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Contracts for the Benefit of Third Persons in California

SPEAKING of contracts for the benefit of third persons, Marshall, J., remarked: "There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned. . . . There is confusion not only between different courts, but confusion in the decisions in many jurisdictions in the same court."¹

Inasmuch as the above statement seems true of the California decisions, it may be worth while to review them in order to present as clear a view as possible of the law of this state.²

It has become more or less customary³ to divide beneficiaries into three classes, *viz.*: creditor beneficiaries,⁴ donee beneficiaries, and lastly, incidental beneficiaries to whom are denied legally enforceable

¹ Tweeddale v. Tweeddale (1903) 116 Wis. 517, 522-523, 93 N. W. 440, 442.

² To avoid misconception, it should perhaps be said that the term "beneficiary" is employed here, as generally, to mean one who will be benefited by the performance of the contract but who is not a party thereto. Excluded are those who claim by way of assignment either by consensual agreement or by operation of law, and also the beneficiaries of trusts where the contract calls for performance to a party to the contract who in the particular case is a trustee for others. Nor are we concerned herein with the problems of the undisclosed principal in the law of agency, although there may be some resemblances in that topic.

Although most of the cases on the subject are actions for money judgments, yet in a particular case injunctive, as in *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041, or other equitable relief may be proper.

³ 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 356; RESTATEMENT OF THE LAW OF CONTRACTS (Am. L. Inst. 1932) § 133.

⁴ The term is used in a broad sense to include one to whom the promisee is under some liability, whether contractual or delictual. This liability at the time the contract is made may be mature or immature, absolute or contingent. It may also be entirely prospective as when a surety bond protects those who may later supply building materials, although no one is under obligation to buy them from any particular person when the contract is made. The beneficiary may also be a double-barrelled one, as where a reinsurer agrees with the fire insurer to satisfy the obligations of the original policy which binds the insurer to pay to a mortgagee of the insured. *Whitney v. American Ins. Co.* (1900) 127 Cal. 464, 59 Pac. 897.

interests.⁵ Accepting, however, the meaning attached to "creditor" and "donee" in this connection, it would seem that there is still another class in whom are recognized legal interests. For want of a better term they may be called quasi-creditor beneficiaries, although they might as well be called quasi-donee beneficiaries. Falling within this class are those who are creditors of persons other than the promisee, such as laborers or materialmen protected by a building contractor's bond, where the owner-promisee is under no personal obligation to such persons although his property may be subject to a lien. Even less aptly may the laborer be called a creditor beneficiary where he has not even a lien as in the case of governmental improvements. Yet such person is not exactly a donee beneficiary since performance of the bond merely results in satisfaction of his claim against another. Still less applicable is the term "creditor beneficiary" to a laborer securing the benefit of a collective bargaining wage agreement, particularly where he is not even a member of the union obtaining the agreement, and in ignorance thereof works under an individual arrangement with the employer for a lower wage.⁶ The laborer must work to secure the benefit of the agreement but he is a donee so far as he obtains benefits not provided for by his contract of employment. Another type of quasi-creditor beneficiary is presented in a California case where a wholesaler exacted from a retailer an agreement not to retail at less than a certain price. The promise was obtained because the wholesaler had agreed with the manufacturer to do so. It would be improper to call the manufacturer a donee, and yet he was not a creditor of the promisee since the latter performed his obligation by the very act of securing the retailer's promise.⁷ While to some extent this three-fold classification of beneficiaries with enforceable interests may be of no legal significance, the rights of the different classes may, as will be shown later, be somewhat different.

Before the adoption of the Civil Code there were few decisions in California. In the earliest,⁸ presenting a simple creditor beneficiary contract, recovery was denied, with little discussion, on the

⁵ The terms "creditor" and "donee" beneficiaries have only recently found expression in the cases. See *Anderson v. Calaveras Central Min. Corp.* (1936) 13 Cal. App. (2d) 338, 57 P. (2d) 560, citing *RESTATEMENT OF THE LAW OF CONTRACTS* (Am. L. Inst. 1932) § 133.

⁶ 2 WILLISTON, *op. cit. supra* note 3, § 379A; (1931) 16 MINN. L. REV. 100; (1935) 2 U. OF CHI. L. REV. 335; (1931) 18 VA. L. REV. 182; (1937) 46 YALE L. J. 706.

⁷ *D. Ghirardelli Co. v. Hunsicker*, *supra* note 2.

⁸ *McLaren v. Hutchinson* (1861) 18 Cal. 80.

ground that the creditor was not a party to the contract. The next⁹ cast doubt upon the first. Finally in *Morgan v. Overman Silver Mining Co.*¹⁰ the court allowed recovery to a creditor beneficiary without reference to the earlier cases.

STATUTORY PROVISIONS

The Civil Code, as originally enacted in 1872, contained several sections, still extant in their original form, that have been relied upon as justifying recovery by the beneficiary. Deferring discussion of that most clearly applicable,¹¹ it is proposed to discuss first section 2854:

"A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction."

A considerable number of California decisions has based the right of the creditor beneficiary upon this section.¹² It is, however, at once obvious that the donee and quasi-creditor beneficiary cases cannot be founded upon it, for the promisee cannot possibly be a surety since by hypothesis he is under no obligation to the beneficiary.

The code section is clearly a statutory expression of an equitable doctrine previously worked out by the courts, although not without objection and dissent, and we find cases in other jurisdictions, lacking such statutory provision, basing the right of the creditor beneficiary upon it. The principle is sometimes stated as an instance of subrogation. The use of that term, however, would seem incorrect. Briefly, subrogation proper is the principle that one who has to pay and does pay a debt by reason of being a surety,¹³ or who, without

⁹ *Lewis v. Covillaud* (1862) 21 Cal. 179.

¹⁰ (1869) 37 Cal. 534.

¹¹ CAL. CIV. CODE § 1559.

¹² *Biddel v. Brizzolara* (1883) 64 Cal. 354, 30 Pac. 609; *Williams v. Naftzger* (1894) 103 Cal. 438, 37 Pac. 411; *Hopkins v. Warner* (1895) 109 Cal. 133, 41 Pac. 868; *Tulare County Bank v. Madden* (1895) 109 Cal. 312, 41 Pac. 1092; *Daniels v. Johnson* (1900) 129 Cal. 415, 61 Pac. 1107; *Cunningham v. Robinson* (1925) 196 Cal. 672, 239 Pac. 313 (assuming buyer of property subject to chattel mortgage); *Mottashed v. Central & Pac. Impr. Corp.* (1935) 8 Cal. App. (2d) 256, 47 P. (2d) 525 (stating that CAL. CIV. CODE § 1559 is based upon this principle).

¹³ He may be technically not a contractual surety but be under some obligation, although as between himself and another the latter should ultimately pay. See Langmaid, *Some Recent Subrogation Problems in the Law of Suretyship and Insurance* (1934) 47 HARV. L. REV. 976, reprinted in *LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP*

liability pays to protect some interest of his own when as between himself and another the latter should pay, is put in the position of the creditor as against the principal or that other person. The application of the rule embodied in section 2854 to the creditor beneficiary contract is a neat instance of question-begging. The argument is that the promisor is the principal debtor and the promisee the surety, and hence that the creditor is entitled to the benefit of the contract. This assumes the promisor to be liable to the creditor; how otherwise could he be the principal debtor? It would seem as sensible to say that in ordinary suretyship the principal debtor is liable to the creditor because the surety is entitled to exoneration by the principal rather than on the ground that the latter contracted with the creditor. Furthermore, the equity doctrine of the code section is confined, apart from the very instance in question, to the case where the principal has given his surety a mortgage, pledge, or other security of like nature. Here, however, the only "security" that the "surety" has is the very promise that makes the promisor liable to the creditor beneficiary. It is only as a *result* of the theory that the promisor becomes the principal and the original debtor the surety that certain suretyship defenses are afforded the promisee when sued by the creditor beneficiary.¹⁴ It is, however, necessary to point out many

MCMURRAY (1935) 245. Also as between co-sureties, the one paying more than his proper contributive share may be subrogated *pro tanto* as against his fellow.

¹⁴ Extension of time to assuming grantee of mortgaged property discharges the mortgagor. *Tuohy v. Woods* (1898) 122 Cal. 665, 55 Pac. 683; *Herd v. Tuohy* (1901) 133 Cal. 55, 65 Pac. 139; *Crisman v. Lanterman* (1906) 149 Cal. 647, 87 Pac. 89. See also *Braund v. Crew* (1920) 183 Cal. 728, 192 Pac. 531 (extension to non-assuming grantee taking expressly subject to mortgagor). The following cases also recognize that the assuming grantee of the mortgagor becomes the principal and the mortgagor the surety: *Williams v. Naftzger*; *Hopkins v. Warner*, both *supra* note 12; *Roberts v. Fitzallen* (1898) 120 Cal. 482, 52 Pac. 818. Where there is a series of assuming grantees, each is principal to the preceding ones. *Robson v. O'Toole* (1919) 45 Cal. App. 63, 187 Pac. 110. Since the extension of time rule is based on the theory that a binding extension may prejudicially affect the surety because it makes it impossible for the creditor to collect from the principal until the extension period has expired, thereby delaying the surety in his subrogation to the creditors remedies against the principal, the argument is not sound as applied to a creditor beneficiary contract, except possibly in the mortgage assumption contract for reasons later set forth, since, as will consequently appear, the promisee may collect from the promisor without having first paid the debt.

The Uniform Partnership Act, section 36 (3) [CAL. CIV. CODE § 2430 (3)], adopts the suretyship theory to a retiring partner to whom the other partner promises to pay existing debts by providing that if the creditor with knowledge of the agreement "consents to a material alteration in the nature or time of payment of such obligations," the retiring partner shall be discharged. It is to be noted that the assumption contract

differences between our case and ordinary suretyship. Thus, although the promisee of a simple creditor beneficiary contract, as will appear later, can recover from the promisor on the latter's non-performance the amount of the debt without having himself first paid the creditor, the surety cannot so recover from his principal. The result of such recovery by the promisee must be to discharge the promisor; it would be manifestly unjust to subject the latter to double liability. On the other hand, judicial proceedings between the surety and his principal alone cannot discharge the liability of either to the creditor. The principal and surety cannot "rescind" the contract to the prejudice of the creditor; the promisee and the promisor may, however, do just this thing. In other words, a full-fledged suretyship relation does not exist. Analogies are dangerous beasts to be handled with care, lest they turn and rend their user.¹⁵

here is not a simple creditor beneficiary contract, since the promisor is already under obligation to the creditor. See *General Tire & Rubber Co. v. Noble* (1923) 222 Mich. 545, 193 N.W. 229.

On the suretyship theory, where a foreclosure suit is brought against both mortgagor and assuming grantee, it has been held proper to direct that execution shall not issue for a deficiency against the mortgagor until property of the grantee has been exhausted. *Hamburger v. Ellingson* (1934) 139 Cal. App. 311, 33 P. (2d) 850.

It must be noted, however, that the extension doctrine would seem no longer to apply in California where the original obligation is in the form of a negotiable note. In *Mortgage Guarantee Co. v. Chotiner* (1936) 8 Cal. (2d) 110, 64 P. (2d) 138, (1937) 108 A. L. R. 1080, the supreme court, relying on cases to the effect that an accommodation maker of a negotiable note is not discharged under the Uniform Negotiable Instruments Act by an extension to the accommodated payee, a much-mooted point since the Act, held that an extension of time to a non-assuming grantee, where the mortgage secured a negotiable note, did not release the mortgagor-maker, and hence did not release the guarantor of the note. It would seem, however, that, as pointed out in *Industrial Trust Co. v. Goldman* (R.I. 1937) 193 Atl. 852, the problem is different from that involved in an extension to an accommodated payee, since in our case the extension is granted to one not a party to the note, and hence that the case falls within another provision of the Act, California Civil Code section 3200: "*A negotiable instrument is discharged . . . (4) By any other act which will discharge a simple contract for the payment of money. . .*" (Italics added.) Since an extension of time to the principal will discharge the surety, the *instrument* would be discharged and with it the liability of all parties to it. Most of the cases on the point, however, as well as the discussions by commentators, seem to assume that the two problems are virtually the same. See, however, (1928) 12 MINN. L. REV. 668; (1928) 6 NEB. L. BULL. 417; (1937) 10 So. CALIF. L. REV. 511.

¹⁵ In another case, rested partly on California Civil Code section 2854, the defendant to induce a surety company to go on the stay of execution bond of another promised the surety to pay the judgment. *Goff v. Ladd* (1911) 161 Cal. 257, 118 Pac. 792. Yet it is to be noted that the judgment debtor did not give any "security" to the surety, as that term is usually employed, nor did the surety receive this obligation of the defendant from the principal. Section 1559, also relied on, would seem the better justification for the result.

