Practical Real Estate Law

Fourth Edition

Daniel Hinkel

California State Supplement

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CHAPTER 1: INTRODUCTION TO THE
LAW OF REAL PROPERTY

MINERAL RIGHTS

Textbook page 3

Lateral and subjacent support, limiting the rights of mine owners, is a well-established principle in California law. An owner may sell mineral rights below 500 feet or may exercise a right of surface entry above 500 feet. (See Hendricks v. Spring Valley Mining and Irrigation Company (1881) 58 Cal 190; Empire Star Mines Company v. Butler (1944) G2 CA2d 466, 145 P.2d 49; Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83.)

WATER RIGHTS

Textbook page 3

Under California practice water rights can be acquired by three methods: (1) by ownership of riparian land; (2) by appropriation; and (3) by prescription.

In addition to riparian and appropriative rights, California recognizes pueblo rights. These rights are derived from Spanish law whereby Spanish or Mexican pueblos could claim water rights. Pueblo rights are limited to use of water for ordinary purposes within a municipality.

In California the administration of water rights is a function of the State Water Resources Control Board established in 1967.

FIXTURES

Textbook page 5

Regardless of the article’s lawful categorization as an “ordinary fixture” or “trade fixture” under California removal statutes, any fixture installed in good faith by mistake may be removed...
on payment of damages. (Civil Code Section 1013.5; see Cornell v. Sennes (1971) 18 CA.3d 126, 135, 95 CR. 728.)

METHODS OF ACQUIRING OWNERSHIP TO REAL PROPERTY

Textbook page 7

California law requires the claimant’s possession must be uninterrupted for 5 years. (CCP §318-325; see Akley v. Bassett (1922) 189 Cal. 625, 640.).

California follows the majority rule that the claim is sufficient whether it is deliberately wrongful or based on mistake. (Gilardi v. Hallam (1981) 30 C.3d 317, 322-326, 178 CR 624.)

ADVERSE POSSESSION

Textbook page 9

California law requires that there be some privity of estate between the successive landholders such as by will, intestate succession, or grant. (Allen v. McKay & Co. (1898) 120 Cal. 332, 339, 52, P.828; Sorensen v. Costa (1948) 32 C2d 453, 463–464.)

California is a minority and requires additionally that the adverse possessor pay all the taxes levied and assessed upon the property during the period. (CCP §325 [see Tobin v. Stevens (1988) 204 CA3d 945, 947, 953, 251 CR 587.])

In summary, the occupancy must be open and notorious and hostile and adverse, The adverse possessor must have some reasonable claim or right and paid all taxes levied and assessed for five consecutive years.

FEE SIMPLE DETERMINABLE

Textbook page 11

Fee simple determinable was abolished in California in 1982. (Civil Code §885.020.)
ROLE OF PARALEGAL IN REAL ESTATE LEGAL PRACTICE
Textbook, page 14

Paralegals assist and, in many cases, coordinate the entire real estate closing (see Chapter 14). The role of a paralegal in each of these skills areas will be examined in more detail throughout various chapters of this book.

RESEARCH MATERIALS FOR REAL PROPERTY LAW
Textbook page 15

In California one of the largest providers of legal materials is Continuing Education of the Bar—California, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612, 510/302-2000, http://www.ceb.com/


ETHICS: INTRODUCTION
Textbook page 16

In California attorneys are subject to the Rules of Professional Conduct that were adopted by the Board of Governors of the State Bar of California and approved by the California Supreme Court. (See Rules of Professional Conduct 1–100 through 5–320.) California attorneys are also bound by sections of the Business and Professions Code applicable to lawyers. (Business & Professions Code §6000–6238.) Considerable discussion surrounding the use of legal assistants and paralegals has occurred in California. Guidelines regulating paraprofessionals are found in Business and Professions Code §§6400–6456.
CHAPTER 2: CONCURRENT OWNERSHIP

RIGHTS, DUTIES, AND LIABILITIES OF THE COMMON OWNERS

Textbook page 19

Under California law the consent of the other common owners may be expressed or implied. (See Combs v. Ritter (1950) 100 CA2d 315, 317-320.)

TENANCY BY THE ENTIRETY

Textbook page 23

California does not recognize tenancy by the entirety.

COMMUNITY PROPERTY

Textbook page 24

For an application of community property issues to California, see below:

The following question and answer involves application of community property issues unique to California. Read the following question and answer for yourself before reviewing the suggested answer which follows.

COMMUNITY PROPERTY QUESTION

The following events occurred in California.

Husband (H), a carpenter, and Wife (W), a nurse, were married in 1965. In 1966, W contracted to buy a small office building. She paid the purchase price in installments by withdrawals from a joint bank account into which H and W deposited their earnings. In 1970, W paid the last installment and received a deed conveying the building to “W, a married woman.” He knew W was buying the building and made no objection. He did not know how the title to the building was taken.
In 1980, H’s aged uncle, Ted (T), promised H and W that if they would move into his home, maintain it in good repair, and care for him for the remainder of his life, he would will his house and furniture to H. H and W moved in with T, cared for him, and maintained his home in good repair until his death in 1985. T left a valid will giving his house and furniture to H.

H and W continued to live in the house. Returning home one day, W discovered to her surprise that all the furniture had been removed. H confessed that he had sold the furniture and used the proceeds to pay gambling losses he had secretly incurred.

State Bar of California. Used with permission.

In a dissolution of marriage proceeding now pending, what are W’s and H’s rights, if any, with respect to the following:

1. The office building?
2. The house?
3. The furniture or its value?

Discuss

Answer according to California law.

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ANSWER TO COMMUNITY PROPERTY QUESTION

I

OFFICE BUILDING

The office building characterization as separate or community property is first determined by looking at the manner in which the property was acquired. That is, its source. The facts here indicate the office building was acquired with funds from a joint bank account containing the couple’s earnings during marriage. California law holds that earnings during marriage are community property and hence any assets which are purchased with community property funds are also community property.
The source characterizations may be rebutted by certain title presumptions in California law. The first title presumption provided that a married woman who acquired property before January 1, 1975, by written document resulted in the assumption that the property was her separate property. Of course this could be rebutted by a showing that the property was purchased with community property funds over which the husband did not control or manage. Now in this case the title to the office building was taken by “W, a married woman” in 1970 but the money came from community property funds that they held in a joint account. The question therefore is whether or not the husband had management and control over the joint account and if he did not he could perhaps rebut the presumption that the office was the wife’s separate property. If the husband, on the other hand, did not control the account and did not object then it may be presumed that he intended a gift of his community property interest in the asset which his wife purchased. There is nothing here to indicate, however, that the husband knew how the title was taken. California’s transmutation rules today require a written agreement in order to change separate from community property if the agreements are made after January 1, 1985. The husband can probably rebut the presumption and the office building will probably be deemed community property to be divided equally between both spouses.

II

THE HOUSE

California law holds that property acquired by a gift, intestacy, or by will is the separate property of the spouse who so acquired it. In this case, however, the house was left to the husband in Ted’s will but it was only left to the husband because of the services that both the husband and wife provided for Ted. The wife certainly has a community property interest in her husband’s services during marriage which are rendered on behalf of Ted and, therefore, to the extent that she has an interest in those services she should have likewise a corresponding interest in the property that was rendered to her husband because of those services. Her husband cannot in all likelihood argue that the wife was presumed to have gifted the services which he rendered to Ted and therefore there was no transmutation. Accordingly the house should be divided equally as a community property asset.
III
THE FURNITURE OR ITS VALUE

As previously discussed the furniture was most likely the community property of both husband and wife as a result of the source of it. If it were the separate property of the husband he could have disposed of the furniture any way he wanted to. Likewise a spouse can sell any personal property items which are community property. However, California law does not allow for one spouse to sell the furniture of a family home without a written agreement of the other spouse. Accordingly the husband’s sale of the furniture was not authorized and the spouse would be able to recover it from the purchaser without repaying the money paid by that person to her spouse. If she is unable to recover the property she may be able to assess as damages the value of the furniture from the husband.

DOWER AND CURTESY

Textbook page 25

Except to the extent otherwise provided in Probate Code §120, the estates of dower and curtesy are not recognized. The California Law Revision Commission points out that Probate Code §120 “gives the surviving spouse rights in California real property of a non-domiciliary decedent that may be akin to dower or curtesy in the decedent’s state of domicile.”

