by section 580d as a deficiency upon a note following a sale under the power.

The supreme court's opinion in *Roseleaf* demonstrated that *Freedland* goes no further than the avoidance device and that its holding applies only to notes representing the same consideration. Because the *Roseleaf* plaintiff's notes were not held by the creditor who had had the extrajudicial sale, the senior selling creditor satisfied a separate debt. In allowing the plaintiff's action, *Roseleaf* clarified the fact that *Freedland* did not extend 580d's "note" to every note but only to those that represent the same consideration; only to those, in 726 and 580a terms, that represent the same "debt" or same "obligation."

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¹⁵³ 45 Cal.2d 462, 289 P.2d 463 (1955).

¹⁵⁴ 41 Cal.2d 193, 259 P.2d 425 (1953). In holding 580d to be a bar to the nonselling junior's action, the district court of appeal in *Roseleaf* combined *Freedland* with the following dicta from *Brown*:

These provisions [§§ 580a and 580d] indicate a considered course on the part of the Legislature to limit strictly the right to recover deficiency judgments, that is, to recover on the debt more than the value of the security. Next comes section 580b. . . . That section is necessarily intended to provide a protection for the trustor because if it were intended to cover only the situation where there has been an actual sale of the security under the power of sale in the trust deed, it would be superfluous. Section 580d covers precisely that situation in *all* trust deeds, whether purchase money or otherwise.

Id. at 197, 259 P.2d at 426-27. This dicta unquestionably supports the district court of appeal's use of it—but the dicta seems erroneous. Section 580d would not have rendered § 580b superfluous even if *Brown* did not extend 580b to the sold-out junior. Section 580b bars the selling creditor's deficiency judgment after judicial sale while § 580d does not. Only if a purchase money encumbrancer uses a nonjudicial sale in preference to a foreclosure action is there an overlap. In the absence of § 580b, purchase money creditors would use judicial foreclosure and take a deficiency. To say that § 580b would be superfluous in view of § 580d, unless applied to the separate debt of the nonforeclosing creditor, is to ignore this effect of 580b.

¹⁵⁵ A purchase money chattel mortgage is not within § 580b, nor is this the combination of chattel and real purchase money encumbrances that is within the second paragraph of § 580b.

III

SECTION 726: ONE FORM OF ACTION TO RECOVER UPON A "DEBT"

The *Freedland v. Greco* "same note-same debt" equation could have affected *Roseleaf* in another way—not in the confusion with the note of the unrelated senior encumbrancer but in its effect upon the four notes held by the plaintiff. The *Roseleaf* plaintiff sued on only three of the four notes that made up the total price of the hotel.¹⁵⁶ The other note remained secured by the hotel, was not in default, and was not included in the plaintiff's action. The "same note-same debt" question suggested by these facts is whether or not the four notes given at the same time in payment of a single price for one piece of property were but part of a single "debt" under section 726.¹⁵⁷ If they were, section 726 would have compelled the exhaustion of all security, including that for the remaining note, as a prerequisite to a judgment on the part of the debt represented by the three notes in suit.¹⁵⁸

The supreme court noted that the prior exhaustion of the security for the three notes had removed the 726 bar.¹⁵⁹ This is true, however, only if each note represented a separate debt. If each note was but a part of a single debt, not all of the security for that debt would have been exhausted until after the plaintiff's sale of the security for his remaining note. Thus

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¹⁵⁶ These three, it will be recalled, although initially secured by junior trust deeds on unrelated properties, had been left unsecured by senior sale of these parcels.

¹⁵⁷ In compelling one form of action to recover upon a secured debt, § 726 refers only to the "mortgage." But CAL. CODE CIV. PROC. § 725a makes it clear that § 726 includes the trust deed. It has long been so construed. *Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley*, 217 Cal. 644, 20 P.2d 940 (1933).

¹⁵⁸ A good recent example is *Schwerin v. Shostak*, 213 A.C.A. 42, 28 Cal. Rptr. 332 (1963), where the creditor, so as to sue directly on the notes, unsuccessfully sought to avoid § 726 relying upon a change in the form of the debt. The sanction for failing to exhaust all security is the waiver of the balance of the debt and the waiver of the balance of the security. *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200 (1889); see *Appel v. Hubbard*, 155 Cal. App. 2d 639, 318 P.2d 164 (1957). Whether or not the 1933 amendment of § 726 from "one action" to "one form of action" changed *Hall v. Arnott* with respect to waiver of the balance of the debt, § 580d and the fair-value provision of § 726 make it clear that the creditor would waive the balance of his security by taking a prior judgment. Otherwise, by reversing the order, the creditor could get what 580d prohibits, a personal judgment and extrajudicial sale of the security—or what the fair-value section prevents, a judgment not reduced to the excess over the fair market value of the security. The point normally will arise only if the debtor fails to prevent the action on the note by failing to raise § 726 as an affirmative defense. Like any other affirmative defense, § 726 is waived if not raised. See *Salter v. Ulrich*, 22 Cal. 2d 263, 138 P.2d 7 (1943); *Spector v. National Pictures Corp.*, 201 Cal. App. 2d 217, 20 Cal. Rptr. 307 (1962).

¹⁵⁹ The creditor may sue on the debt notwithstanding § 726 if his security becomes valueless to him as a result of economic decline, *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086 (1890); is destroyed, *Cohen v. Marshall*, 197 Cal. 117, 239 Pac. 1050 (1925); or is exhausted by senior sale, *Savings Bank v. Central Mkt. Co.*, 122 Cal. 28, 54 Pac. 273 (1898); *Giandini v. Ramirez*, 11 Cal. App. 2d 469, 54 P.2d 91 (1936).

the supreme court's comment upon section 726 necessarily implied that each note represented a distinct debt.