Before concluding discussion of California Civil Code section 2854, it is desired to point out a peculiar result that might follow from its application. If the creditor beneficiary should release the debtor without full payment, he might be held, as a New Jersey court decided,¹⁶ to have thereby released the promisor. The same result might follow upon the discharge in bankruptcy of the debtor. According to one theory employed to explain the right of the creditor to securities given by the principal to the surety for the latter's protection, that right is derivative and can rise no higher than the surety's. The surety who is released can employ the securities for reimbursement only for such payment as he has made. Hence it follows that there is nothing left to which the creditor beneficiary can be "subrogated." It would not, however, be extraordinary to find a court, having used the suretyship "subrogation" theory, to reach the desired result of liability to the creditor beneficiary, ungratefully throwing it overboard to avoid the result of the New Jersey case, a result certainly inconsistent with a true suretyship.¹⁷

The next statutory provision to be considered is Civil Code section 2777:

"One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately, to every person injured by such act."

So far as has been discovered, only one California case has rested its decision on this section. That involved a simple creditor beneficiary contract, and reliance was also placed on section 1559.¹⁸ It is

¹⁶ *Feitlinger v. Heller* (1933) 112 N. J. Eq. 209, 164 Atl. 6.

¹⁷ It hardly seems proper here to discuss at length the doctrine embodied in Civil Code section 2854. Apparently the latest and fullest treatment of the topic is Jennings, *A Creditor's Rights in Securities Held by his Surety* (1938) 22 MINN. L. REV. 316.

¹⁸ *Bryan v. Banks* (1929) 98 Cal. App. 748, 277 Pac. 1075. Of the California decisions cited in support, *Dutil v. Pacheco* (1863) 21 Cal. 438, is not in point, and in addition was decided before the adoption of the code; *Moore v. McSleeper* (1894) 102 Cal. 277, 36 Pac. 593, was an action by a sheriff suing on a bond given to indemnify him against liability for an attachment, and hence also is not in point, nor was section 2777 mentioned. Also cited was *Moore v. Los Angeles Iron & Steel Co.* (C. C. S. D. Cal. 1898) 89 Fed. 73, which held the section covers the situation where an employer's liability policy provided that the insurer should pay the employer sums for which he should become liable to employees. The last case, however, has been severely criticized and its construction of the code section repudiated. *Treloar v. Keil & Hannon* (1918) 36 Cal. App. 159, 171 Pac. 823; *Severns v. California H. Indem. Exch.* (1929) 100 Cal. App. 384, 280 Pac. 213. See also *Northam v. Casualty Co. of America* (C. C. D. Mont. 1909) 177 Fed. 981; *Conley v. United States Fidelity etc. Co.* (1934) 98 Mont. 31, 37 P. (2d) 656, which would seem to construe the identical Montana provision in the way suggested in the text. See *Title Guaranty etc. Co. v. Duarte* (1921) 54 Cal. App. 260, 201 Pac. 790.

extremely doubtful whether the section can be construed to apply to our problem. On its face it seems designed to cover the case where the indemnitor is seeking to procure the indemnitee to do an act that may cast liability upon the latter. In the creditor beneficiary contract, however, the act of the promisee, the debtor, is payment to the creditor, hardly an injury to him; if the promisee himself does the act, the creditor cannot later hold the promisor. In addition the contract calls for an act to be done by the promisor, not one to be done by the promisee. A perusal of the other provisions of Title XII, in which this section occurs, would seem to bear out its inapplicability.¹⁹ In any event the section cannot possibly apply to the donee beneficiary contract.

In some cases the promise to pay the debt of the promisee has been considered an offer to the creditor. This theory was applied in *More v. Hutchinson*²⁰ to reach a dubious result. The assets of one corporation had been transferred to another on the latter's promise to pay the debts of the former. Holding that the promise was an offer to the creditors requiring acceptance by them, the court reached the conclusion that the statute of limitations did not begin to run against the stockholders of the promisor, under the old stockholder's liability law, until there had been acceptance by the creditors, although the statutory period had elapsed after the assumption and after the maturity of the debts.²¹ The offer and acceptance theory is untenable. In the formation of contracts offers call for some counter-promise or act involving consideration.²² The "offer" in question calls for nothing unless it be an expression of willingness to take advantage of it.

¹⁹ See Note (1936) 24 CALIF. L. REV. 193, for a discussion of the differences between contracts to indemnify against liability and against loss.

In some states the creditor beneficiary's action has been based on the real party in interest statute. *Rector v. Lyda* (1920) 180 N. C. 577, 105 S. E. 170, (1922) 21 A. L. R. 411. That act is of very doubtful applicability. The statute is procedural only and not intended to change the substantive law. See 2 WILLISTON, *op. cit. supra* note 3, § 366.

²⁰ (1921) 187 Cal. 623, 203 Pac. 97, (1924) 12 CALIF. L. REV. 328.

²¹ The court appears to have found such acceptance for the first time in the taking of a note of the second corporation, although it was admitted that in the ordinary case the taking of a renewal note would not extend the period of limitations against the stockholders. One might be inquisitive enough to ask what the court would have done had the question been raised whether stockholders at the date of the "acceptance" or stockholders at the date of promise would have been the ones liable.

²² Recognizing this difficulty, in *Copeland v. Beard* (1928) 217 Ala. 216, 115 So. 389, the court disposed of the point by saying that the consideration for the promise as between promisor and promisee was also consideration among all three, ignoring the fact that the contract was complete before the creditor "accepted."

The offer theory encounters another difficulty in that offers call for acceptance within a reasonable time if none is specified, a point not alluded to in the case under discussion. The theory is also inconsistent with certain statute of limitations cases, to be later considered, holding that the statute begins to run against the promisor from the date of the promise if the debt is already due, otherwise from its maturity.²³

Another Civil Code provision, namely section 1589,

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting,"

might at first glance appear to have application to our problem in some cases. By taking property from the promisee on a promise to pay the promisee's debt for the price, it may be thought that the grantee accepted the benefit of the original sale and because of the statute became under an obligation to the seller. The literal reading of the section, however, would dispense even with the necessity of the promise and lead to the result that one buying goods, even for cash, from another who had not paid for them would be liable to the original seller for the unpaid price, provided he knew of such non-payment. A similar result would follow whenever an executory contract was assigned, whatever the terms of the assignment and even

²³ In a later case, *Bogart v. George K. Porter Co.* (1924) 193 Cal. 197, 223 Pac. 959, it was said that the "offer" must be accepted within a reasonable time and that eleven years is not such; the decision, however, seems to be put on the ground that the cause of action arose at the maturity of the debt assumed. The decision of the court of appeal in *Central Bank of Oakland v. Wells Fargo Bank & Union Trust Co.* (1937) 18 Cal. App. (2d) 559, 64 P. (2d) 465, 65 P. (2d) 1301, going on the offer theory, presented a different problem. There had been a sale under a trust deed after conveyance to an assuming grantee. Just after the sale, according to the grantee's contention, the grantor for a consideration had released the grantee. On the ground that the "offer" had been accepted by a demand for payment before the claimed rescission of the "contract," the court affirmed a deficiency judgment against the grantee. In denying a hearing, however, the supreme court based its conclusion on the finding that there had been no rescission and stated its unwillingness to approve the view that the assumption was an offer "which becomes in all events binding upon the purchaser when accepted by the mortgagee." 18 Cal. App. (2d) at 567, 65 P. (2d) at 1301. The court of appeal by discovering a contract between the creditor and the promisor was able to avoid the difficulty of Civil Code section 1559 that implies that a rescission between the debtor and the promisor before suit by the beneficiary prevents suit by the beneficiary, a point to be later discussed. In *Anderson v. Calaveras Central Min. Corp.*, *supra* note 5, it was said that the commencement of the action was a sufficient acceptance of the benefit of the contract.

if the assignment was for security only. Since, however, the section appears in a chapter devoted to consent in the making of contracts, it would seem intended to cover only parties to the original transaction, where there was no consent in words but one properly to be inferred from conduct and attendant circumstances. Without thorough investigation herein of the decisions, suffice it to say that the cases construing the section are in accord with this explanation and therefore that it has no application to our problem.²⁴

It would seem obvious that it is section 1559 of the Civil Code that best covers a beneficiary contract.²⁵

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

There are numerous cases that rely upon this section.²⁶

BENEFICIARIES WITH ENFORCEABLE INTERESTS. HEREIN OF INCIDENTAL BENEFICIARIES

It has become customary to refer to certain persons as incidental beneficiaries to whom are denied legally enforceable interests.

²⁴ *Lisenby v. Newton* (1898) 120 Cal. 571, 52 Pac. 813 (assignment of executory contract); *Beazley v. Embree* (1919) 41 Cal. App. 706, 183 Pac. 298 (same; § 1589 applies only as between the parties to the original transaction); *Wilson v. Beazley* (1921) 186 Cal. 437, 199 Cal. 772 (same); *Weidner v. Ziegler* (1933) 218 Cal. 345, 23 P. (2d) 515; *Armstrong Co. v. Shell Co. of Calif.* (1929) 98 Cal. App. 769, 277 Pac. 887 (§ 1589 applies only to parties to original transaction); *Stone v. Owens* (1894) 105 Cal. 292, 38 Pac. 726 (building contract assigned as security only; suggested that the section applies where principal of unauthorized agent accepts benefit of performance); *Canale v. Copello* (1902) 137 Cal. 22, 69 Pac. 698 (occupancy of leased premises without assent of lessee does not impose obligation to pay rent; § 1589 applies only to parties to original transaction); *Tarpey v. Curran* (1924) 67 Cal. App. 575, 588-589, 228 Pac. 62, 68.

²⁵ Other statutory provisions applicable to particular sorts of contracts are reserved for later discussion.

²⁶ *More v. Hutchinson*, *supra* note 20; *Sherwood & Sherwood v. Gill & Lutz* (1918) 36 Cal. App. 707, 173 Pac. 171; *Stanton v. Santa Ana Sugar Co.* (1927) 84 Cal. App. 206, 257 Pac. 907. Other cases will be cited, *infra*.

No attempt has been made to discover decisions bearing on such topics as offer, acceptance and consideration, matters that have no peculiar significance in our topic. See 2 WILLISTON, *op. cit. supra* note 3, § 394. *Watkins v. Clemmer* (1933) 129 Cal. App. 567, 19 P. (2d) 303 (if consideration is lacking, creditor beneficiary has no action); *Fishback v. J. C. Forkner Fig Gardens* (1934) 137 Cal. App. 211, 30 P. (2d) 586 (contract of sale called for taking conveyance "subject" to mortgage, but grantee received deed in ignorance that it contained an assumption clause; hence mutual assent lacking). Obviously beneficiary must show that contract calls for the claimed performance. *Roberts v. Fitzallen*, *supra* note 14 (note but not mortgage provided for attorneys' fees; grantee assumed payment of mortgage but not the note).

A moment's reflection will suggest innumerable persons who may be benefited by the performance of a contract between others; thus any of the creditors of a creditor may be benefited by the payment of the claim of the latter; those with whom a buyer has contracted to supply goods may be benefited by the performance of the seller's contract for goods of that type. Obviously, however, intolerable confusion would result were all such persons given directly enforceable interests, although in the appropriate cases third persons may reach certain contractual assets of their debtors by garnishment. To state, however, that a certain plaintiff is an incidental beneficiary is but to express a conclusion that affords no test of distinction.

Conceivably the courts might have adopted as the test the dominant purpose or motive²⁷ of the promisee:²⁸ Was it to secure a benefit for himself or for a third person? In donee and quasi-creditor beneficiary contracts such test would result in the conclusions reached by the courts. Thus in a life insurance policy payable to a wife, the

Probably as a result of the dubious decision (see 2 WILLISTON, *op. cit. supra* note 3, § 382) of *Banta v. Rosasco* (1936) 12 Cal. App. (2d) 420, 55 P. (2d) 601, that where land was conveyed expressly subject to mortgage, the amount of the debt being deducted from the price, a promise to pay the debt could be implied, there were enacted in 1937 amendments to Civil Code section 1624 and Code of Civil Procedure section 1973, requiring a written assumption signed by the grantee, unless the deed itself provided for such assumption.

In *Couture v. Ocean Park Bank* (1928) 205 Cal. 338, 270 Pac. 943, a bank depositor drew a check payable to the order of A for B, and B collected. In holding that the bank's payment to B discharged its liability to the depositor, the court went partly on the ground that B was a beneficiary under section 1559 and as such could have sued the bank, ignoring completely that under the Uniform Negotiable Instruments Law (CAL. CIV. CODE § 3265e) even the ordinary payee of an uncertified check has no action against the drawee.