OTHER LEGAL ENTITIES

Textbook page 33

GENERAL PARTNERSHIPS

The Uniform Partnership Act is codified in California Corporations Code, Section 16100 et seq.
California allows for the formation of a general partnership without a written partnership agreement. (See *Weiner v. Fleischman* (1991) 54 Cal. 3d 476, 286 CR 40; Corporations Code, Section 16202.)

**LIMITED PARTNERSHIPS**

California classification of partnerships is codified in Corporations Code, Sections 15611 et seq.

**LIMITED LIABILITY COMPANIES**

California filing requirements for limited liability companies are found in California Corporations Code, Sections 17050 et seq.

**ETHICS: UPL**

Textbook page 32

See California Rules of Professional Conduct Rule 1-300 regarding restriction against unauthorized practice of law.
CHAPTER 3: SURVEYS AND LAND DESCRIPTIONS

LAND DESCRIPTIONS

Textbook page 40

CALIFORNIA REQUIREMENTS FOR LAND DESCRIPTIONS

Various methods have been approved in California for describing the property in a deed. The more usual methods are by metes and bounds, by government surveys (see California Real Estate Company v. Walkup (1915) 27 CA 441, 448, 150 P 385; McDonald v. Mason (1938) 25 CA2d 17, 23, 76 P2d 212), or by reference to a recorded map. (McCullogh v. Olds (1895) 108 C 529, 41 P 420.) Satisfactory descriptions have also involved describing the property by its common name (Civil Code §1092) by referring to adjoining property (see Orena v. Newlove (1908) 153 C 136, 140, 94 P 628) or by a reference to a previous instrument. (See Marcone v. Dowell (1918) 178 C 396, 402, 173 P 465.)
CHAPTER 4: PUBLIC REGULATION AND ENCUMBRANCES

PUBLIC REGULATION

Textbook page 72

The California legislature has declared that it intends to provide only a minimum of limitation and/or zoning regulation in order that the respective counties and cities exercise the maximum degree of control over local zoning matters. (Government Code §65800.)

ZONING

Textbook page 72

Indeed California courts will enforce zoning regulations in order to protect the public welfare where there was otherwise some impediment to the enforcement of a restriction or equitable servitude. (See Scroggins v. Kovatch (1976) 64 CA3d 54, 134 CR 217; Stell v. Jay Hales Development Co. (1992) 11 CA4th 1214, 1228, 15CR2d 220; Govt. Code, §66499.33.)

ZONING

Textbook page 72

Ensign Bickford Realty Corp, v. City Council

(1977) 68 CA3d 467; 137 CR 304

OPINION

Scott, J.—The City of Livermore appeals from a judgment granting Ensign Bickford Realty Corporation’s petition for a writ of mandamus directing appellant city to reconsider Bickford’s rezoning application.

Respondent Bickford is the owner of a parcel of real property located in the northeast section of the City of Livermore. The property was annexed by the city in 1968, and shortly thereafter was zoned “CN,” a classification permitting neighborhood commercial facilities. The

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CN zoning of the property was at all times consistent with the city’s general plan and was retained until June 3, 1974, when the city rezoned the property “RS-4,” for residential use only. In 1975 Bickford applied to the city council for rezoning to CN, stating that a neighborhood shopping center would presently be constructed on its property and that Tradewell Stores, Inc., a grocery store chain, would be the major tenant. The city planning commission, by a resolution adopted on May 6, 1975, recommended against the CN zoning. Its recommendation was based upon the following factors: “1. That although the proposed rezoning is in conformance with the General Plan, the public necessity, convenience, and general welfare does not require the adoption of ‘CN’ zoning of this property at this time. 2. That the population base to support a Neighborhood Commercial area, as outlined in the General Plan, is not adequate at this time, nor is it anticipated that the neighborhood population will become large enough in the immediate future to justify rezoning at this time. 3. Inasmuch as the principal use proposed for the subject site is one intended to serve the ‘community’, the intent of the proposed rezoning to ‘CN’ would not be served (provision of day to day shopping convenience to the surrounding neighborhood). 4. That current lack of sewer capacity makes it unlikely that necessary supporting population will develop in near future.”

On July 28, 1975, following a public hearing, the city council denied Bickford’s application by a vote of three to one. The city council hearing was recorded and a transcript thereof was introduced into evidence and considered by the court below. It appears from the discussion at the public hearing that a portion of the northeast section of Livermore, in the so-called Springtown area, had already been zoned CN. The council wanted to develop this area before permitting commercial development elsewhere in the northeast section of Livermore. Various members of the council expressed the view that although there was a sufficient population based in the area to support one shopping center, the population was insufficient to sustain two such centers and the commercial development should be located in Springtown. Three of four council members present felt that to allow the development of a shopping center on Bickford’s property would frustrate the announced policy of promoting development of the Springtown area where land had already been zoned CN for a neighborhood commercial center.
Thereafter, at the request of the city council, the city manager wrote to Tradewell Stores, Inc., urging that Tradewell consider locating its store in the proposed Springtown shopping complex. The letter expressed the unanimous view of the city council that the northeast sector of Livermore (wherein respondent’s property is located) needed neighborhood shopping accommodations.

The trial court found that the city council, in denying respondent’s application for rezoning, failed to make findings of fact as required by California law and by the Livermore Zoning Ordinance. The court further found that the purpose is denying respondent’s application was to encourage development of the Springtown CN zoned property by eliminating a competitive economic threat to such property, and that the council’s decision was not predicated upon considerations of public health, welfare, safety, or morals. The court concluded that the refusal of the city to rezone its property was arbitrary and capricious, unconstitutionally discriminatory against Bickford, and denied it equal protection of the laws.

Appellant contends that the decision of the city council in refusing to rezone respondent’s property from a residential to a commercial classification was a valid exercise of the police power, and hence did not constitute an abuse of discretion or a denial of equal protection. It is also argued that the council was not required to make findings in support of its decision. We agree. We have concluded that the city council acted reasonably in denying respondent’s rezoning application and that the writ of mandamus should have been denied.

*****

. . . II. It is fundamental that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of the police power. (Millar v. Board of Public Works (1925) 195 C. 477 [234 P. 381, 38 A.L.R. 1479]; Lockard v. City of Los Angeles (1949) 33 C.2d 453 [202 P.2d 38, 7 A.L.R.2d 990].) In determining whether a particular ordinance represents a valid exercise of the police power, the courts “simply determine whether the statute or ordinance reasonably relates to a legitimate governmental purpose.” (G & D Holland Construction Co. v. City of Marysville (1970) 12 CA3d 989, 994 [91 CR 227].) Every intendment is in favor of the validity of the exercise of the police power, and even though a court
may differ from the determination of the legislative body, the ordinance will be upheld so long as it bears substantial relation to the public health, safety, morals, or general welfare. (Wilkins v. City of San Bernardino (1946) 29 C.2d 332, 337, 338-339 [175 P.2d 542]; Miller v. Board of Public Works, supra, at p. 490; Town of Los Altos Hills v. Adobe Creek Properties, Inc. (1973) 32 CA3d 488, 508 [108 CR 2711].)

III. The enactment of a zoning ordinance is a legislative function and is presumptively valid. The presumption may be upset if the evidence compels a conclusion that the ordinance is, as a matter of law, unreasonable or invalid. (Lockard v. City of Los Angeles, supra, 33 C.2d 453; Orinda Homeowners Committee v. Board of Supervisors (1970) 11 CA3d 768, 775 [90 CR 88, 43 A.L.R.3d 880].) A zoning ordinance is unconstitutional only if no substantial reason exists to support the determination of the city council. If the reasonableness of the ordinance is reasonably debatable, the ordinance must be upheld. (Reynolds v. Barrett (1938) 12 C.2d 244, 249 [83 P.2d 29]; Town of Los Altos Hills v. Adobe Creek Properties Inc., supra, 32 CA3d at p. 499.)

In Lockard v. City of Los Angeles, supra, the court stated: “In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances. [Citation.] It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. [Citation.] [¶] The courts will, of course, inquire as to whether the scheme of classification and districting is arbitrary or unreasonable, but the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power. [Citations.] The wisdom of the prohibitions and restrictions is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action. [Citations.] In passing upon the validity of legislation it has been said that ‘the rule is well settled that the legislative determination that the facts exist make the law necessary, must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or
evidence which cannot be controverted, and of which the courts may properly take notice.’ [Citations.]” (33C.2d at pp. 460–461.)