Although there is authority for the proposition that separate notes constitute separate debts for purposes of section 726, this authority tends to deal with the easy problem of notes given for distinct purposes.¹⁶⁰ With or without direct precedent, however, the court undoubtedly was correct in concluding that by fractionalizing a total price and representing distinct parts of it by truly distinct notes, the parties successfully converted the indebtedness into separate debts for section 726 purposes.

Had the court held the four notes to be parts of the same debt, thereby compelling sale of the security for the fourth note prior to suit on the three, it would have had to rewrite the transaction of the parties. Since the fourth note was current, its default would have had to have been implied in order to allow the sale of its security. Where part of a single debt is not due, the code¹⁶¹ provides for sale of as much of the security as is necessary to satisfy the part of the obligation in default. It may or may not be practical to sell part of a hotel to satisfy whatever part of the debt is past due. But unless the three separate notes were secured by the hotel, in addition to the fourth note for which it was express security, there would be no past due obligation to satisfy from its sale. In other words, contrary to the terms of the notes and trust deeds, the court would have had to have found the fourth note to be in default and the other three notes to be additionally secured by the hotel. A sale of the remaining security would have depended upon acceleration of the part of the debt represented by the fourth note—this would be contrary not only to the transaction adopted by the parties, but also to the legislative policy against acceleration.¹⁶² All of this would be surprising indeed as an interpretation of a debtor relief provision.

There are many ways that the parties could have expressed the price as a single debt. They could have used a single note secured by four separate trust deeds, thereby having the common single-debt, multiple-security transaction for purposes of sections 726, 580b, and 580d.¹⁶³ Otherwise they could have adopted notes that are separate in form but represent the same

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¹⁶⁰ See, e.g., *County Bank v. Greenberg*, 127 Cal. 26, 59 Pac. 139 (1899); *McArthur v. Magee*, 114 Cal. 126, 45 Pac. 1068 (1896); *Guyselman v. Ramsey*, 179 Cal. App. 2d 802, 4 Cal. Rptr. 133 (1960); *Williams v. Reed*, 113 Cal. App. 2d 195, 248 P.2d 147 (1952); *Flores v. Stone*, 21 Cal. App. 105, 131 Pac. 348 (1913). See also *Williams v. Reed*, 48 Cal. 2d 57, 307 P.2d 353 (1957).

¹⁶¹ CAL. CODE CIV. PROC. § 728.

¹⁶² CAL. CIV. CODE § 2924c relieves the debtor even from express acceleration, allowing him to reinstate by payment of nonaccelerated arrearages.

¹⁶³ Illustrative are *Stockton Sav. & Loan Soc'y v. Harrold*, 127 Cal. 612, 60 Pac. 166 (1900); *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200 (1889). This also would have made it a single "purchase price" for 580b purposes. See text accompanying notes 73-85 *supra*.

consideration, in the *Freedland v. Greco* tradition, and still have had a single-debt, multiple-security transaction for deficiency purposes.¹⁶⁴ They chose instead to represent different amounts by notes that were separately payable and separately secured; notes that had nothing in common except the fortuitous circumstance that they were given at the same time to make up a total amount—or, if one prefers, a total indebtedness. The court wisely chose to give effect to the format adopted by the parties.

The form of the “debt” controls. If the parties express a single price by a single note or by duplicate notes, they have a single debt. If they express a single price by participation or series notes, they still have a single debt.¹⁶⁵ But if they break the price into distinct amounts represented by separate notes that are independently secured or partially unsecured, they have separate debts. This construction of the 726 “debt” is identical with the construction of 580d’s “note” and, where factually applicable as it was in *Roseleaf*, with 580b’s “purchase price.” Several notes may represent one debt or several debts; if the former, the transaction is a “debt” for purposes of section 726, a “note” within 580d, and a “purchase price” for 580b purposes; if the latter, it is not a “debt,” a “note,” or a “purchase price.” The meaning of these terms, in the multiple note context, is identical. In addition, as previously mentioned, there is a good possibility that there is no difference between 726’s “debt” and 580d’s “note” even in the non-note context, just as there is no difference between the 726 “debt” and the 580b “purchase price” regardless of the evidence of indebtedness.

CONCLUSION

It is possible today to answer many antideficiency questions that in the past were purely speculative. In *Roseleaf* and *Bargioni* the supreme court specifically resolved some of them. By adopting a frame of reference to which others can be related, the court pointed toward the solution to most of the remainder. With the possible exception of the *Brown v. Jensen* extension of section 580b, the judicial construction of the statutes has given them a consistent framework so that a decision under any one of the sections is precedent for the same decision under any of the others. Predicting what is or is not subject to the deficiency limitations has become, therefore, a task that one may undertake with considerably less uncertainty than in the past.

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¹⁶⁴ *Freedland v. Greco*, 45 Cal. 2d 462, 289 P.2d 463 (1955).

¹⁶⁵ The note or certificate holders have neither different liens nor separate debts, but are instead common owners of a single encumbrance. Regardless of due dates, no one is prior; each shares pro rata in the single recovery in the absence of an agreement for pro tanto recovery. See, e.g., *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883 (1884). See also CAL. CODE CIV. PROC. § 728; OSBORNE, MORTGAGES §§ 243-44 (1951).