In *Riverside Land Co. v. Jarvis* (1917) 174 Cal. 316, 163 Pac. 54, where by the articles of incorporation, by-laws and certificates of stock, it was provided that the stock should be appurtenant to certain lands and pass with them, it was held at suit of a subsequent owner of land that he was entitled to have the stock transferred to him, on the ground, *inter alia*, that there was a contract for his benefit under section 1559. The proper explanation, also made in the case, is that former Civil Code section 324, now section 330.24, makes the stock appurtenant to the land. The former explanation would run into difficulty, were there to be an attempted rescission between the original owner of the land and the corporation after the ownership of the land had passed.

²⁷ Some difficulties might arise in applying even such test. Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds* (1928) 38 YALE L. J. 1, 3.

²⁸ "Promisee" rather than "contracting parties" is used advisedly, since, if purpose or motive be the test, it should be the promisee's that should control since he is buying the promise; the promisor's purpose is to get the consideration and it would usually be a matter of indifference to him whether his performance is to be rendered to the promisee or someone else. Corbin, *op. cit. supra* note 27, at 5.

insured's purpose is to secure a benefit for the wife, although the purpose may be inspired by desire to fulfill some moral obligation.²⁹ That such test was not adopted is a matter of history. The leading case of *Lawrence v. Fox*,³⁰ decided in New York in 1859 and the virtual originator of the whole doctrine in the United States, involved a simple creditor beneficiary contract, where it would seem that the dominant purpose was to secure a benefit of the promisee-debtor, that is, the discharge of his debt.³¹ It may be suggested, parenthetically at this point, that there is much to be said for the theory that the action of the creditor beneficiary is a short-cut method of reaching an asset of his debtor. In the light, however, of the decisions following that case, all of which for some time seem to have been of that type, it would have been extraordinary had Civil Code section 1559³² been deemed inapplicable. History then turned thumbs down on dominant

²⁹ While in the creditor beneficiary contract little, if any, harm would be done by denying the beneficiary a direct action, since the promisee is injured by breach, the same cannot be said of the donee contract for the promisee is here not pecuniarily injured. While if the donee were denied action, the promisee might on quasi-contractual grounds recover for benefits conferred, yet to confine the remedy to such action would be to favor unduly the promisor since he could with virtual impunity break a contract unfavorable to himself or perform if favorable. "Heads, I win; tails, you lose." See Whittier, *Contract Beneficiaries* (1923) 32 YALE L. J. 790, 793.

³⁰ (1859) 20 N. Y. 268.

³¹ To what extent the then imperfect development of garnishment and the reaching of assets in equity may have subconsciously been responsible for that decision is a matter of conjecture. It is to be noted, however, that had the decision been the other way, many of the difficulties, to be considered subsequently, might have been avoided in this type of contract.

Whittier, *op. cit. supra* note 29, at 799-802, summarizes the objections to action by the creditor beneficiary: (1) Contract is really made for benefit of promisee; (2) promisee may sue and thereby adequately enforce the contract, there being no lack of damages as in the donee case; (3) permitting suit means that when the promisee is bankrupt the beneficiary gains an unfair preference over the other creditors; (4) in some cases the beneficiary is allowed to recover although the promisee could not, as in the usury situation later considered. As to the third objection, it has been held that if the contract is made when the promisee is insolvent, it may amount to a voidable preference. *Rogers v. Fidelity Sav. Bank & Loan Co.* (W.D. Ark. 1909) 172 Fed. 735. But it would seem that it should be the time of payment not the time of the contract that is vital, where the law is that the contract may be rescinded by the contracting parties. It has been held that a release by the mortgagor of his assuming grantee may constitute a conveyance by the mortgagor in fraud of creditors. *Young v. Trustees of Public Schools* (1879) 31 N. J. Eq. 290; *Willard v. Worsham* (1882) 76 Va. 392.

² WILLISTON, *op. cit. supra* note 3, §§ 362-364, while generally opposing the direct action of the creditor beneficiary, would seem, somewhat illogically, to treat the contract as an asset of the promisee reachable only by the beneficiary.

³² In the Code Commissioner's Report, in the 1872 Annotated Civil Code, *Lawrence v. Fox* and similar cases were cited.

purpose as the sole test at least.³³ If, then, dominant purpose as an exclusive test must be abandoned, the only possible test would seem to be, at least in the case of affirmative promises, whether the promise calls for performance to the third person, as paying him money, transferring property to him, building structures on his land.³⁴ With few exceptions, most of which can be better explained on other grounds, the California cases would appear to conform to this test in the case of affirmative promises.³⁵ Thus, failing to meet this test is a crop mortgagee where the defendant had agreed with the landowner-mortgagor to supply irrigation water, although non-performance rendered the crop a failure;³⁶ likewise a legatee disappointed because an attorney engaged by the testatrix to draft and supervise the execution of the will procured the legatee to act as witness.³⁷ And where the defendant had agreed to lend money to the promisee to enable him to erect a building, laborers and materialmen were denied recovery as beneficiaries.³⁸ There, however, is one California deci-

³³ The objection seems to have been seldom raised in California that the contract was not made for the benefit of the creditor. In *Montgomery v. Dorn* (1914) 25 Cal. App. 666, 145 Pac. 148, the objection was unsuccessful. *Mottashed v. Central & Pac. Impr. Corp.*, *supra* note 12, recognizing that the contract was really made for the benefit of the mortgagor-promisee, expressed the view that the rule had been extended to protect the creditor beneficiary on the subrogation theory. See also *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal. (2d) 232, 73 P. (2d) 1163. *National Bank v. Grand Lodge* (1878) 98 U. S. 123, expressed the view that the purpose was not to benefit the creditor.

³⁴ Corbin, *op. cit. supra* note 27, at 7, suggests as most nearly representing the authorities: "... a third party who is not a promisee and who gave no consideration has an enforceable right by reason of a contract made by two others (1) if he is a creditor of the promisee or of some other person and the contract called for a performance by the promisor in satisfaction of the obligation; or (2) if the promised performance would be of pecuniary benefit to him, and the contract was so expressed as to give the promisor reason to know that such benefit was contemplated by the promisee as one of the motivating causes of his making the contract." See also (1938) 26 CALIF. L. REV. 627.

³⁵ It is not intended herein to deal with the sometimes difficult problem of construction, that is, whether the promise to a present or future obligor of the plaintiff is to indemnify the latter against loss as distinguished from liability. If the latter, the promise is of the creditor beneficiary type. *Wilson v. Shea* (1916) 29 Cal. App. 788, 157 Pac. 543. In the former the promise does not call for performance to the creditor, although he will be benefited by payment by the promisor, an anticipatory satisfaction of the indemnitor's promise.

³⁶ *Diggs v. Pacific Gas & Elec. Co.* (1922) 57 Cal. App. 57, 206 Pac. 765. See also *Higgins v. Monckton* (1938) 95 Cal. App. Dec. 123, 83 P. (2d) 516.

³⁷ *Buckley v. Gray* (1895) 110 Cal. 339, 42 Pac. 900.

³⁸ *Smith v. Anglo-California Trust Co.* (1928) 205 Cal. 496, 271 Pac. 898. It might be mentioned that the claimants recovered on another theory, the correctness of which does not concern us here.

sion that appears to be inconsistent with the above theory, but it is of doubtful authority.³⁹

Reference was made above to certain cases going on the ground that the plaintiff was an incidental beneficiary although the promise called for performance to him. One involves the promise of a second mortgagee to the mortgagor to pay off the first mortgage; the first mortgagee was denied a deficiency judgment against the second.⁴⁰ It is submitted, however, that the proper explanation is that, unlike the case of the ordinary assumption of a mortgage by a purchaser, the consideration on the part of the mortgagor was not executed but was still executory; that the promise was really to lend additional funds to the mortgagor; that the measure of recovery for breach of such a promise is not the amount of the promised loan but is nominal ordinarily; and further, the very attempt of the first mortgagee to obtain a deficiency judgment indicates the probability that repayment of the contemplated loan will not be forthcoming, that the security will be worthless, and hence that there will be a failure of consideration. In another case⁴¹ where the hauler of gravel for the defendant agreed to save the latter harmless from railroad demurrage charges on the gravel, and the defendant agreed to pay the suppliers of gasoline used in hauling, such amount to be deducted from the hauling charges, the gasoline seller was denied recovery. But the proper explanation, also relied upon by the court, would seem to be that since the defendant paid the demurrage charges by reason of the hauler's failure, he should be allowed that payment as a set-off.⁴²

It is when we consider negative promises⁴³ that difficulties may arise in applying the test suggested for affirmative promises, *i.e.*,

³⁹ *Chung Kee v. Davidson* (1887) 73 Cal. 522, 15 Pac. 100. Gold dust was turned over to the defendants on their promise to apply it to their own claims against the promisee and the claims of laborers for the promisee. On the assumption, seemingly made, that the promise was a simple one to pay debts of the promisee, the laborers were creditor beneficiaries. On the second appeal, however, (1894) 102 Cal. 188, 36 Pac. 519, the court would appear to have made the correct diagnosis of the facts in holding the laborers to be the beneficiaries of a trust.

⁴⁰ *Savings Bank v. Thornton* (1896) 112 Cal. 255, 44 Pac. 466. See 2 WILLISTON, *op. cit. supra* note 3, § 387.

⁴¹ *Ferguson v. Marsh* (1918) 37 Cal. App. 482, 174 Pac. 678.

⁴² The point of set-off is to be later considered.

⁴³ Restrictive covenants in conveyance of land, creating so-called negative easements enforceable in equity, are not to be discussed. So far as such covenants are intended for the benefit, *inter alia*, of persons other than the grantor and his subsequent grantees, who may be treated as assignees of the covenants, they are contracts for the benefit of third persons. The subject, however, has been usually placed by the courts in a separate pigeon-hole of the law of property. See Note (1922) 11 CALIF. L. REV. 48; (1923) 11 *ibid.* 141.

whether the contract calls for performance to the alleged beneficiary. In some situations, to be sure, no difficulty will arise as where the promise is to refrain from suing a third person or to refrain from competing with *him*.⁴⁴ A negative promise, however, may be so worded that it is not clear whether "performance" is to be to the promisee or some third person; in such case no test suggests itself except that of the dominant purpose of the promisee. The sort of situation contemplated was presented in *D. Ghirardelli Co. v. Hunsicker*,⁴⁵ where the plaintiff, a manufacturer, in selling to a wholesaler exacted an agreement that the latter should require his vendees to promise not to retail below a certain price. Relying upon section 1559 of the Civil Code, the court enjoined the defendant retailer. It would appear that the dominant purpose of the promisee in securing the defendant's agreement was to benefit the plaintiff, although it might well be that all wholesalers and even all other retailers would also be benefited.

At this point it may be mentioned that the word "expressly" in Civil Code section 1559 does not require the beneficiary to be designated by name; it is sufficient that he be a member of a class to whom performance is to be rendered.⁴⁶ Nor is it even essential that the beneficiary be in existence when the contract is made.⁴⁷ It is also immaterial that the promise calls for performance to the promisee himself as well as to his creditors.⁴⁸ It would appear to be a question

⁴⁴ In *Kolberg v. Sherman-Williams Co.* (1928) 93 Cal. App. 609, 269 Pac. 975, the manufacturer of a spray was held not relieved of liability to the plaintiff for damages to orange trees through its use by reason of the fact that the middleman seller to the plaintiff contracted for immunity. The provision may be construed as a promise not to sue the middleman; in effect the defendant was properly denied the benefit of the negative promise.

⁴⁵ *Supra* note 2.

⁴⁶ *Whitney v. American Ins. Co.*, *supra* note 4; *Sherwood & Sherwood v. Gill & Lutz*, *supra* note 26; *Woodhead Lumber Co. v. E. G. Nieman Investments* (1929) 99 Cal. App. 456, 278 Pac. 913.

⁴⁷ *Marysville Elec. Light & Power Co. v. Johnson* (1892) 93 Cal. 538, 29 Pac. 126 (mutual promises by many to form a corporation and take stock therein; the corporation may sue).