IV. The sole issue here is whether there is any reasonable basis in fact to support the legislative determination of the city council. (See Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 C.2d 515, 522 [20 CR 638, 370 P.2d 342].) We are not bound by the finding of the trial court. As stated in Lockard, supra, 33C.2d at page 462: “The findings and conclusions of the trial court as to the reasonableness of a zoning ordinance are not binding on an appellate court if the record shows that the question is debatable and that there may be a difference of opinion on the subject.”

At the public hearing held on the matter, it was generally agreed that the northeastern section of the city needed a shopping center, and that the population base in that area would support one, but not two such centers. The issue, then, was where the shopping center should be located. The council members, after discussing the issue among themselves and hearing the views of residents in the community, determined that it would be in the best interest of the city to attract new residents to Springtown, and hence decided to encourage the development of a commercial complex in that area. Thus it was determined that the CN zoning would be limited to Springtown, already zoned for such use, and the surrounding area would remain residential.

Bickford contends that the purpose of the city council in making the above decision was to restrict competition, and that inasmuch as the restriction of competition or the protection of monopolies is an impermissible zoning objective, the city council’s decision cannot stand. Where the sole purpose of a zoning ordinance or decision is to regulate or restrict business competition, the regulation is subject to challenge. It is not enterprise which may have been encouraged by a prior zoning classification. (Wilkins v. City of San Bernardino (1946) 29 C.2d 332, 340 [175 P.2d 542]; Pacific P. Assn. v. Huntington Beach (1925) 196 C. 211, 216 [237 P. 538, 40 A.L.R. 782]; Bernstein v. Smutz (1947) 83 CA2d 108, 119 [188 P.2d 48].)

V. Despite the principle that cities may not directly restrict competition under the guise of zoning power, it must be recognized that land use and planning decisions cannot be made in a vacuum, and all such decisions must necessarily have some impact on the economy of the
community. (1 Anderson, American Law of Zoning (2d ed. 1976) §7.28, pp. 605–606.) In Van Sicklen v. Browne (1971) 15 CA3d 122, 125 [92 CR 786], a conditional use permit for a gas station was denied on the ground, *inter alia*, that “Approval would create a further proliferation of this type of land use in a neighborhood already adequately served by service stations. . . . There is no demonstrated need for additional service stations in this neighborhood at this time.” The court stated (at pp. 127–127): “Although cities may not use zoning powers to regulate economic competition [citations], it is also recognized that land use and planning decisions cannot be made in any community without some impact on the economy of the community. As stated in Metromedia, Inc. v. City of Pasadena, 216 CA2d 270, 273 [30 CR 731], ‘Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future.’ Taking cognizance of this concept we perceive that planning and zoning ordinances traditionally seek to maintain property values, protect tax revenues, provide neighborhood social and economic stability, attract business and industry and encourage conditions which make a community a pleasant place to live and work. Whether these be classified as ‘planning considerations’ or ‘economic considerations,’ *we hold that so long as the primary purpose of the zoning ordinance is not to regulate economic competition, but to subserve a valid objective pursuant to a city’s policy powers, such ordinance is not invalid even though it might have an indirect impact on the economic competition.*” (Italics added.) Bickford urges that Van Sicklen should be read as permitting the restricting of competition only when the business activity is hazardous. The court did discuss the legislative right to regulate overconcentration of gas stations because they “use products which are highly inflammable and explosive,” and an increase in their number in a small area “increases the danger to the public.” (15 CA3d at p.128.) We view this as a supplemental rationale for the upholding of the city’s determination. (See Hagman, *Cal. Zoning Practice* (Cont.Ed.Bar Supp. 1795) §5.14, p. 95.)

**VI.** Here, the city council determined that the area needed would support one shopping center, and that to further the long-range development plan for the city, the shopping center should not be located on Bickford’s property, but in Springtown. This would have the effect of encouraging residential and commercial development in that area. It would also undoubtedly
have the effect of decreasing the market or lease value of respondent's property. By its very nature, a zoning ordinance may be expected to depress the value of some land while it operates, in its total effect, to achieve an end which will benefit the whole community. An ordinance is not constitutionally defective where it classifies for residential use land which would yield a greater profit if used for business purposes. Nor does the fact that two parcels of property which are similar in nature but zoned differently make the zoning unreasonable. (Orinda Homeowners Committee v. Board of Supervisors (1970) 11 CA3d 768, 775–776 [90 CR 88, 43 A.L.R.3d 880].)

*****

. . . VII. We conclude that the denial of Bickford’s zoning application was not unreasonable nor a denial of its right to equal protection under the law. The record clearly establishes a rational basis for the city’s action as a proper exercise of its police power.

The judgment is reversed, with directions that judgment be entered in favor of appellant.

Draper, P. J., and Devine, J., concurred.

Respondent’s petition for a hearing by the Supreme Court was denied May 26, 1977.

BUILDING CODES AND SUBDIVISION REGULATIONS

Textbook page 73

Regulation and enforcement of environmental and protection laws is established in California through the California Environmental Quality Act (Public Resources Code §21000 et seq.). That act requires that “(a) All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment. Whenever feasible, a standard format shall be used for environmental impact reports.” (Public Resources Code §21100)
ENVIRONMENTAL PROTECTION LAWS

Textbook page 73

Regulation of hazardous wastes is covered under the “Hazardous Substances Account Act.” (Health & Safety Code §25300 et seq.)

FEDERAL AND STATE INCOME TAX LIENS

Textbook page 79

For California procedures see Civil Code §2885.

JUDGMENT LIENS

Textbook page 80

California provides for a ten-year period for enforcement of a judgment lien. (Code of Civil Procedures §683.020.)

MECHANICS’ AND MATERIALMEN’S LIENS

Textbook page 80

Creation of liens in California is governed by the provisions of Civil Code §2881 et seq.

OTHER MECHANICS’ AND MATERIALMEN’S LIEN CONSIDERATIONS

Textbook page 81
CALIFORNIA APPROACH TO LIEN CLAIMS

The California approach incorporates both the New York and Pennsylvania theories. Accordingly, California holds that:

“(a) The liens provided for in this chapter shall be direct liens, and shall be for the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, whichever is less. The lien shall not be limited in amount by the price stated in the contract. . . .”

“(b) This section does not preclude the claimant from including in the lien any amount due for labor, services, equipment, or materials furnished based upon a written modification of the contract or as a result of the recission, abandonment, or breach of the contract. However, in the event of recission, abandonment, or breach of the contract, the amount of the lien may not exceed the reasonable value of the labor, services, equipment, and materials purchased by the claimant.” (California Civil Code §3123.)

RESTRICTIVE COVENANTS

Textbook page 81

RECORDING REQUIREMENTS FOR LIEN CLAIMS IN CALIFORNIA

California Civil Code §3115 provides as follows:

“Each original contractor, in order to enforce a lien, must record his claim of lien after he completes his contract and before the expiration of (a) 90 days after the completion of the work of improvement as defined in §3106 if no notice of completion or notice of cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation.”


Civil Code §1468 prescribes whether covenants will run with the land. In addition, where a
restrictive covenant is otherwise unenforceable California courts will nevertheless oppose the restriction under the doctrine of equitable servitude.

COVENANTS RUNNING WITH THE LAND IN CALIFORNIA

California Civil Code §1468 provides that in order to run with the land the following requirements must be met:

“(a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants;

(b) Such successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee;

(c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof, or if the land owned by or granted to each consists of undivided interests in the same parcel or parcels, the suspension of the right of partition or sale in lieu of partition for a period which is reasonable in relation to the purpose of the covenant;

(d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situated. . . .”

_B.C.E. Development, Inc., v. Carroll J. Smith_  
215 CA3d 1142; 264 CR55 [Nov. 1989]

OPINION

Froehlich, J.—La Costa Land Company (La Costa) was a corporation engaged in the development and sale of residential realty. It developed and marketed a multi-unit project called La Costa South Unit No. 1. In June of 1968 La Costa caused to be recorded a “Declaration and Establishment of Protective Conditions and Restrictions” (the CC&Rs) which purported to establish restrictions of various kinds on all lots within the subdivision. Deeds to individual
parcels, including the deed of the defendants Smiths’ (hereafter Smiths) predecessor in interest, referred to the CC&Rs and incorporated the same as part of the conveyance. The CC&Rs provide that enforcement of the restrictions may be brought by the developer (referred to as declarant in the CC&Rs), its successors or assigns, or the owners of any portion of the realty covered by the CC&Rs. The power to approve or disapprove residential building plans is vested, under the CC&Rs, in an architectural committee.