⁴⁸ *Montgomery v. Dorn*, *supra* note 33; *Stanton v. Santa Ana Sugar Co.*, *supra* note 26. The result is that the promisor may subject himself to many suits, although presumably only one suit could be maintained by the promisee for failure to pay the various creditor beneficiaries under the rule of *Meyer v. Parsons* (1900) 129 Cal. 653, 62 Pac. 216. Compare the difficulty in partial assignments due to the policy against splitting of causes of action. 2 WILLISTON, *op. cit. supra* note 3, §§ 441-444. As, however, it may be argued that since the policy is adopted for the benefit of a promisor, no injustice may be thought done him where he voluntarily agrees to pay several persons. Moreover,

of construction only whether the contract calls for performance to the alleged beneficiary and that the word "expressly" was intended simply to negative "incidentally."⁴⁹

QUASI-CREDITOR BENEFICIARIES

The range of quasi-creditor beneficiaries is large. Obvious instances are of the state or other governmental unit taking from a building contractor a bond conditioned in part to pay laborers and materialmen,⁵⁰ and of the private owner taking a similar bond. In the first the owner is not even subject to a lien. In the second, while the property may be subject to a lien, yet the bond may go further than merely to save the owner harmless from liens and contain conditions to pay the laborers and materialmen; whether it is one or the other may present difficulties of construction with which we are here not concerned. It is to be noted, however, that in both the obligee of the bond is not a debtor of the beneficiaries. In addition to such instances and those of various public official bonds,⁵¹ as well as bonds

if the creditor beneficiary's action be thought of as a method of reaching assets of a debtor, a short-cut garnishment, so to speak, the policy against splitting may yield to a stronger policy of aiding a creditor to reach his debtor's assets. If one garnishment does not exhaust the garnished debt, presumably another creditor can reach the balance, or the owner can sue for it.

⁴⁹ Where a builder of public works agreed "at his own expense and cost" to "find and provide all materials and labor" and his bond was similarly conditioned, it was held that the surety was liable to materialmen under section 1559. *W. P. Fuller & Co. v. Alturas School Dist.* (1915) 28 Cal. App. 609, 153 Pac. 743. Under the identical provision of the Montana code the opposite result was reached on the ground that "expressly" meant "clearly" or "distinctly" and that in the particular case the matter was one of inference only. *Minneapolis Steel & Machinery Co. v. Federal Surety Co.* (C. C. A. 8th, 1929) 34 F. (2d) 270. The result of the latter case would appear to render the provision practically meaningless since it is hardly conceivable that it was inserted to prevent the contractor from buying materials as agent of the public body. While its presence in the building contract conceivably (but hardly reasonably, for other parts of the contract must have been clear that the contractor and not the public body was to supply materials and labor since otherwise the contractor would be little more than a supervisor of the work) could be considered a mere redundancy to negative any obligation on the part of the public body to furnish materials and labor, its presence on the bond, not simply as part of a quotation of the whole construction contract, forbids such interpretation.

⁵⁰ *Union Sheet-Metal Works v. Dodge* (1900) 129 Cal. 370, 62 Pac. 41 (non-statutory bond). See CAL. GEN. LAWS (1937) Act 6423, requiring bonds on public work contracts for benefit of laborers, materialmen, etc.

⁵¹ CAL. POL. CODE § 961 (individuals aggrieved may sue in own name on the bond); *ibid.* §§ 962-967. See also *ibid.* § 982 as to bonds of trustees, receivers and officers of court, and § 985. Workmen's compensation insurance presents another beneficiary contract. CAL. INS. CODE §§ 11630-12023. No attempt will be made here to consider the legal problems arising under these statutes and the bonds or policies given thereunder.

required by statute as a prerequisite to engaging in certain occupations,⁵² the reports present us with others. Where the defendant bought a controlling interest in another corporation and agreed with the seller of the stock to keep the plaintiff in its employ for a year at not less than a specified salary, it was held that the latter could maintain an action under Civil Code section 1559.⁵³ There is nothing in the report to indicate that the plaintiff had a continuing contract with the employer and, if not, he could not be a creditor beneficiary; nor was the plaintiff a full-fledged donee beneficiary since he would have to work to secure the benefits and presumably his discharge by the defendant would be justified on the usual grounds. Likewise, where there are mutual promises by various persons to form a corporation and take stock therein, the corporation may hold the defaulting subscriber, although other subscribers are not obligors of the corporation as to defendant's subscription.⁵⁴ Where an owner gave a mortgage to secure future advances, which mortgage would have priority over subsequent materialmen's liens, and also bond to the mortgagee conditioned upon building and payment of materialmen, the surety was held liable to the latter.⁵⁵

PSEUDO-CREDITOR BENEFICIARIES

Examination of the reports discloses instances of what on their face purport to be creditor beneficiary contracts but lack a vital element: namely, the liability, either in whole or part, of the promisee to the beneficiary. The fact that in some recovery is denied, while in others allowed, although there seems little reason for distinction, but without cross-references, illustrates the tendency to pigeon-hole in

⁵² Thus until the provision was repealed (Cal. Stats. 1933, p. 540) a real estate broker was required to give bond providing that an injured individual might sue upon the same. Cal. Stats. 1923, p. 96, § 9a, as amended by Cal. Stats. 1929, p. 228.

⁵³ *Le Ballister v. Redwood Theatres, Inc.* (1934) 1 Cal. App. (2d) 447, 36 P. (2d) 827. A similar result was reached in *Lian v. Huglen* (1926) 141 Wash. 369, 251 Pac. 585, differing perhaps in the fact that employee had a contract with the promisee which the defendant agreed to carry out. It should be noted, however, that in both the plaintiff would be under no obligation to continue working for the new employer, absent a separate contract with the latter.

⁵⁴ *Marysville Elec. Light & Power Co. v. Johnson*, *supra* note 47. It is to be noted that the action was sustained as a contract made for the benefit of the corporation and not under code provisions relating to the formation of corporations. In *Little v. Banks* (1881) 85 N. Y. 258, a book publisher agreed with the state to print law reports and furnish them to booksellers at a specified price. The plaintiff book seller was allowed recovery for what were held to be liquidated damages specified in the contract.

⁵⁵ *Woodhead Lumber Co. v. E. G. Niemann Investments*, *supra* note 46.

different categories according to fact situations without perception of essential similarity.

A common type occurs where in the chain of purchasers from a mortgagor there is a break in the assumptions of the mortgage, *i.e.*, one of the grantees does not assume payment although later ones do. In California, as well as in other states, although there is authority to the contrary elsewhere,⁵⁶ the assuming grantees after such break are held not personally liable to the mortgagee.⁵⁷ The first of such California decisions, *Ward v. De Oca*,⁵⁸ was put on the ground that since the promisee was not himself liable, he could not be a surety, and hence the mortgagee is not in a position to invoke the principle that the creditor is entitled to the benefit of securities held by the surety. No attention was paid to Civil Code section 1559. If it be granted that the clause was not due to the mistaken supposition, a rational assumption, that the promisee was himself liable (in which case reformation would seem possible)⁵⁹ or due to an excess of caution,⁶⁰ the only possible motive for the promise is to benefit the

⁵⁶ 2 WILLISTON, *op. cit.* *supra* note 3, § 386A.

⁵⁷ *Ward v. De Oca* (1898) 120 Cal. 102, 52 Pac. 130; *Andrews v. Robertson* (1918) 177 Cal. 434, 170 Pac. 1129; *Sherwood v. Lowell* (1917) 34 Cal. App. 365, 167 Pac. 554; *Case v. Egan* (1922) 57 Cal. App. 453, 207 Pac. 388, (1923) 11 CALIF. L. REV. 139. *Page v. W. W. Chase Co.* (1904) 145 Cal. 578, 79 Pac. 278, suggests a similar result where a grantee agreed to pay off a street assessment lien for which there was no personal liability. In *Mottashed v. Central & Pac. Imp. Corp.*, *supra* note 12, it was held that, where a trustee not personally liable for a mortgage debt, took from the beneficiary of the trust an agreement to pay off the debt, the beneficiary was not liable to the mortgagee. An interesting question is suggested in this connection. If there are two successive assuming grantees and later the mortgagor and his grantee rescind the assumption, would the effect be to release the second?

⁵⁸ *Supra* note 57.

⁵⁹ Rescission in equity was allowed for mistake in *Hartwig v. Clark* (1903) 138 Cal. 668, 72 Pac. 149. There was a contract for the sale of land described as subject to a mortgage. Both parties were ignorant that the statute of limitations had run against the mortgage. When the deed was executed the defendant-grantee only was aware of this. It was held that the grantor was entitled to a reconveyance where, although his deed merely recited that the land was subject to the mortgage, there was evidence that the defendant had orally agreed to pay the debt. The mortgagee was not a party to the suit. Granting that the mortgage could not be enforced against the grantee because of Civil Code sections 2911, 2922 (See *infra* page 523 under *Statute of Limitations*), it does not follow that a personal obligation did not arise in favor of the mortgagee in the absence of mistake.

⁶⁰ Since the obvious purpose in practically all such assumption clauses is to protect the grantor-promisee, the court might by a strained construction interpret them to be promises to indemnify the grantor against loss.

mortgagee, who would then be a quasi-creditor beneficiary.⁶¹

On the other hand, there are situations where we hear nothing in the opinions of the "subrogation" theory which would lead to a conclusion opposite to the one reached. Thus where a borrower has given a mortgage to secure a note including in its principal amount usurious interest, and has subsequently conveyed the property expressly subject to the mortgage, the amount of such principal having been deducted from the purchase price, it is generally held that the grantee may not set up the usury in the foreclosure suit;⁶² and, if such grantee has assumed such mortgage "debt," a deficiency judgment for an amount including the usury may be obtained against him although it could not be had against the mortgagor.⁶³ This result is usually based on the ground that the grantee should not be allowed in effect to cut down the price for the property. Whatever superficial merit such argument may possess ignores the fact that the result is contrary to the purpose of the usury law and gives the lender the very thing that law was intended to deny. If, as would appear, it is desirable to avoid the windfall to the grantee resulting immediately from a contrary result, there is no necessary obstacle against allowing the borrower a recovery from the grantee. The result of the cases, it should be noted, is both inconsistent with theory that the creditor beneficiary's action is a short-cut to reaching assets of his debtor, and also with the "subrogation" theory, already referred to, since the mortgagor cannot be a "surety" for the usurious part of the note.⁶⁴ In line with the usury cases are decisions to the effect that, where there is a lack or failure of consideration for the mortgagor's

⁶¹ Would the rule of *Ward v. De Oca*, *supra* note 57, be applied to a breach in a chain of assumptions of a lessee's obligation to pay rent where there are succession assignments of the lease? There is a bare affirmative suggestion to that effect in *Bank of America etc. Ass'n v. Moore* (1937) 18 Cal. App. (2d) 522, 64 P. (2d) 460. In *Chase v. Oehlke* (1919) 43 Cal. App. 435, 185 Pac. 425, where there was an unbroken chain of assuming assignees, the next to last was held liable, although under the principles of covenants running with the land he would not have been, for rent accruing after his own assignment.

⁶² Although the problem arose in a different way the result would seem to follow from *Matthews v. Ormerd* (1903) 140 Cal. 578, 74 Pac. 136; *Esposti v. Rivers Bros., Inc.* (1929) 207 Cal. 570, 279 Pac. 423; *Ames v. Occidental Life Ins. Co.* (1930) 210 Cal. 271, 291 Pac. 182.

⁶³ See *Aitken v. Southwest Finance Corp.* (1933) 131 Cal. App. 95, 20 P. (2d) 1000. See (1933) 67 U. S. L. Rev. 163, for collection of cases.

⁶⁴ Whittier, *op. cit. supra* note 29, at 801, n. 44: "It is hard to see any substantial distinction between cases where the promisee thought he was liable because he had bought land subject to a mortgage though he had not assumed the mortgage and cases

promise, the assuming grantee cannot set it up against the mortgagee.⁶⁵ The same argument is made that to allow the defense is to give a windfall to the grantee.⁶⁶

In conclusion it may be said that in the break-in-the-mortgage-assumptions cases, on the one hand, and the usury and failure or lack of consideration cases on the other, the only difference is that in the latter denial of liability results in a windfall to the promisor, *if* the matter is not cured in the way suggested, whereas in the former denial has no such effect since the assuming grantee has doubtless paid his non-assuming grantor what both parties considered the value of the property less the amount of the encumbrance. The result of the cases, however, is to give a windfall to the usurious lender or the mortgagee who has not advanced the sum for which the mortgage was given. It is further to be observed that where there is a break in the chain of assumptions, a result opposite to that reached in California would not give the mortgagee something that is not due him from somebody. If any distinction is to be made between the two types of cases, just the opposite conclusions should be reached.

where he believed himself liable because he had promised to pay and did not know of the defense of usury. . . . In both cases he thinks himself liable: in both he is not liable: in both he is attempting to protect his own interests: in neither is he desiring to make a gift to the beneficiary."

⁶⁵ *Patten v. Pepper Hotel Co.* (1908) 153 Cal. 460, 96 Pac. 296; *Harris v. Whittier Bldg. & Loan Ass'n* (1936) 18 Cal. App. (2d) 260, 63 P. (2d) 840. See also *Washer v. Independent Min. & Dev. Co.* (1904) 142 Cal. 702, 76 Pac. 654; *Davis v. Davis* (1912) 19 Cal. App. 797, 127 Pac. 1051, Sup. Ct. *hearing den.*, Nov. 23, 1912. 3 JONES, MORTGAGES (8th ed. 1928) § 1892.