In 1987 Smiths submitted plans to the architectural committee, seeking approval of same in order to construct a residence. The plans received ultimate approval by the committee in October of 1987, and construction commenced soon thereafter. In January of 1988 a member of the architectural committee visited the construction site and concluded the structure was not being built in accordance with the approved plans. Letters subsequently were sent demanding a cessation of construction. A complaint for temporary injunction halting construction was issued February 2, and was confirmed by a preliminary injunction issued April 1, 1988. The preliminary injunction restrains Smiths from any construction activity which is inconsistent with the plans approved by the architectural committee. Smiths appeal from the order imposing the preliminary injunction.

Smiths attack the trial court order on the sole ground that the plaintiff has no standing to sue. [footnote omitted]

DISCUSSION

(1a) The plaintiff, B.C.E. Development, Inc. (BCE), brings the action as the successor in interest to La Costa Land Company, the original declarant. Smiths contend that neither the original developer nor its successor in interest is entitled to enforce the CC&Rs, notwithstanding the specific provision for enforcement contained in the CC&Rs themselves. The developer lost the right to enforce the CC&Rs, it is claimed, because it transferred all of the land in the development to third parties. Smiths cite as black letter law the proposition that one who imposes reciprocal land covenants retains the right to enforce the same only so long as he continues in ownership of some of the land benefited by the covenants. It is conceded that BCE owns no property in the development.
Smiths refer to considerable authority for this contention, a selection of which is cited for purposes of illustration as follows. Volume 4 Witkin, Summary of California Law (9th ed. 1987) Real Property, section 503, page 681, states: “Restrictions on use of land are unenforceable by a party who does not own any of the property intended to be benefited.” Miller and Starr state that “the rights of enforcement can be reserved by the subdivider-grantor during such time as he retains the ownership of some part of the dominant tenement.” (4 Miller & Starr, Cal. Real Estate (1977), §25.10, p. 183.) In 13 Biel, California Real Estate Law and Practice, section 470.79, pages 470-43, 470-44, the proposition is stated more explicitly as follows: “The developer can retain the right to enforce restrictive Covenants only so long as he or she retains property in the restricted area. Where a project is being developed in stages and the developer holds no interest in any lots in the first stage which are benefited by restrictions, the fact that he or she owns lots in later development stages does not give him or her the right to enforce restrictive covenants in the first stage. [Fns. omitted.]” The preliminary statement of the proposition in Annotation (1973) 51 A.L.R.3d 556, in the extensive comment, Who May Enforce Restrictive Covenant or Agreement as to Use of Real Property, includes the recitation that “generally, a restrictive covenant can be enforced only by the owner of some part of the dominant land for the benefit of which the covenant was made,” and that a failure to demonstrate an ownership interest will show that such party “has no interest in the covenant and is a mere intruder.” (Id. at pp. 586–587.)

(2) An understanding of the above-recited principle is aided by a brief review of the law of covenants running with land. Enforcement of mutual covenants may be achieved by successors in interest to original interests (i.e., individuals who were not parties to the original agreement upon which the covenant was imposed, because the covenant becomes appurtenant to the land with reference to which it was created). (Civ. Code, §§1460, 1468; 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §486, p. 663.) In order to establish the binding effect of such covenant upon subsequent landowners, it is necessary that certain essential requisites be met. One of these is that the covenant must “touch or concern the land,” meaning that it must relate to the use of both the benefited and burdened land. (4 Witkin, supra, §488, pp. 665–666.) The requirement presumptively cannot be met when the party seeking enforcement of the covenant...
has no land to be benefited.

(3a) Agreements restricting land use may be enforced, even though not meeting all the requisites of a common law covenant running with the land, by classifying them as equitable easements or servitudes, enforceable by injunctive relief in equity. (4 Witkin, Summary of Cal. Law, supra, §493, pp. 670–671.) As stated in Richardson v. Callahan (1931) 213 Cal. 683, 686 [3 P.2d 927]: “The marked tendency of our decisions seems to be to disregard the question of whether the covenant does or does not run with the land and to place the conclusion upon the broad ground that the assignee took with knowledge of the covenant and it was of such a nature that when the intention of the parties coupled with the result of a failure to enforce it was considered, equity could not in conscience withhold relief.” (1b) It appears that the complaint in this case relies upon the California doctrine of equitable servitude enforcement rather than compliance with the strict requirements of covenants running with the land. [footnote omitted]

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. . . We take no issue with the holdings in either of these cases. (3b) We conclude, however, that the talisman for enforcement is not the rigid requirement of retention of an interest in land, but rests upon a determination of the intention of those creating the covenant. Ordinarily it is quite true that parties to reciprocal land covenants will intend enforcement only by those who have an interest in the subject land, for otherwise, as stated in the comment in American Law Reports, third edition, the person lacking interest is a mere intruder. The comment continues, however, to explain that there may be cases in which land ownership by the enforcer may not be required, citing as an example the use of homeowners’ associations as a modern device for enforcement. (Annot., supra, 51 A.L.R.3d at p. 587.)

California confirmation of this concept is found in Russell v. Palos Verdes Properties (1963) 218 Cal.App.2d 754 [32 Cal.Rptr. 488]. It was there held that a homeowners association granted enforcement rights by the development’s declaration of land restrictions had standing to bring an enforcement action, not withstanding that it owned no realty in the covenant area. The court found that the land covenant caused the association to become a beneficiary of rights.
granted to all landowners, and thereby to have an equitable interest in the land sufficient to justify its enforcement action.¹

The landmark case in California on the subject of equitable servitudes, *Werner v. Graham* (1919) 181 Cal. 174 [183 P. 945], emphasized the importance of determination of the parties’ intent in the original deed restrictions. Subsequent authorities dealing with servitude enforcement procedures find a requirement of land owning in the party seeking enforcement not because such is an absolute condition, but because that is found to be the intent of the restriction. In *Young v. Cramer* (1940) 38 Cal.App.2d 64 (where the plaintiff succeeded to an interest in reversion but held no land subject to the covenant), the result was reached by a reading of the provisions of the deed and a determination therefrom that the parties intended an equitable servitude enforceable only by owners of lots in the tract. In *Kent v. Koch*, supra, 166 Cal.App.2d 579 (where a subdivider of successive tracts was precluded from enforcement of tract number one restrictions when it had sold all its lots in the tract), the decision rested on a construction of the agreement imposing restrictions. "A mere perusal of said agreement shows that it did not intend to make the restrictions for the benefit of any property other than that referred to in it, namely, the lots shown on the map of subdivision 1.” (*Id.* at p. 583.) [footnote omitted]

(1c) The La Costa Land Company CC&Rs are clear in their allocation of rights to the declarant. Land use decisions are to be made by the architectural committee. The committee is to be appointed by the declarant, and may be modified by the declarant. This power remains until the “Declarant [shall], . . . at its option, relieve itself of the obligation of appointing. . . .” (Art. VIII, §§8 and 10 of the declaration.) The right to enforce the declaration is vested in the “Declarant, its successors or assigns, or the owners of any portion of said property. . . .” (Art. XII §1 of the declaration.) No limitation is imposed upon action by the declarant in terms of its continued ownership of land. Indeed, if only landowners could take enforcement action, it would

¹See also *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642 [191 Cal.Rptr. 209], in which the current importance of homeowner associations in the enforcement of mutual covenants is recognized, the association in that case being held liable to homeowners for failure to take enforcement action, even though it was, of course, not a landowner in the development.

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have been unnecessary to specify in the CC&Rs that enforcement could be undertaken by the declaring or the owners of land.