⁶⁶ In *J. F. Hall-Martin Co. v. Hughes* (1912) 18 Cal. App. 513, 123 Pac. 617, there was a promise to pay certain described debts including one to the plaintiff of "\$8,200 for street improvements." It was held immaterial that the true debt was less since the amount was part of the purchase price of land conveyed to the defendant. It seems to have been a case of mistake, rectification of which would enure to the benefit of the grantor.

In *Alvord v. Spring Valley Gold Co.* (1895) 106 Cal. 547, 40 Pac. 27, on the concession that a corporate mortgage was invalid, the court held that an assuming grantee could not take advantage of the defect in a foreclosure suit, since he was "estopped." Why more estopped than an assuming grantee after a break in the chain of assumptions? There was no evidence of any prejudicial reliance by the mortgagee. If the mortgage but not the debt was invalid, the contract would be a simple creditor beneficiary one involving personal liability only. The difference between enforcing the mortgage and imposing personal liability would be highly important, particularly were there intervening liens between the dates of the mortgage and of the assumption. See also *San Ramon Valley Bank v. Walden Co.* (1921) 53 Cal. App. 534, 200 Pac. 662.

ACTION BY PROMISEE OF CREDITOR BENEFICIARY CONTRACT*

A creditor beneficiary contract involves difficulties absent from other types since the former is inspired chiefly, if not entirely, by the promisee's desire to benefit himself by procuring his own discharge. To deny him an enforceable interest would be most unjust, particularly where by reason of the promisor's default he has himself paid the debt.⁶⁷ Strict adherence to the suretyship theory, previously discussed, would result in his obtaining a cause of action only upon his payment, at which time the statute of limitations would begin to run against him, with the result that his action could be brought against the promisor although the statutory period available against the creditor beneficiary had expired. Where, however, there is a simple creditor beneficiary contract, uncomplicated by a mortgage assumption, it is held in California that the breach of the promisor's agreement creates at once in the promisee a cause of action for the full amount of the debt, although he has paid nothing and possibly may never pay.⁶⁸ While the true surety before payment to the creditor has parted with nothing and hence should have no action, save the equitable suit for exoneration, yet in our case the promisee has parted

*Where the contract is of the donee type, it has been suggested that the promisee has an action for nominal damages. No reason is apparent for such result and the reports seem to present no instances. Yet in an equity suit by the promisee, to which the donees were parties defendant, the court held that the promisor defendant could be ordered to perform. *Croker v. New York Trust Co.* (1927) 245 N. Y. 17, 156 N. E. 81.

In some quasi-creditor beneficiary contracts the promisee may be injured substantially by breach. Thus, if a building contractor's bond was conditioned on the payment of laborers and materialmen, thereby going further than an agreement to keep the property free of liens, the owner obligee would himself be injured if he paid to discharge liens.

⁶⁷ And a mortgagor may buy up the note and mortgage and sue to foreclose his assuming grantee. *Beach v. Waite* (1913) 21 Cal. App. 304, 131 Pac. 880.

⁶⁸ *Meyer v. Parsons*, *supra* note 48. In the opinion it was said that the promisee was not obliged to rescind the contract and sue for the value of benefits conferred. See *Note* (1936) 6 BROOKLYN L. REV. 64. And if the promisor has broken his promise, it would seem that the promisee should be permitted his alternative remedy of restitution in the same manner and to the same extent as when the contract calls for performance to himself. 5 WILLISTON, *op. cit. supra* note 3, § 1455A.

Where a mortgagor paid a personal judgment based on the note (it does not appear how it came about that the action was allowed under Code of Civil Procedure section 726; possibly the objection had not been raised), he was awarded a personal judgment against the assuming grantee of his assuming grantee. *Flint v. Cadenasso* (1883) 64 Cal. 83, 28 Pac. 62. Even in this action the objection was not raised that the suit should have been for foreclosure.

No California case has been discovered involving the point whether it would be material that the statute of limitations had barred the debt of the promisee, and where

with value to the promisor and hence ought to be allowed action.⁶⁹ This difference indicates that a true suretyship does not exist.⁷⁰ It is to be noted further that at least after payment of such judgment in favor of the promisee, if not before, the creditor beneficiary's right of action against the promisor must disappear since otherwise the latter would be compelled to pay twice.⁷¹ Yet such judgment and payment thereof, involuntary on the part of the promisor, would hardly seem to be a rescission within the meaning of Civil Code section 1559, "before the *parties* thereto rescind it,"⁷² since the words appear to refer to a rescission by mutual assent.

The mortgage assumption contract, however, presents a real difficulty. If before payment the mortgagor be permitted action against his assuming grantee, payment of judgment would not discharge the mortgage with the result that the grantee might find himself compelled to pay to avoid foreclosure, and, while it may be assumed that no deficiency judgment could be entered against him, yet foreclosure would in effect result in the grantee paying again up to the value of the property.⁷³ One solution⁷⁴ of the difficulty would be to deny the mortgagor action against the assuming grantee until he has paid the debt or until there has been foreclosure.⁷⁵ In some states

therefore in a sense his damages for breach may be thought to have come to an end. To deny him, however, recovery against the promisor in whose favor the statute has not run would be to deprive a debtor, desirous of paying his creditor, the opportunity of securing funds with which to pay; on the other hand, to allow recovery would permit the promisee to decline to pay the creditor beneficiary and at the same time divest the latter of his claim against the promisor.

⁶⁹ See *Morlan v. Loch* (1915) 95 Kan. 716, 149 Pac. 431.

⁷⁰ No California case apparently presents the problem whether the promisee may elect to wait until he pays the debt and then successfully claim in his action against the promisor that the statute does not begin to run against him until payment. But see *infra* note 71.

⁷¹ This is recognized in *Hartman Ranch Co. v. Associated Oil Co.*, *supra* note 33.

⁷² Italics added.

⁷³ A similar difficulty would arise where on a partnership dissolution one partner agreed to pay firm debts, if the other without payment were permitted suit.

⁷⁴ It may be that the mortgagor should be allowed a suit in equity to compel his assuming grantee to pay off the debt. *Woodruff v. Germansky* (1922) 233 N. Y. 365, 135 N. E. 601.

⁷⁵ In *White v. Schader* (1921) 185 Cal. 606, 198 Pac. 19, there had been a foreclosure suit in which the mortgagor had been served by publication only and had not appeared, and the sale had resulted in a deficiency. It does not appear, however, whether the assuming grantee had been personally served and, if so, whether a deficiency decree had been rendered against him. The mortgagee then sued the mortgagor for the deficiency and the latter the grantee for the same amount. The second action was held not premature. It will be observed that the difficulties alluded to do not exist and that payment by the grantee to the mortgagor would doubtless discharge the grantee of liability to the mortgagee as in the situation presented in the preceding paragraph of the

this solution has been reached by treating the promise as one to indemnify against loss; one difficulty is that it is a distortion of the promise, and furthermore such interpretation would render it difficult to justify a deficiency judgment in favor of the mortgagee against the grantee. Such solution, however, may avoid a statute of limitations difficulty, since the statute would begin to run only upon payment by the mortgagor, whereas to hold that the mortgagor has a cause of action immediately upon breach of the grantee's promise means that the mortgagor would frequently lose his action before he realizes he has one, or at least before he realizes the necessity of its exercise. What, however, the California courts will do cannot be prophesied with any degree of assurance; what little there is in the opinions tends to indicate a leaning towards this solution.⁷⁶ On the other hand, some courts permit the mortgagor to sue his assuming grantee without having first paid off the debt and before foreclosure.⁷⁷

text. *Banfield v. Marks* (1880) 56 Cal. 185, holds that where a judgment for a deficiency has been obtained against the mortgagor, he may obtain judgment against the assuming grantee without having paid.

⁷⁶ In *Hopkins v. Warner*, *supra* note 12, it was said that, because of the California law as to debts secured by mortgages, the mortgagor has no cause of action against the assuming grantee before foreclosure. Where the mortgagor and the last of several successive assuming grantees were parties to the foreclosure suit and a deficiency judgment was entered against the mortgagor, it was held that the latter had two years from his payment in which to sue his immediate grantee; the rule of true suretyship was applied. *Graham v. Durnbaugh* (1919) 44 Cal. App. 482, 186 Pac. 798. See also *Robson v. O'Toole*, *supra* note 14.

In *Lewis v. Hunt* (1933) 133 Cal. App. 520, 24 P. (2d) 557, the assuming grantee gave a deed of trust to his grantor for the balance of the price. The grantor bought in at the trustee's sale and subsequently paid off the prior mortgage. It was held that he could not then sue on the assumption promise. The opinion seems to go on the ground that the promise was, under Civil Code of Procedure section 726 relating to actions on debts secured by mortgage, only one to indemnify "contingent upon the sale of the mortgaged property in a legal foreclosure proceeding" and that the grantor had deprived himself of his right of action by his failure to foreclose the original mortgage and determine the deficiency, if any. 133 Cal. App. at 524, 24 P. (2d) at 558. The explanation seems questionable since it is difficult to see how, after buying in at the trustee's sale, he could foreclose a mortgage on his own property in which his grantee had no longer any interest. The same result has been reached elsewhere [*McCrum v. Rubbert* (1934) 219 Iowa 454, 257 N.W. 766, (1935) 97 A.L.R. 1073] and seems correct for the reason that by buying back the property at the trustee's sale the mortgagor takes subject to the mortgage and hence is in the position of any grantee who buys property subject to a mortgage without assuming its payment; if such grantee pays to avoid foreclosure he cannot come back on the mortgagor-grantor. If, however, the mortgagor had a deficiency judgment rendered against him in a foreclosure suit, it would not seem improper to allow him reimbursement from his grantee.

⁷⁷ The authorities for both views are collected in Notes (1922) 21 A.L.R. 504; (1932) 76 *ibid.* 1191; (1935) 97 *ibid.* 1076. See 2 WILLISTON, *op. cit. supra* note 3, §§ 390-392.

RESCISSION BY MUTUAL AGREEMENT OF THE CONTRACTING PARTIES

(a) *Creditor Beneficiary Contracts*

The words "before the parties thereto rescind it" of Civil Code section 1559⁷⁸ would seem by implication to mean that the parties by mutual agreement may effectually destroy the interest of the beneficiary,⁷⁹ unless the rescission occurs after the beneficiary's action.⁸⁰ While there are decisions that a mutual rescission before suit will destroy the interest of the beneficiary,⁸¹ yet there are statements in the opinions to the contrary.⁸² It would seem that a reconveyance to his grantor by the assuming grantee of mortgaged land would amount to a rescission of the agreement, discharging the grantee; the decisions elsewhere are generally to that effect.⁸³ What little is to be found in the California reports seems to be in accord.⁸⁴

⁷⁸ "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

⁷⁹ The promisor, sued by the beneficiary, must affirmatively plead such rescission. *Stanton v. Santa Ana Sugar Co.*, *supra* note 26; disapproving dictum to the contrary in *Ericksen v. Rhee* (1919) 181 Cal. 562, 185 Pac. 847.

⁸⁰ *Bryan v. Banks*, *supra* note 18; release of simple creditor beneficiary contract after suit ineffective.

⁸¹ *Konda v. Fay* (1913) 22 Cal. App. 722, 136 Pac. 514 (real estate broker beneficiary); *Hillside Packing Ass'n v. Cowles* (1937) 20 Cal. App. (2d) 26, 66 P. (2d) 451. And a release by the mortgagor of the personal obligation of his assuming grantee may destroy the personal obligation of the latter to the mortgagee. *Hubard & Appleby v. Thacker* (1922) 132 Va. 33, 110 S. E. 263.

⁸² *Calhoun v. Downs* (1931) 211 Cal. 766, 297 Pac. 548; *Miles v. Miles* (1926) 77 Cal. App. 219, 246 Pac. 143. Without reference to section 1559 of the Civil Code, the court in *Malone v. Crescent City M. & T. Co.* (1888) 77 Cal. 38, 18 Pac. 858, compelled the promisor of a simple creditor beneficiary contract in effect to pay twice. For work to be done by the promisee, the promisor agreed to pay part of the compensation to the plaintiff, such payment to "have precedence . . . over any other order or indebtedness" 77 Cal. at 40, 18 Pac. at 859. It was held that payment of the amount due to the promisee or others at the promisee's order was no defense. It is difficult to see how such payment with the assent of both parties does not amount to a rescission. Compare the right of promisee to sue for breach of the contract and recover the amount of the unpaid debt.

⁸³ 2 WILLISTON, *op. cit. supra* note 3, § 397, n. 3; Notes (1922) 21 A. L. R. 439, 462; (1927) 47 *ibid.* 339, 342. See Note (1927) 13 CORN. L. Q. 123.

⁸⁴ *Biddel v. Brizzolara*, *supra* note 12, dictum, but based on subrogation theory. In *Williams v. Naftzger*, *supra* note 12, the two owners of land conveyed to an assuming grantee who later gave a deed back to the two mortgagors by the terms of which the mortgagors reassumed the debt for a consideration paid to one of them. The other mortgagor, however, was not a party to the agreement and refused to accept and release the grantee, notifying the latter to that effect. It was held that the grantee was subject to a deficiency decree. The question was then simply whether one of two obligees could release the obligor without the consent of the other.

(b) *Donee and Quasi-Creditor Beneficiary Contracts*

The question here is whether the parties to a contract calling for performance to a donee or quasi-creditor beneficiary can destroy the interest of the latter without his consent. The question has arisen in connection with life insurance. In general such contracts have been treated as a separate class with little or no reference to other beneficiary agreements, and it has usually been held that, absent the now common provision for change of beneficiary, the parties thereto cannot rescind the contract or change the beneficiary. The first-named beneficiary is said to obtain a vested interest beyond the control of the insured and insurer, although his interest is of course subject to the conditions of the policy and particularly the premium conditions.⁸⁵ There seems little reason for distinguishing between insurance and other types of donee beneficiary contracts, although there may well be reason for distinguishing creditor beneficiary contracts since in the latter class the real object is to benefit the promisee, and he has substantive interests therein which are protected as already shown. The California cases seem to follow this general rule as to life insurance with no reference to the rescission clause of California Civil Code section 1559.⁸⁶ In *Griffith v. New York Life Insurance Co.*,⁸⁷ despite the fact that insurer and insured by mutual agreement purported to cancel the insurance and the unpaid note given for the first premium, the beneficiary whose assent had not been obtained recovered.⁸⁸ The case, however, went even further in allowing re-

⁸⁵ 2 WILLISTON, *op. cit. supra* note 3, § 396. Vance, *The Beneficiary's Interest in a Life Insurance Policy* (1922) 31 YALE L. J. 343, traces the development of this concept.

⁸⁶ *In re Dobbels Estate* (1894) 104 Cal. 432, 38 Pac. 87, suggests that making the policy payable to a third person is virtually a short-cut to taking out the policy payable to the insured himself, and then assigning the same to the beneficiary. See Whittier, *op. cit. supra* note 29, at 795. In *Yore v. Booth* (1895) 110 Cal. 238, 42 Pac. 808, on the vested interest theory the court denied the admissibility in evidence of declarations of the deceased insured to prove the falsity of age representations made in the application. See also *Simmons v. Miller* (1915) 171 Cal. 23, 151 Pac. 545.

⁸⁷ (1894) 101 Cal. 627, 36 Pac. 113.

⁸⁸ Although in aleatory contracts failure of one contracting party to perform his obligation does not usually excuse the other [3 WILLISTON, *op. cit. supra* note 3, §§888-889A; RESTATEMENT OF THE LAW OF CONTRACTS (Am. L. Inst. 1932) § 293] unless there is an express condition, and hence is not a defense to the donee beneficiary's action, yet, if such failure in the particular type of contract involved would be a defense, had the promise called for performance to the promisee, it should be also a defense against the beneficiary. Nor would it be proper to allow the beneficiary to compel the donor promisee to perform in order to secure the benefit of the counter-performance, since to do so would compel the donor to consummate the gift.

covery although the insured died in the second year with the second premium unpaid as well. On this latter point the opinion is based on the ground that the statutory requirement of notice to the insured of the maturity of that premium had not been met. The results seem extraordinary since the notice would have been sent normally to the insured instead of to the beneficiary, and hence, absent rescission, if sent might never have come to the notice of the beneficiary. It would also seem that the statutory requirement of notice to the insured was intended to prevent the inadvertent failure to pay subsequent premiums and in this case was excused by reason of the insured's conduct. It will be noted that there was a complete failure of consideration for the insurer's promise.⁸⁹ In another case the insured, claiming a right to rescind on the ground that his consent had been obtained by fraud of the insurer's agent, sued to recover back the premium. In denying relief the court went on the vested interest theory, although it was also suggested that the relief might possibly have been granted if the beneficiary had been made a party to the suit.⁹⁰ No attention was paid in the opinion to Civil Code section 1689 that rescission may be had by a party whose consent to a contract has been induced by fraud. Assuming that Civil Code section 1559 refers to a consensual rescission of the two contracting parties, it certainly does not follow that the promisor cannot defend the beneficiary's suit on ground of fraud.⁹¹

⁸⁹ In *Denike v. Denike* (1927) 86 Cal. App. 493, 261 Pac. 322, virtually an interpleader proceeding, the vested interest of the beneficiary was recognized, but the insurer had refused to change the beneficiary without his consent.

⁹⁰ *Jurgens v. New York Life Ins. Co.* (1896) 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386. It would seem that the beneficiary could not successfully oppose rescission for fraud and thus in effect secure a gift so procured. The necessity of making the beneficiary a party to the suit was based on the ground that the insurer might become liable to the beneficiary, apparently for the reason that the finding of fraud would not be *res judicata* as to her. Yet in the case of assignments of choses in action, it is not a defense to a suit by an alleged assignee that the plaintiff has not made the assignor a party, although the assignor would not be concluded by a determination that the assignment had been made.

⁹¹ If the situation be such that, had the contract called for performance to the promisee he would be entitled to restitution of the consideration paid the promisor because of the latter's unjustifiable repudiation or failure to perform, it would seem that the donee beneficiary should have such alternative remedy. No California decision has been observed. 5 WILLISTON, *op. cit. supra* note 3, § 1455A. The vested interest theory would be violated were the action in the promisee. That theory is responsible for the conclusion that on the bankruptcy of the insured no interest passes to the trustee. 2 WILLISTON, *op. cit. supra* note 3, § 396; 6 *ibid.* § 1998D.

It is not proposed herein to consider various problems arising where a policy of life insurance or a mutual benefit certificate permits a change of beneficiary. In the case of the latter, disputes have frequently arisen as to whether the change has been properly

The California reports appear to disclose few donee contracts, other than life insurance, and few quasi-creditor beneficiary contracts, and none involving the rescission point. No reason is apparent on theory for treating them differently from the insurance cases.⁹²

STATUTE OF LIMITATIONS

The statute of limitations will not ordinarily raise any peculiar difficulties in the donee or quasi-creditor type of contract for obvious reasons. Because, however, of the nature of the creditor beneficiary agreement, creating, as it does, interests in both promisee⁹³ and beneficiary, certain kinds of problems arise that cannot occur under the donee contract or in connection with contracts in general. The fol-

made and the effect of incomplete compliance with the requirements of the certificates or the rules of the organization. *McLaughlin v. McLaughlin* (1894) 104 Cal. 171, 37 Pac. 865; *Jory v. Supreme Council A. L. H.* (1894) 105 Cal. 20, 38 Pac. 524; *Grimbley v. Harrold* (1899) 125 Cal. 24, 57 Pac. 558. Problems of community property may be involved. *In re Castagnola's Estate* (1924) 68 Cal. App. 732, 230 Pac. 188.

While it was held in *Waters v. Conselho Supremo*, etc. (1918) 38 Cal. App. 360, 176 Pac. 368 [see (1936) 105 A. L. R. 950, 951, for cases in other jurisdictions to same effect] that, after the death of the insured the original beneficiary of a mutual benefit certificate was entitled to have cancelled a new certificate naming another and to recover the benefit where the insured was insane when he procured the new, yet on the other hand the opposite result has been reached at the suit of the original beneficiary of both an ordinary life policy permitting change and a mutual benefit certificate where the changes have been procured through fraud or undue influence exercised upon the insured by the new beneficiary. *Hoeft v. Supreme Lodge, K. of H.* (1896) 113 Cal. 91, 45 Pac. 185; *New York Life Ins. Co. v. Dunn* (1920) 46 Cal. App. 203, 188 Pac. 1028. In some jurisdictions a contrary result has been reached [see (1936) 105 A. L. R. 950, 957] and the original beneficiary has been allowed relief where the appointment of the new one was due to mistake of the insured. *Rosenblum v. Manufacturers Trust Co.* (1936) 270 N. Y. 79, 200 N. E. 587, 105 A. L. R. 947. The last-cited California decisions go on the ground that the interest of the beneficiary is "a mere expectancy." Those named in a will as legatees, however, have "inere expectancies" and yet may have relief when the revocation of the first and the making of a new one was procured by the undue influence of those designated in the second as legatees. *Vaughn v. Vaughn* (1928) 217 Ala. 364, 116 So. 427; *O'Brien, Appellant* (1921) 120 Me. 434, 115 Atl. 169; *Lyon v. Dada* (1901) 127 Mich. 395, 86 N. W. 946. California Probate Code section 22 provides that a revocation of a will procured by duress, menace, fraud or undue influence may be declared void. And a constructive trust may be imposed at the suit of heirs upon the beneficiary of a will who by fraud prevented its revocation. *Brazil v. Silva* (1919) 181 Cal. 490, 185 Pac. 174. See Note (1915) 3 CALIF. L. REV. 350; (1919) 8 *ibid.* 110.

⁹²In *Rogers v. Schottlerback* (1914) 167 Cal. 35, 138 Pac. 728, a promisee let the promisor have the former's child on an agreement that the child should be left by will half the promisor's property. The estate was held liable. See also *Staples v. Hawthorne* (1929) 208 Cal. 578, 283 Pac. 67; *Mutual Life Ins. Co. v. Henes* (1935) 8 Cal. App. (2d) 306, 47 P. (2d) 513.

⁹³The effect of the statute as to the promisee has already been considered.

lowing discussion will, therefore, be confined to creditor beneficiary contracts.

Obviously where the promise is made before maturity of the promisee's debt, the statute begins to run only upon the maturity of that debt.⁹⁴ And if the statute has partly run against the promisee when the promise is made, the effect is not to give the promisor the advantage of this period.⁹⁵ In other words, there is no "tacking" such as is found in the law of adverse possession. Consistent with these views is a holding that when the promise is to pay within a year already due debts, the statute does not begin to run until the year has elapsed.⁹⁶ And if the statute has completely run against the debtor-promisee when the promise is made, the statute begins to run against the promisor from the date of maturity of his promise.⁹⁷

When we consider the mortgage assumption contract, we encounter a difficulty, not concerned with personal liability but with the enforceability of the mortgage itself. Here are involved sections 2911 and 2922 of the Civil Code.⁹⁸ Without examining the reasons for the judicial conclusions reached under these sections, suffice it to say that the supreme court has held that, where there is a new promise by the mortgagor himself before the statute has run against foreclosure, the mortgage is kept alive for the additional period applicable

⁹⁴ *Roberts v. Fitzallen*, *supra* note 14. Despite "*at any time* before the parties thereto rescind it" of California Civil Code section 1559, the statute applies. (Italics added.) *Bogart v. George K. Porter Co.*, *supra* note 23, which also states that action against the promisee does not stop the running as against the promisor.

⁹⁵ *Sherwood & Sherwood v. Gill & Lutz*, *supra* note 26. *Bogart v. George K. Porter Co.*, *supra* note 23, *semble*. It should be observed that to allow action against the promisor when the debt is barred against the promisee is hard to reconcile with the theory that the creditor beneficiary's action is merely a mode of reaching assets of his debtor. Presumably a garnished debtor cannot "waive" the limitations defense that his creditor has to the main claim. The point can arise only where, owing to lack of jurisdiction over the defendant, no personal judgment can be rendered against him, but after payment of judgment by the garnishee, the latter is sued by his creditor. And on the "subrogation" theory inasmuch as the promisee's obligation is no longer enforceable, how can the creditor take advantage of the "security" given to the "surety?"

⁹⁶ *Anderson v. Calaveras Central Min. Corp.*, *supra* note 5. The action was begun after the statute had run against the promisee.

⁹⁷ *Davis v. Davis*, *supra* note 65, clearly takes this position although personal liability of the promisor was not involved. The decision, however, of the court as to foreclosure can not be considered law in the light of the cases cited in notes 99-104, *infra*.