This being an equitable action, it is appropriate to consider factors beyond the mere letter of this documentation. Recent times have seen increased development of multi-residential units which are interrelated. Condominium construction introduced the concept of common space dividers, both vertical and horizontal. Open as well as communal space reserved for the common use of tract residents became a typical benefit of developments, both in the form of condominiums and separated dwelling unit tracts. Private internal roads and gated entrances gave rise to the necessity of guards and maintenance personnel for the service of all residents of the development. Regulation of the rights, inter se, of the residents could be achieved, and assured, only by the adoption of highly detailed and specific regulations, imposed on initial buyers and successors in interest alike by the use of recorded mutual agreements. That these agreements were intended not to be restricted by old common law formulae is illustrated by their typical name: “Covenants, Conditions and Restrictions.” Rather than using rights of reverter, which constitute a drastic and cumbersome form of remedy, the CC&Rs typically provide for enforcement by way of injunction.

Injunctive relief requires a court action. Typically, the interest in enforcing restrictions will be common to most, if not all, members of the community. Requiring individual landowners to shoulder the burden of enforcement litigation would be unreasonable. The administration of the common areas in the development is typically allocated to a homeowners association, or to some other entity constituted to represent all of the owners. Often at the inception of the development the enforcement entity is created and controlled by the developer of the project. It is highly reasonable in these circumstances that the representative association or other central agency undertake, on behalf of all homeowners, such litigation as may be required to enforce the CC&Rs. Where the clear intent of the CC&Rs is to vest enforcement powers in an enforcement agency, there is no reason to further condition such enforcement powers upon the retention by the enforcement agency of land ownership in the development.
We note that this is not a case in which a developer is shown to have retained unreasonable or imperious control over artistic decisions of homeowners long after having completed the subdivision. Equity might well decline to enforce such asserted control, especially if it were shown to be contrary to the then desires of the homeowners. That is not this case. Under the provisions for amendment of the declaration, the homeowners at any time, by vote of two-thirds of their members, could have ousted the developer’s designated enforcement agency and substituted their own committee. In accordance with Civil Code section 1356 (part of the Davis-Stirling Common Interest Development Act) the homeowners since 1985 could have petitioned for the right to amend their declaration by vote of only a plurality of their members. The homeowners in this subdivision having permitted the continuance of the architectural committee named by BCE, and having tolerated BCE’s administration, for apparently many years following completion of the subdivision, it may be inferred that they have ratified the continuance of the status quo. [footnote omitted]

In this case no issue is made of the validity of the CC&Rs. They are land use restrictions which (insofar as the record discloses) are reasonable in all regards, were imposed in accordance with law, and constitute enforceable equitable servitudes both benefiting and burdening each lot in the subdivision. While the Smiths were not original parties to the CC&Rs, they acquired title with notice of same and are bound by the CC&Rs. The most logical enforcement entity for policing the CC&Rs is the entity created for that purpose in the declaration itself—the declarant or its successor in interest. Having accepted title subject to this condition, Smiths are not now in a position to complain that enforcement in accordance therewith is inequitable. The trial court was correct in holding that the CC&Rs could be enforced by action of the entity so designated in the declaration, even though that entity owned no land in the subdivision.

The judgment of the trial court is affirmed. Respondent is entitled to costs on appeal.

Wiener, Acting P. J., and Benke, J., concurred.
CHAPTER 5: EASEMENTS AND LICENSES EXPRESS GRANT

Textbook page 103

In California an easement in gross is both assignable and inheritable unless restricted by proper language to certain individuals. (*LeDeit v. Ehlart* (1962) 205 CA2d 154, 166, 22 CR747; *Leggio v. Haggerty* (1965) 231 CA2d 873, 878, 482 CR 400.)

IMPLIED EASEMENT

Textbook page 105

California Civil Code §1104 refers in terms only of implied grant. California also recognizes easements by implied reservation. Accordingly a purchaser may take not only the obvious benefits, but also the obvious burdens. However, an easement is less readily implied in favor of the grantor himself. (See *Mikels v. Rager* (1991) 232 CA3d 334, 360, 284 CR 87; *Moores v. Walsh* (1995) 38 CA4th 1046, 1049, 45 CR2d 389.)

IMPLIED EASEMENT IN CALIFORNIA

California Civil Code §1104 reads as follows:

“A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.”

PREScriptive EASEMENT

Textbook page 106

An easement by prescription may be acquired by adverse use for 5 years. (See Civil Code §1006, 1007, and 1008.)
TERMINATION OF EASEMENTS

Textbook page 110

While an easement obtained by grant cannot be lost by mere non-use (Tarr v. Watkins (1960) 180 CA2d 362, 364, 4 CR 293), an easement by prescription may be lost by mere non-use for the same period of that required for its acquisition (the prescriptive period of 5 years). (Civil Code §811, subdivision 4; People v. Oceanshore R. (1948) 32 C.2d 406, 419, 196 P.2d 570.)

LICENSES

Textbook page 111

Perhaps the most important characteristic of a license, which clearly distinguishes it from an easement, is that a license is revocable at any time at the will of the licensor. (Kaler v. Brown (1951) 101 CA2d 716, 719, 226,P.2d 66.)
CHAPTER 6: CONTRACTS

MINORS OR INFANTS

Textbook page 119

In California a minor is an individual who is under the age of 18 (California Family Code §6500).

Under California law a minor cannot make a contract relating to real property or any interest therein. Any attempt to do so is “void ab initio.” (See California Family Code §6701(b).)

MENTAL INCOMPETENTS

Textbook page 119

Under California law a person adjudged mentally incompetent lacks capacity to make a contract of any kind. (See Civil Code §40(a).)

PARTNERSHIPS

Textbook page 120

The Authority of a general partner is now controlled by “California Revised Limited Partnership Act” set forth in California Corporations Code §15611, et seq.

PERSONAL REPRESENTATIVES

Textbook page 121

An administrator of an intestate estate, under California law, requires a court order to lease, mortgage, or execute a deed of trust on real property. (See California Probate Code §9942.)
WRITTEN AGREEMENTS

Textbook page 124

In California there is a rebuttable presumption of consideration whenever the contract for the purchase and/or sale of property is in writing. (See Bank of America v. Hollywood Improvement Co. (1941) 46 Cal.App.2d 817, 821, 117 P.2d 13.) And, an exchange of legally binding promises between a buyer and seller may be sufficient consideration. (See Bleecher v. Conte (1981) 29 Cal.3d 345, 350, 173 Cal.Rptr. 278; and see contra in N. Borelli v. Brusseau (1993) 12 Cal.App.4th 647, 654.)

CALIFORNIA STATUTE OF FRAUDS

Textbook page 124

The California statute of frauds is codified in Civil Code §1624 and reads as follows:

“(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party’s agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

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(5) An agreement that by its terms is not to be performed during the lifetime of the promisor.

(6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

(7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.

(b) Notwithstanding paragraph (1) of subdivision (a):

(1) An agreement or contract that is valid in other respects and is otherwise enforceable is not valid for lack of note, memorandum, or other writing and is enforceable by way of action or defense, provided that the agreement or contract is a qualified financial contract as defined in paragraph (2) and (A) there is, as provided in paragraph (3), sufficient evidence to indicate that a contract has been made or (B) the parties thereto by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

(2) For purposes of this subdivision, a ‘qualified financial contract’ means an agreement as to which each party thereto is other than a natural person and that is any of the following:

(A) For the purchase and sale of foreign exchange, foreign currency, bullion, coin, or precious metal on a forward, spot, next-day value or other basis.
(B) A contract (other than a contract for the purchase of a commodity for future
delivery on, or subject to the rules of, a contract market or board of trade) for the purchase,
sale, or transfer of any commodity or any similar good article, service, right, or interest that
is presently or in the future becomes the subject of a dealing in the forward contract trade,
or any product or byproduct thereof, with a maturity date more than two days after the date
the contract is entered into.

(C) For the purchase and sale of currency, or interbank deposits denominated in United
States dollars.

(D) For a currency option, currency swap, or cross-currency rate swap.

(E) For a commodity swap or a commodity option (other than an option contract traded
on, or subject to the rules of a contract market or board of trade).

(F) For a rate swap, basis swap, forward rate transaction, or an interest rate option.

(G) For a security-index swap or option, or a security or securities price swap or option.

(H) An agreement that involves any other similar transaction relating to a price or
index (including, without limitation, any transaction or agreement involving any
combination of the foregoing, any cap, floor, collar, or similar transaction with respect to a
rate, commodity price, commodity index, security or securities price, security index, other
price index, or loan price).

(I) An option with respect to any of the foregoing.