⁹⁸ §2911: "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

§ 2922: "A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property."

to the new promise.⁹⁹ On the other hand, if the statute has once run against foreclosure, the new promise, while it will revive the personal obligation, will not revive the mortgage.¹⁰⁰ On the authority of the decisions to the effect that the mortgage is kept alive as against the mortgagor when the latter makes a new promise before foreclosure is barred, the court has also held that where the mortgagor conveys, before foreclosure is barred, to an assuming grantee, the period of limitations for foreclosure begins to run again.¹⁰¹ It is not, however, clear from the opinion in the case cited whether the result is based on the ground (1) that the mortgagor's deed with its assumption clause constitutes an acknowledgment implying a promise by the mortgagor and thus keeps alive his personal obligation and with it the mortgage for an additional four years, thereby meeting the writing requirements of Code of Civil Procedure section 360, or (2) that it is the assumption by the grantee, treated independently, that keeps the mortgage alive as to him irrespective of the mortgagor's continued liability. The earlier case of *Biddel v. Brizzolara*¹⁰² held that a provision for assumption in an executory contract of sale, later rescinded, did not have the effect of causing the statute to start running again against the mortgagor, since, assuming the acknowledgment of the debt could be construed as a new promise by the mortgagor to pay, it nevertheless failed to keep the mortgage alive since a new promise by the debtor must be made to the creditor, while here such promise was made to the purchaser.¹⁰³ The court of appeal¹⁰⁴ had to meet the issue squarely and the holding is consistent only with the second ground. The grantee assumed the debt before it was due, and two days before foreclosure would be barred acknowledged the debt in writing to the mortgagee. A foreclosure suit brought several months later was successful, although it seems to have been admitted that no judgment could be entered against the mortgagor.

⁹⁹ *Southern Pac. Co. v. Prosser* (1898) 122 Cal. 413, 55 Pac. 145; *Worth v. Worth* (1909) 155 Cal. 599, 102 Pac. 663; *Sanford v. Bergen* (1909) 156 Cal. 43, 52, 103 Pac. 333, 336.

¹⁰⁰ *Wells v. Harter* (1880) 56 Cal. 342; *Weinberger v. Weidman* (1901) 134 Cal. 599, 66 Pac. 869.

¹⁰¹ *Daniels v. Johnson*, *supra* note 12. See also *Curtis v. Holee* (1921) 184 Cal. 726, 195 Pac. 395.

¹⁰² *Supra* note 12. See also *Biddel v. Brizzolara* (1880) 56 Cal. 374.

¹⁰³ See 1 WILLISTON, *op. cit. supra* note 3, § 189.

¹⁰⁴ *Fielding v. Iler* (1919) 39 Cal. App. 559, 179 Pac. 519.

DEFENSES THAT WOULD BE AVAILABLE HAD CONTRACT CALLED FOR
PERFORMANCE TO PROMISEE

In the situation referred to in the above title, it would seem obvious that, normally at least, in all types of beneficiary contracts, many such defenses can also be asserted in the beneficiary's action. It is thought unnecessary herein to do more than to allude to the numerous decisions arising under life insurance policies and fire policies protecting the mortgagee by a simple loss-payable clause, where false representations¹⁰⁵ and violation of conditions have defeated the beneficiary's expectations.¹⁰⁶ Likewise the beneficiary will be defeated by a failure of consideration.¹⁰⁷ In these respects the similarity to the position of an assignee should be noted.

SET-OFF, COUNTERCLAIM, AND RECOUPMENT

The problem here is whether in the beneficiary's action the promisor may set-off or counterclaim demands against the promisee to wipe out or cut down liability.¹⁰⁸ In the donee or quasi-creditor beneficiary situation, it would seem that such should not be allowed for claims arising out of separate and distinct transactions. When the contract is made the promisor knows that performance to the beneficiary is called for and it would be as improper to allow the cross-claim, even negatively, as to allow a debtor to set-off against an assignee's action claims arising after notice of the assignment. A different view, however, might well be taken, were the cross-demand based on the breach by the promisee of the very contract, although such breach did not amount to a defense.

¹⁰⁵ See also *K. Lundeen Corp. v. Barlow* (1932) 120 Cal. App. 391, 7 P. (2d) 1102.

¹⁰⁶ The converse is presented where the promisor would be liable to the promisee, had the contract called for performance to him, despite the fraud of the promisee, as where the promisor has retained the consideration, and a similar result is reached. *Pear-sall v. Townsend* (1935) 7 Cal. App. (2d) 162, 45 P. (2d) 824. See also *Bank of Alameda County v. Hering* (1933) 134 Cal. App. 570, 25 P. (2d) 1004.

¹⁰⁷ *Jennings v. Jordan* (1916) 31 Cal. App. 335, 160 Pac. 576; *Brion v. Cahill* (1917) 34 Cal. App. 258, 165 Pac. 704; *Benedict v. Hunt* (1871) 32 Iowa 27; *Clay v. Woodrum* (1891) 45 Kan. 116, 25 Pac. 619.

¹⁰⁸ We are not concerned with the promisor setting off his own claims against the beneficiary. This may be done in the appropriate case—*Clay v. Woodrum*, *supra* note 107—with the result in a creditor beneficiary situation that the promisee's claim against the promisor will be extinguished as by payment to the beneficiary according to the terms of the contract.

On the other hand, the answer is not necessarily the same if the beneficiary is of the creditor type, since as has been shown the promisee has a pecuniary interest of his own and may himself sue upon breach. To allow the cross-demand to cut down liability would seem proper, and the little authority in the state permits it. Thus, where the defendant had agreed with a hauler of gravel to pay the supplier of gasoline used in hauling, such payments to be deducted from the haulage charges, and the hauler agreed to save the defendant harmless from railway demurrage charges on the gravel, it was held that the gasoline seller could not recover where by reason of the hauler's failure the defendant had paid demurrage charges exceeding the gasoline claim and the hauler had ceased work leaving nothing due him.¹⁰⁹ An even stronger case is presented in Wyoming¹¹⁰ where the promisee broke an "independent" covenant; it was held that the promisor could use his claim for damages negatively, although he could not have an affirmative judgment thereon. It is interesting to note that the court relied upon as analogous California decisions to the effect that to the action of an agent of an undisclosed principal the defendant can similarly set-off claims against the principal.

REFORMATION AT SUIT OF BENEFICIARY

There seems to be little authority in California on the problem whether a beneficiary can procure reformation. In one case a land contract called for payment by the two parties of a commission to a broker, but the amount and the name of the broker were omitted. Reformation was granted at the suit of the broker against the two parties.¹¹¹ Discussion, however, revolved around the Statute of Frauds provision as to real estate brokers. Inasmuch as both parties had clearly shown their intent to rescind the provision for the commission, it is strange that no allusion is made to the rescission pro-

¹⁰⁹ *Ferguson v. Marsh*, *supra* note 41. It should be mentioned, however, that the court went also on the ground that the plaintiff was an "incidental" beneficiary.

¹¹⁰ *Farmers' State Bank v. Nicholson* (1927) 36 Wyo. 221, 254 Pac. 134. See also *Fulmer v. Wightman* (1894) 87 Wis. 573, 58 N.W. 1106. In *Gunn v. McAlpine* (1914) 125 Minn. 343, 147 N.W. 111, where there were several creditor beneficiaries and there had been a partial failure of consideration, it was held that it was not error to have deducted a *pro rata* share of the damage from the plaintiff creditor beneficiary's claim instead of the whole amount as the defendant contended.

¹¹¹ *Calhoun v. Downs*, *supra* note 82. In the district court of appeal (1930) 289 Pac. 857, the court held that the beneficiary was "a party aggrieved" within Civil Code section 3399.

vision of Civil Code section 1559. Absent such difficulty, no reason appears why the beneficiary should not be entitled to reformation in the proper case, and in *Cantlay v. Olds & Stoller Inter-Exchange*¹¹² it was decided that, where an automobile liability policy purported to insure merely the named insured and also its employees, one who had rented out his trucks to the named insured and had paid a judgment to a tortfeasor could have the policy reformed and recover upon it as reformed, where owing to mistake the policy did not also protect those whose trucks were hired by the named insured. Although the point has apparently not arisen in California, it has been decided elsewhere¹¹³ that the tortfeasor who has recovered judgment against the named insured may also have the policy reformed to conform to the intention of the contracting parties.¹¹⁴

It is now proposed to examine a few more or less special kinds of beneficiary contracts, some of which have been affected by recent legislation.

REAL ESTATE BROKERS AS BENEFICIARIES

It sometimes happens that the only remedy of a real estate broker depends on a provision for payment of commission contained in the contract of sale to which he is not a party.¹¹⁵ A number of California decisions allow him recovery as a beneficiary in the proper case.¹¹⁶ Where, however, the defendant justifiably refused to consummate an exchange because of lack of title of the other party, he was not liable; there was a failure of consideration.¹¹⁷ If, on the other hand, the defendant unjustifiably refuses to carry out the transaction, he

¹¹² (1932) 119 Cal. App. 605, 7 P. (2d) 395, Sup. Ct. *hearing den.*, March 10, 1932.

¹¹³ *Hunt v. Century Indem. Co.* (R. I. 1937) 192 Atl. 799, (1938) 112 A. L. R. 902.

¹¹⁴ See *Liability Insurance*, *infra* p. 529. Does not generally the promisee of a beneficiary contract have such interest as to require his joinder as a party? In *Wilson v. Shea*, *supra* note 35, a wholly undisclosed principal was denied reformation where the agent was not joined. See 2 COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 1474.

¹¹⁵ Civil Code section 1624 and Code of Civil Procedure section 1973 require a writing, and hence in the absence of such the broker cannot recover on his own oral contract of employment.

¹¹⁶ *Lundeen v. Nowlin* (1912) 20 Cal. App. 415, 129 Pac. 474. A contract for exchange of lands provided for the parties paying separate sums to the broker. The exchange had been consummated. Note the broker was a quasi-creditor beneficiary, for apparently there was no previous enforceable obligation on the part of either party.

¹¹⁷ *Jennings v. Jordan*; *Brion v. Cahill*, both *supra* note 107; *K. Lundeen Corp. v. Barlow*, *supra* note 105 (similar except that defendant justifiably repudiated because of fraud of other party to contract).

is liable to the broker.¹¹⁸ In the *Stanton* case¹¹⁹ it is interesting to note that the commission was payable by the buyer upon the execution of the deed, an event that did not happen. While in the ordinary case of a contract for the sale of land the buyer is not liable in an action at law for *the price*, where he does not get the land, but only for damages, yet here the broker recovered the full commission. Although frequently performance of conditions to be performed by the plaintiff, a party to the contract, is excused and recovery for the promised sum adjudged when the failure has been caused by the defendant or "waived" by him provided that the plaintiff has rendered the full consideration, yet it is somewhat extraordinary to apply this doctrine to a beneficiary where the consideration has failed, albeit the failure is due to the defendant.¹²⁰ Another case¹²¹ reaches a peculiar result. An exchange contract called for different sums, each in excess of \$100, to be paid by the two parties, but also stipulated that if either party should refuse to carry out the agreement he should pay the broker \$100 as liquidated damages. To the defaulting defendant's claim of a maximum liability of \$100, the court retorted that the provision was a penalty within Civil Code sections 1670 and 1671, and hence void since there was no uncertainty as to the broker's damages. It would seem to have been ignored that the plaintiff was not a party to the contract; that the "penalty" did not enure to the benefit of the other party; and that the provision was merely a promise to pay a lesser sum on the happening of a contingency. The con-

¹¹⁸ *Stanton v. Carnahan* (1911) 15 Cal. App. 527, 115 Pac. 339 (refusal not a "rescission" within CAL. CIV. CODE § 1559, although admitted that a rescission agreement would prevent recovery); *Pyle v. Benjamin* (1929) 102 Cal. App. 691, 283 Pac. 372 (same, except the contract was for an exchange, separate sums to be paid by the parties). In *Cole v. Low* (1927) 81 Cal. App. 633, 254 Pac. 676, the broker recovered from the seller who unjustifiably declined to consummate. The case is of exceptional interest, since, as the court construed the contract, the buyer and seller jointly and severally promised to pay the broker. Since the buyer would have been excused from liability to the broker by the seller's default, it is extraordinary to excuse one of two joint and several promisors for failure of consideration and not the other. But how can two jointly and severally promise each other to pay a third person a single sum? Are not both parties promisors only and not each both promisor and promisee? It should be added that for reasons discussed by the court, the decision did not go on the ground that the signed writing was a subsequent written memorandum of an earlier oral agreement with the plaintiff, sufficient to meet the requirement of the Statute of Frauds.

¹¹⁹ *Supra* note 118.

¹²⁰ In *Houghton v. Kuehnrich* (1920) 46 Cal. App. 469, 189 Pac. 457, a contract for exchange gave the defendant a power to cancel the same within a certain time. The obvious conclusion was reached that the exercise of the power precluded recovery of the commission.

¹²¹ *Pyle v. Benjamin*, *supra* note 118.

siderations of policy responsible for the rule as to the penalties seem entirely absent and, in addition, while the amount of a penalty cannot be recovered regardless of actual damages, it is of course not uncommon for many contracts, held valid, to set a maximum limit.