(3) There is sufficient evidence that a contract has been made in any of the following
circumstances:

(A) There is evidence if an electronic communication (including, without limitation,
the recording of a telephone call or the tangible written text produced by computer
retrieval), admissible in evidence under the laws of this state, sufficient to indicate that in
the communication a contract was made between the parties.
(B) A confirmation in writing sufficient to indicate that a contract has been made between the parties and sufficient against the sender is received by the party against whom enforcement is sought no later than the fifth business day after the contract is made (or any other period of time that the parties may agree in writing) and the sender does not receive, on or before the third business day after receipt (or the other period of time that the parties may agree in writing), written objection to a material term of the confirmation. For purposes of this subparagraph, a confirmation or an objection thereto is received at the time there has been an actual receipt by an individual responsible for the transaction or, if earlier, at the time there has been constructive receipt, which is the time actual receipt by that individual would have occurred if the receiving party, as an organization, had exercised reasonable diligence. For the purposes of this subparagraph, a ‘business day’ is a day on which both parties are open and transacting business of the kind involved in that qualified financial contract that is the subject of confirmation.

(C) The party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made.

(D) There is a note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker.

For purposes of this paragraph, evidence of an electronic communication indicating the making in that communication of a contract, or a confirmation, admission, note, memorandum, or writing is not insufficient because it omits or incorrectly states one or more material terms agreed upon, as long as the evidence provides a reasonable basis for concluding that a contract was made.

(4) For purposes of this subdivision, the tangible written text produced by telex, telefacsimile, computer retrieval, or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing, and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing. The confirmation and notice of objection referred to in subparagraph (B) of
paragraph (3) may be communicated by means of telex, telefacsimile, computer, or other similar process by which electronic signals are transmitted by telephone or otherwise, provided that a party claiming to have communicated in that manner shall, unless the parties have otherwise agreed in writing, have the burden of establishing actual or constructive receipt by the other party as set forth in subparagraph (B) of paragraph (3).

(c) This section does not apply to leases subject to Division 10 (commencing with Section 10101) of the Commercial Code.”

REMEDIES FOR BREACH OF A REAL ESTATE CONTRACT

Textbook page 125

The statute of frauds is set forth in Civil Code §1624.

LIQUIDATED DAMAGES

Textbook page 127

For a discussion of the description and validity of liquidated damages applied to real property in California,

CALIFORNIA DESCRIPTION AND VALIDITY OF LIQUIDATED DAMAGES

The description and validity of liquidated damages as applied to real property as defined in California Civil Code §1675 which provides in pertinent part as follows:

“...

(b) A provision in a contract to purchase and sell residential property which provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer’s failure to complete the purchase of the property is valid to the extent that payment in the form if cash or check, including a post-dated check, is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and of subdivision (c) or (d) of this section.
(c) If the amount actually paid pursuant to the liquidated damages provision does not exceed 3% of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that such amount is unreasonable as liquidated damages.

(d) If the amount actually paid pursuant to the liquidated damages provision exceeds 3% of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.

(e) For the purposes of subdivisions (c) and (d), the reasonableness of an amount actually paid as liquidated damages shall be determined by taking into account both of the following:

(1) The circumstances existing at the time the contract was made.

(2) The price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if such sale or contract is made within 6 months of the buyer’s default.”

REAL ESTATE BROKER

Textbook page 127

Educational requirements for real estate brokers and/or agents are set forth in California Business and Professions Code §10153.2.

California law has a very comprehensive set of regulations governing real estate brokers. (See Business and Professions Code, Sections 10130 et seq.)

SUMMARY

Textbook page 139

California law provides for a broker’s lien in narrowly defined circumstances. (See Business and Professions Code, Section 10243.)

LISTING AGREEMENTS
CHAPTER 7: PREPARATION AND REVIEW OF A REAL ESTATE CONTRACT

EXAMPLE 7-1

Textbook page 145

In California there is a rebuttable presumption of consideration whenever the contract for the purchase and/or sale of the property is in writing. (See Bank of America v. Hollywood Improvement Co. (1941) 46 CA2d 817, 821, 117 P.2d 13.)

CONDITION OF THE PROPERTY AND RISK OF LOSS

Textbook page 152

In California the seller retains the risk of loss until either title or possession is transferred to the purchaser. (See Greco v. Oregon Mutual Fire Insurance Co. (1961) 191 CA2d 674, 680–681, 12 CR 202; Vierneisel v. Rhode Island Insurance Co. (1946) 77 CA2d 229, 231, 175 P.2d 63.)

TIME IS OF THE ESSENCE

Textbook page 156


CAVEAT EMPTOR AND THE SELLER DISCLOSURE FORM

Textbook page 161

The California approach to the rule of Caveat Emptor as applied to real property is codified in Civil Code, Sections 1102 et seq. (See also Lingsch v. Savage (1963) 213 CA2d 729, 29 CR 201.)
SELLER’S DISCLAIMER OF WARRANTY

Textbook page 169


PURCHASE AND SALE AGREEMENT
CHAPTER 8: DEEDS

GENERAL WARRANTY DEED

Textbook page 214

No particular words are necessary in California for the creation of a warranty provided that it is otherwise expressly stated in the deed. A warranty of title will not be implied. (See National Pacific Oil Co. v. Watson (1920) 184 Cal. 216, 193 P. 133; Tropico Land & Improvement Company v. Lambourn (1915) 170 Cal. 33, 148 P.206; Gee v. Moore (1859) 14 Cal. 472.)

EXECUTORS AND ADMINISTRATION DEEDS

Textbook page 217

For California law on distribution of testate and intestate property, see California Probate Code, Sections 10500 et seq. and 11600 et seq., respectively.

WRITTEN INSTRUMENT

Textbook page 218

Since 1872 California has recognized a very simple form of grant by California Civil Code §1092 which reads as follows:

“A grant of an estate in real property may be made in substance as follows:

I, A B, grant to C D all that real property situated in (insert name of county) County, State of California, bounded (or described) as follows: (here insert property description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as for instance, ‘The Noris Ranch.’)

Witness my hand this (insert day) day of (insert month), 20-. A.B.”
SIGNATURE OF GRANTOR

Textbook page 219

   In California, there is no requirement stating where the deed must be signed.

WITNESSES OF DEEDS

Textbook page 219

   Attestation of a deed is not required in this state for its validity although it does entitle the instrument to be recorded. (See Schhuur v. Rodenback (1901) 133 Cal. 85, 65 P. 298.)

GRANTING CLAUSE

Textbook page 221

   In California absent the contrary indication, the use of the word “grant” conveys an estate in fee simple absolute. (See Northwestern Company v. Humboldt Milling Company (1921) 186 Cal. 599, 200 P.9.)
CHAPTER 9: FINANCING SOURCES IN
REAL ESTATE TRANSACTIONS

ETHICS: OVERBILLING

Textbook page 258

The rules concerning fees for legal services are set forth in rule 4-200 of the Rules of Professional Conduct.
CHAPTER 10: LEGAL ASPECTS OF REAL ESTATE FINANCE

USURY

Textbook page 278

For information on California usury law, see “Usury Law §1 et seq.” and California Constitution Article XV, §1.

MORTGAGES, DEEDS OF TRUST, AND SECURITY DEEDS

Textbook page 281

A deed of trust is the commonly used security interest.

PARTIES TO A MORTGAGE

Textbook page 282

Community property states such as California require the signature of both spouses.

CANCELLATION OR SATISFACTION OF MORTGAGE

Textbook page 286

In California, a mortgagor’s deed, executed by the mortgagee, conveys to the grantee the entire and unencumbered title to the estate. (See Jones v. Sanders (1903) 138 Cal. 405, 71 P.506.)

GROUND FOR FORECLOSURE

Textbook page 288

Foreclosure may also be had for a portion of the debt as where one of a series of notes secured by a mortgage is due and unpaid. (See Yoakam v. White (1893) 97 Cal. 286, 32 P.238.)
TYPES OF FORECLOSURE

Textbook page 288

Although the power of sale foreclosure, where contained in the mortgage, is provided for, California also provides for judicial foreclosure. (See California Code of Civil Procedure §§725a through 730.5.)

EFFECT OF A VALID FORECLOSURE SALE

Textbook page 289

The mortgagor may still retain a right of redemption, depending on the circumstances, for up to one year following the sale of the property under a decree in a foreclosure action. (See California Code of Civil Procedure §§729.010 and 729.030.)