LIABILITY INSURANCE

Until the fairly recent enactment of statutes covering the matter, so-called liability insurance policies were generally drawn in such a way that the injured third person was usually denied action against the insurer. The "no action" clause or other similar provisions made the contract merely one to reimburse the insured for sums paid by him; it was in effect a contract against loss rather than against liability. The result was that the tortfeasor has usually been held unable in any way to obtain the benefit of the insurance.¹²² To remedy what were thought to be the socially unjust results of the decisions, statutes were passed in various states whereby the tortfeasor was in effect made a creditor beneficiary. Such an act was first adopted in California in 1919.¹²³ Briefly the Act requires the policy to contain provisions that the bankruptcy or insolvency of the insured shall not release the insurer "from the payment of damages for injury sustained or loss occasioned *during the life of such policy*" and that after judgment against the insured an action may be brought against the insurer on the policy "*subject to its terms and limitations*, by such judgment creditor to recover on the judgment."¹²⁴ The clear intent of the first italicized words, particularly in the light of previous judicial history, would seem to be to preclude rescission of the policy by the parties thereto so far as an attempted rescission purported to discharge the insurer as to injuries occurring theretofore,¹²⁵ although to permit rescission as to subsequent injuries.¹²⁶

¹²² Laube, *The Social Vice of Accident Indemnity* (1931) 80 U. OF PA. L. REV. 189, vigorously criticizes the courts for their refusal to devise methods whereby the injured person might procure the protection for which the insurer has been paid premiums.

¹²³ Cal. Stats. 1919, p. 776. With changes of phraseology it now is CAL. INS. CODE §§ 11580, 11581.

¹²⁴ Italics added.

¹²⁵ See *Georgia Casualty Co. v. Boyd* (C. C. A. 9th, 1929) 34 F. (2d) 116; *Spann v. Commercial Standard Ins. Co.* (1936) 82 F. (2d) 593; *Bachman v. Independence Indem. Co.* (1931) 112 Cal. App. 465, 485, 297 Pac. 110, 118; *Zimmerman v. Union Automobile Ins. Co.* (1930) 133 Ore. 600, 291 Pac. 495; *Indemnity Co. of America v. Pitts* (Tex. Civ. App. 1933) 58 S. W. (2d) 53; *Finkelberg v. Continental Casualty Co.* (1923) 126 Wash. 543, 219 Pac. 12.

¹²⁶ See *Hooker v. American Indem. Co.* (1936) 12 Cal. App. (2d) 116, 54 P. (2d) 1128.

Therefore it must be noted that the rescission clause of California Civil Code section 1559 is rendered inapplicable as to existing liabilities, while kept alive as to possible subsequent ones. The Act thus makes the benefit of the policy exclusively available to the creditor beneficiary tortfeasee, although, if the insured should pay the latter, any creditor of the insured could reach the insurer's obligation of reimbursement by garnishment.¹²⁷ On the other hand, if before payment by the insured to the tortfeasee, the insurer should pay the insured even in good faith with intent, not fulfilled, that the money should be paid over to the injured person, it would seem that the insurer would not be relieved of liability to the tortfeasee, since to reach such result would be as opposed to the purpose of the Act as to allow rescission between the parties.

Since the tortfeasee's remedy is based on the policy, the success of his action must depend upon compliance with its terms and conditions. The second italicized clause of the statute requires this result. This would seem particularly obvious where as in this state the automobile driver is under no statutory or other obligation to carry insurance. Hence, ordinarily at least, the tortfeasee is no more able to recover than the insured himself would be had he paid the former. There are, however, in the opinions occasional dicta that a violation of a condition by the insured would not be a defense to the injured person if the violation did not substantially prejudice the insurer.¹²⁸ The correctness of such dicta is open to question. On the other hand, if the failure to meet the various conditions can be said to have been caused by the insurer, as where he has been in collusion with the insured to bring about such result, it would certainly be as much against the spirit of the statute to permit the insurer to take advantage of the breach of condition as it would be to give effect to a rescission agreement with the insured after occurrence of the injury.¹²⁹

¹²⁷ A liability policy may insure not only the named insured but also others. The automobile liability policy today frequently insures persons driving the car with the consent of the named insured. In such case the policy is in a sense both a donee and a creditor beneficiary contract; the person driving the car is a donee beneficiary while the injured person is a creditor (of the donee) beneficiary.

¹²⁸ *Malmgren v. Southwestern A. Ins. Co.* (1927) 201 Cal. 29, 255 Pac. 512; *Hyn-ding v. Home Acc. Ins. Co.* (1932) 214 Cal. 743, 7 P. (2d) 999; *Purefoy v. Pacific Auto Indem. Exch.* (1935) 5 Cal. (2d) 81, 53 P. (2d) 155; *Western M. Co. v. Bankers I. Ins. Co.* (1938) 10 Cal. (2d) 488, 75 P. (2d) 609; *Panhans v. Associated Indem. Corp.* (1935) 8 Cal. App. (2d) 532, 47 P. (2d) 791. In *Valladao v. Fireman's Fund Indem. Co.* (1939) 97 Cal. Dec. 529, 89 P. (2d) 643, the court expressly refused to answer the question.

¹²⁹ See also *Reformation at Suit of Beneficiary*, *supra* p. 526.

FIRE INSURANCE—FULL MORTGAGE CLAUSE

A peculiar type of creditor beneficiary may be found in fire insurance. Where the policy contains a simple loss-payable-to-the-mortgagee clause, the mortgagee secures inadequate protection since he is subject to the various conditions of the policy, the breach of which may be without his consent or even knowledge.¹³⁰ To give him greater protection there is now in general use the New York standard or union or full mortgage rider which by its terms protects the mortgagee although the policy becomes "void" as to the mortgagor, and which provides that, if as to the mortgagor no liability exists, the insurer on payment to the mortgagee shall be subrogated to the rights of the latter. Briefly, then, if the policy remains valid as to the mortgagor, the policy is a simple creditor beneficiary contract and payment to the mortgagee of a loss discharges the debt, *in toto* or *pro tanto*, as in any creditor beneficiary contract. If, however, the policy becomes unenforceable as to the mortgagor, payment to the mortgagee does not enure to the benefit of the mortgagor. Yet the mortgagee cannot be correctly designated a donee beneficiary. While it has been said that where the union mortgage rider is employed, there are in effect two policies or contracts, one with the mortgagor and the other with the mortgagee,¹³¹ yet it cannot be conceded that there really are two contracts. Difficulties with such theory would arise particularly where the mortgagee did not ever know until after loss that the policy had been taken out, although the mortgage might impose a duty on the mortgagor to carry such insurance. Usually, at least, the mortgagee does not pay the premium and undertakes no obligation to the insurer to do so.¹³²

The standard fire policy required by statute in California¹³³ provides for cancellation of the policy to take effect immediately on request of the insured owner, but for cancellation at option of insurer

¹³⁰ Breach of condition will defeat recovery by the mortgagee. CAL. INS. CODE §§ 170, 171. *Holbrook v. Baloise Fire Ins. Co.* (1897) 117 Cal. 561, 49 Pac. 555; *Bank of Oroville v. Minnesota Fire Ins. Co.* (1933) 132 Cal. App. 510, 23 P. (2d) 83.

¹³¹ *Secombe v. Glen Falls Ins. Co.* (1920) 45 Cal. App. 611, 188 Pac. 305; *Wittherow v. United American Ins. Co.* (1929) 101 Cal. App. 334, 281 Pac. 668. See also *Whitney v. American Ins. Co.*, *supra* note 4; *Mosee v. Firemen's Ins. Co. of Newark* (1927) 87 Cal. App. 473, 262 Pac. 436.

¹³² The topic is well handled in Note (1933) 33 COL. L. REV. 305. It is pointed out therein that even fraud of the mortgagor in procuring the issuance of the policy has been held not to defeat the claim of the mortgagee, although there are some decisions to the contrary. Usually of course the interests of a beneficiary are affected by fraud of the promisee in the same manner and to the same extent as if he were the person to whom performance were to be rendered.

¹³³ CAL. INS. CODE § 2071.

to take effect only upon five days written notice to both insured and mortgagee. It will be noted that where there is a simple loss payable clause, the insured may by his action alone deprive the mortgagee of protection without the latter's knowledge. The California statute,¹³⁴ however, although not providing for a particular standard rider, clearly permits the New York standard clause. This rider stipulates that the insurer reserves the power to cancel the policy at any time but "in such case this policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation and shall then cease. . . ."

It will be observed that the main body of the policy and the rider refer to the exercise of an option by one party to cancel and do not expressly bear on the power of the insurer and insured by mutual agreement to rescind the contract. Yet, and particularly in the light of history, it would not be unreasonable to hold that the proper inference to be drawn from the rider is that the contracting parties purport to deny themselves power by mutual agreement to divest the interest of the mortgagee save in the manner specified. If, as has been held in California,¹³⁵ the insurer and insured of a life policy create a "vested" interest in the donee beneficiary in the absence of a reservation of power to change the beneficiary, no reason appears why in the present situation the parties cannot create a similar "vested" interest in the mortgagee. The rescission clause of Civil Code section 1559 could be interpreted to apply only in the absence of provision in the contract to the contrary; in addition Insurance Code section 2078 may be thought to permit an anti-rescission-by-mutual-agreement-of-insured-and-insurer provision, and thereby to legalize the previously mentioned implication. It is difficult to discover any reason of public policy forbidding.

DEFICIENCY JUDGMENTS IN PURCHASE MONEY MORTGAGES— RECENT LEGISLATION

Recent legislation in California¹³⁶ may have somewhat altered the law with regard to one type of creditor beneficiary contract, *i.e.*,

¹³⁴ CAL. INS. CODE § 2078: "There may be added to the standard form, clauses providing for and defining the rights, duties and obligations of mortgagees, assignees and other parties having or acquiring an interest in, right to, or lien upon the insured subject matter."

¹³⁵ See discussion under subtitle (b) *Donee and Quasi-Creditor Beneficiary Contracts*, *supra* p. 520.

¹³⁶ CAL. CODE CIV. PROC. § 580b. As enacted in 1933 the provision was: "No deficiency judgment shall lie in any event after any sale under a deed of trust or mort-

assumption of mortgage debts by a grantee of land. If a seller takes a purchase money mortgage and the buyer in turn conveys to one who assumes payment thereof, it would appear that the mortgagee can not secure a deficiency decree against the assuming grantee. Since the mortgagor cannot be held personally liable, it would seem to follow that inasmuch as he cannot possibly be damaged by the failure of the grantee to pay the debt, he can have no personal action against his grantee. But where the mortgage is not for purchase money, it has been held that the assuming grantee is subject to a deficiency judgment.¹³⁷ A literal reading of the legislation would seem to indicate this result. Yet the grantee assumes the mortgage as part of the price to his grantor and the general policy of the legislation is defeated so far as he is concerned. The situation might perhaps seem clearer if the mortgagee secured a deficiency decree against the mortgagor, a result not forbidden by the statute, in a suit in which the grantee was not personally served, and after payment of the same the mortgagor sued his grantee. To permit him to recover is to allow him to recoup payment of his own borrowing by forcing his grantee to pay what he agreed to pay for the land regardless of its value.¹³⁸

CONCLUSION

There seems little to say by way of summing up the results of this study. It will have been observed that it is the creditor beneficiary contract that has given rise to most of the trouble and that in that field the decisions cannot be explained or reconciled on any one

gage given to secure payment of the balance of the purchase price of real property." As amended in 1935, it reads: "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."

¹³⁷ *Banta v. Rosasco*, *supra* note 26.

¹³⁸ While it is not our purpose here to discuss the policy of the legislation, it may be mentioned that it does not apply where the seller conveys without taking back a mortgage, but receives a note unsecured or secured by personal property; also if a grantee buys from one who had previously given a mortgage, whether for a loan or to secure the purchase money, the latter can demand a note, unsecured or secured by personal property, payable to himself for any balance of the price over the amount of the mortgage and the cash paid.

Even if the criticism of the *Banta* case is sound, the decision may be thought to have been since adopted by the enactment of an amendment in 1937 to Civil Code section 1624 and Code of Civil Procedure section 1973. It would be strange to add to our Statute of Frauds a requirement of a written assumption of the debt signed by the purchaser of land subject to a mortgage, when the deed itself does not provide for such assumption, unless the assumption were to have some effect.

theory. While such decisions may incline one to the conclusion that the ruling in *Lawrence v. Fox*, their progenitor, was an error—an error, however, too firmly embedded in subsequent decisions to be now rectified—it may, perhaps, be not hopeless to expect a recognition that the direct action of the creditor beneficiary is a short-cut to garnishment or the reaching of assets in equity. Although some seemingly settled rules cannot be defended on this theory, yet its recognition might conceivably avoid further difficulties.

Stephen I. Langmaid.

SCHOOL OF JURISPRUDENCE,
UNIVERSITY OF CALIFORNIA.