DEBTOR’S REMEDIES OR DEFENSES TO FORECLOSURE

Textbook page 291

Inadequacy of price, standing alone, does not justify setting aside the trustee’s sale (Smith v. Allen (1968) 68 C2d 93, 95, 65 CR 153), but the sale can be set aside if there is a gross inadequacy of the price paid at the sale, together with a slight irregularity, unfairness, or fraud. (In re Worcester (1986) 811 F.2d 1224, 1228–1230; Sargent v. Shumaker (1924) 193 Cal. 122, 129–130, 223 P. 464.)
See California Code of Civil Procedure §726.5 which provides for an election between waiver of lien and exercise of specific rights and remedies.

California foreclosure proceedings are covered under California Code of Civil Procedure §725a et seq.
CHAPTER 12: TITLE EXAMINATIONS

BONA FIDE PURCHASER FOR VALUE RULE

Textbook page 359

The Massachusetts definition of chain of title applies in California. Thus a subsequent purchaser or an encumbrancer is not charged with constructive notice of an instrument executed by a grantor and recorded before the date of execution of the instrument by which the grantor acquired title. On the other hand, the subsequent purchaser or encumbrancer is charged with notice of an instrument executed prior to but recorded after the conveyance by which his grantor obtained title. (See *Triple A Management Co. v. Frisone* (1999) 69 CA4th 520, 534, 81 CR2d 669; *Far West Savings & Loan Association v. McLaughlin* (1988 2nd Dist.) 201 CA3d 67, 246 CR 872; see also California Civil Code §1213.)

CONSTRUCTIVE NOTICE IN CALIFORNIA

Textbook page 360

In California, as a general rule an instrument erroneously recorded gives constructive notice only of what is actually recorded and hence parties may not be charged with notice of instruments improperly recorded. (*Cady v. Purser* (1901) 131 Cal. 552, 63 P. 844; *Racouillat v. Rene* (1867) 32 Cal. 450.) However, if the record correctly presents the basic essentials of the instrument recorded notwithstanding the defect, it may serve as constructive notice to subsequent purchasers and encumbrancers. (*Dawes v. Tucker* (1918) 178 Cal. 46, 171 P. 1068; *Orr v. Byers* (1988, 4th Dist.) 198 CA3d 666, 244 CR 13.)

In California, mere deposit of the instrument with the recorder is not the equivalent of recordation. (*Eckhart v. Morely* (1934) 220 Cal. 229, 30 P.2d 423.) In order that notice be imparted to third persons not only must the instrument be deposited in the recorder’s office, it must also be recorded in the proper book, and if it is not so recorded it has no effect as to notice.
to subsequent purchasers or mortgagees. (Cady v. Purser (1901) 131 Cal. 552, 63 P. 844;
Federal Construction Co. v. Curd (1918) 179 Cal. 479, 177 P. 473.)

RECORDING STATUTES

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CALIFORNIA RECORDING STATUTE

California: The recording statute is contained in California Civil Code §1213 and reads as follows:

“Every conveyance of real property or an estate for years therein acknowledged or
proved and certified and recorded as prescribed by law from the time it is filed with the
recorder for record is constructive notice of the contents thereof to subsequent purchasers
and mortgagees; and a certified copy of such a recorded conveyance may be recorded in
any other county and when so recorded the record thereof shall have the same force and
effect as though it was of the original conveyance and where the original conveyance has
been recorded in any county wherein the property therein mentioned is not situated a
certified copy of the recorded conveyance may be recorded in the county where such
property is situated with the same force and effect as if the original conveyance had been
recorded in that county.”

RACE-NOTICE FORMAT OF RECORDING STATUTE IN CALIFORNIA

The race-notice format of recording statute is codified in California Civil Code §§1107 and
1214.

California Civil Code §1107 provides as follows:

“Every grant of an estate in real property is conclusive against the grantor, also against
everyone subsequently claiming under him, except a purchaser or encumbrancer who in
good faith and for a valuable consideration acquires a title or lien by an instrument that is
first duly recorded.”
California Civil Code §1214 provides as follows:

“Every conveyance of real property or an estate for years therein, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action.”

**JUDGMENTS**

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Pursuant to California Code of Civil Procedure §337.5, subdivision (3), judgments have a renewable ten-year lifetime.
A title company insuring real property against title defects may also be liable to the purchaser in compensatory damages for any emotional distress that results in later discovered defects. \((\text{White v. Western Title Ins. Co. (1985) 40 C3d 870, 221 CR 509; Jarchow v. Transamerica Title Insurance Co. (1975) 48 CA3d 917, 122 CR 470.})\)

For an example of the law concerning the recovery of attorney’s fees and other costs in enforcing a warranty deed in California, see \(\text{Walters v. Marler (1978) 83 CA3d 1, 147 CR 655.}\)

**PRACTICE TIPS FOR THE PREPARATION AND REVIEW OF A TITLE INSURANCE COMMITMENT**

In California, the common practice is for title agents to issue title insurance commitments and policies. \((\text{See Insurance Code §§699 et seq. and 12340 et seq.)}\)
CHAPTER 14: REAL ESTATE CLOSINGS

ORDERING THE TITLE EXAMINATION

Textbook page 475

It is common practice in California for title examinations to be handled by title insurance companies and for the closing to take place in the office of the title company.

DISBURSING, RECORDING, AND TRANSMITTING FINAL DOCUMENTS

Textbook page 492

It is common practice in California to record all the documents before disbursements are made.
CHAPTER 15: GOVERNMENT REGULATION OF REAL ESTATE CLOSINGS

There is no California-specific law dealing with this chapter.
CHAPTER 16: REAL ESTATE CLOSING FORMS AND EXAMPLES

TRANSFER TAX CERTIFICATE

Textbook page 553

The tax is assessed at the rate of $ .55 for each five hundred dollars ($500) of value of the property. No transfer tax certificate is required in California. Instead, on the upper right hand corner of the deed which is to be recorded a stamp is placed and the amount of the transfer tax is simply written into that stamp.

TERMITE LETTER

Textbook page 554

Termites are a significant problem in California. Although there is no State law requirement for a termite inspection, it is common practice in California for lenders to require a termite report and clearance.

PRELIMINARY CHANGE OF OWNERSHIP REPORT

California State law requires the property owner to file the Preliminary Change of Ownership Report with the County Recorder when recording certain documents. If the form is not filed, the Recorder will charge an additional recording fee. Information furnished on this form by the property owners assists the Assessor in determining property taxes. See Revenue and Taxation Code, Sections 480 et seq.
CHAPTER 17: CONDOMINIUMS AND COOPERATIVES

CONDOMINIUM

Textbook page 594

The major statute is the common interest Development Act (Civil Code §1350 et seq.). Most common interest developments are also subject to two other statutes: (1) the Subdivided Lands Act (Business & Professions Code §11000 et seq.), and (2) the Subdivision Map Act (Government Code §66410 et seq.).

BIRTH OF A CONDOMINIUM

Textbook page 594

A Condominium is a confinement of a larger legal interest identified as a “common interest development which includes any of the following: (1) a community apartment project; (2) a Condominium project; (3) a planned development; (4) a stock cooperative. (Civil Code §1351(c).)

A common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been conveyed, provided all of the following are recorded: (a) a declaration; (b) a Condominium plan, if any exist; and (c) a final map or parcel map. (Civil Code §1352.)

CONDOMINIUM RECORDING REQUIREMENTS IN CALIFORNIA

The required recording of a Condominium plan is further defined as follows:

“'Condominium plan’ means a plan consisting of (1) a description or survey map of a Condominium project, which shall refer to or show monumentation on the ground, (2) a three-dimensional description of a Condominium project, one or more dimensions of which may extend for an indefinite distance upwards or downwards in sufficient detail to identify the common areas and each separate interest, and (3) a certificate consenting to the
recordation of the Condominium plan pursuant to this title signed and acknowledged by the record owner of fee title to that property included in the Condominium project. In the case of a Condominium project which will terminate upon the termination of an estate for years, the certificate will be signed and acknowledged by all lessors and lessees of the estate for years and, in the case of a Condominium project subject to a life estate, the certificate shall be signed and acknowledged by all like tenants and remainder interests. The certificate shall also be signed and acknowledged by either the trustee or the beneficiary of each recorded deed of trust, and the mortgagee of each recorded mortgage encumbering the property. Owners of mineral rights, easements, rights of way, and other non-possessory interest do not need to sign the Condominium plan. A Condominium plan may be amended or revoked by a subsequently acknowledged recorded instrument executed by all the persons whose signatures would be required to record a Condominium plan pursuant to this subdivision.” (Civil Code §1351(e).)

CONTENTS OF A CONDOMINIUM DECLARATION IN CALIFORNIA

As of January 1, 2004, California Law requires the following in the contents of a declaration for the purposes of a common interest development:

California Civil Code, Section 1353.

“(a)(1) A declaration, recorded on or after January 1, 1986, shall contain a legal description of the common interest development, and a statement that the common interest development is a community apartment project, Condominium project, planned development, stock cooperative, or combination thereof. The declaration shall additionally set forth the name of the association and the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes. If the property is located within an airport influence area, a declaration, recorded after January 1, 2004, shall contain the following statement:

NOTICE OF AIRPORT IN VICINITY
This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the
annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

(2) For purposes of this section, an “airport influence area,” also known as an “airport referral area,” is the area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses or necessitate restrictions on those uses as determined by an airport land use commission.

(3) The statement in a declaration acknowledging that a property is located in an airport influence area does not constitute a title defect, lien, or encumbrance.

(b) The declaration may contain any other matters the original signator of the declaration or the owners consider appropriate.”

ARTICLES AND BYLAWS OF A CONDOMINIUM ASSOCIATION

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DOCUMENTS TO BE PROVIDED TO A CONDOMINIUM PURCHASER IN CALIFORNIA

California law requires that the following documents be provided to prospective purchasers as soon as practicable before transfer of title:

California Civil Code, Section 1368.

“. . . (1) A copy of the governing documents of the common interest development, including a copy of the association's articles of incorporation, or, if not incorporated, a statement in writing from an authorized representative of the association that the association is not incorporated.
(2) If there is a restriction in the governing documents limiting the occupancy, residence, or use of a separate interest on the basis of age in a manner different from that provided in Section 51.3, a statement that the restriction is only enforceable to the extent permitted by Section 51.3 and a statement specifying the applicable provisions of Section 51.3.

(3) A copy of the most recent documents distributed pursuant to Section 1365.

(4) A true statement in writing obtained from an authorized representative of the association as to the amount of the association’s current regular and special assessments and fees, any assessments levied upon the owner’s interest in the common interest development that are unpaid on the date of the statement. The statement obtained form an authorized representative shall also include true information on late charges, interest, and costs of collection which, as of the date of the statement, are or may be made a lien upon the owner’s interest in a common interest development pursuant to Section 1367 or 1367.1.

(5) A copy or a summary of any notice previously sent to the owner pursuant to subdivision (h) of Section 1363 that sets forth any alleged violation of the governing documents that remains unresolved at the time of the request. The notice shall not be deemed a waiver of the association’s right to enforce the governing documents against the owner or the prospective purchaser of the separate interest with respect to any violation. This paragraph shall not be construed to require an association to inspect an owner’s separate interest.

(6) A copy of the preliminary list of defects provided to each member of the association pursuant to Section 1375, unless the association and the builder subsequently enter into a settlement agreement or otherwise resolve the matter and the association complies with Section 1375.1. Disclosure of the preliminary list of defects pursuant to this paragraph shall not waive any privilege attached to the document. The preliminary list of defects shall also include a statement that a final determination as to whether the list of defects is accurate and complete has not been made.

(7) A copy of the latest information provided for in Section 1375.1.
(8) Any change in the association’s current regular and special assessments and fees which have been approved by the association’s board of directors, but have not become due and payable as of the date disclosure is provided pursuant to this subdivision. . . .”

Assessment increases in the case of regular assessments are limited to no more than 20 percent greater than the regular assessment for the association’s preceding fiscal year or, in the case of special assessments an amount which in the aggregate is not to exceed 5 percent of the budgeted gross expenses for that fiscal year. (Civil Code §1366(b).) In addition, the association is now required to provide notice by first class mail to owners of the separate interests of any assessment increase not less than 30 nor more than 60 days prior to the increase becoming due. (Civil Code §1366(d).)

OWNER’S LIABILITY FOR COMMON AREAS

Most state Condominium laws do not deal definitively with the issue of individual liability of owners of common areas. In 1982 the National Conference of Commissioners on Uniform State Laws promulgated the “Uniform Common Interest Ownership Act.” The act was designed to cover various types of common ownership, including Condominiums. The act provides that owners are not individually liable for torts arising out of common areas. (Section 3-113) However California did not adopt the act. Hence it would appear that under California law the Condominium owners’ liability for injury or harm caused by the common areas is joint and several. (See Ruoff v. Harbor Creek Community Association (1992) 10 CA4th 1624, 13 CR2d 755; Davert v. Larsen (1985) 163 CA3d 407, 209 CR 445; Shively v. Dye Creek Cattle Co. (1994) 29 CA4th 1620, 1630–1632, 35 CR2d 238.)

COOPERATIVE

Textbook page 599

Although less common than other forms of ownership interest, California law recognizes a “stock cooperative” form of property interest. (Civil Code §1351.)
TIME-SHARES

Textbook page 600

Time-share offerings are covered extensively by the regulations of the California Department of Real Estate in 10 California Code of Regulations §§2810-2813.14. In addition, time-share projects within the coastal zone may also be subject to the rules of the California Coastal Commission.

SUMMARY

Textbook page 601

Common interest developments, including Condominiums, are governed by Civil Code §1350 et seq.
CHAPTER 18: LEASES

COMMON LAW AND LEASES

Textbook page 628

COMMON LAW AND LEASES IN CALIFORNIA

The traditional common-law doctrine that a landlord was under no duty to maintain leased dwellings in a habitable condition during the term of the lease has been discarded in California and an implied warranty of habitability in residential leases has now been adopted and codified. (See Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903, 162 Cal.Rptr. 194; Green v. Superior Court of San Francisco (1974) 10 Cal.3d 616, 111 Cal.Rptr. 704.) The provisions of California Civil Code §1942, commonly called the “repair and deduct” provisions, currently authorized a tenant of residential property, after giving a reasonable notice of necessary repairs to his landlord, either to quit the premises without further liability for his rent due or to repair the necessary items himself and to deduct the cost of repairs, up to one month’s rent, from his total rent due. This code section, however, was not intended as the exclusive remedy of a lessee for a failure of a landlord in his duty to repair and they otherwise do not preclude the adoption of an implied warranty of habitability. (Green v. Superior Court of San Francisco, supra, 10 Cal.3d 616.) Plus, a tenant may withhold rent when a landlord breaches his implied warranty of habitability or the landlord’s breach of the implied warranty of habitability may be asserted by the tenant as a defense in an Unlawful Detainer action brought by the landlord. In its entirety California Civil Code §1942 reads as follows:

“Section 1942. REPAIRS BY LESSEE. (a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month’s rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or
performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period.

(b) For the purposes of this section, if a tenant acts to repair and deduct after the thirtieth day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a rebuttable presumption affecting the burden of producing evidence and shall not be construed to prevent a tenant from repairing and deducting after a shorter notice if all the circumstances require shorter notice.

(c) The tenant’s remedy under subdivision (a) shall not be available if the condition was caused by violation of Section 1929 or 1941.2.

(d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.”

**POSSESSION AND COMMENCEMENT OF THE RENT**

Textbook page 630

In the beginning of the lease term the landlord must give the tenant the right of possession. If the landlord fails to do so, the landlord is in default. There are two major theories which approach this topic. The majority rule, commonly called the English rule, requires that the landlord give the tenant both the legal right of possession and actual possession. This is the theory that is followed in California. (*Rice v. Whitmore* (1888) 74 Cal. 619, 16 P. 501.) The minority rule, commonly called the American rule, requires only that the landlord deliver the legal right of possession. Under that theory it is lessee’s obligation to take necessary steps to secure his actual possession. Under the American rule then a lessee would be required to evict a former holdover tenant who refuses to surrender the premises.

**DAMAGE OR DESTRUCTION TO THE PREMISES**

Textbook page 636

In common law a lessee had an implied covenant to repair or rebuild a structure which was destroyed even without his fault. This law has been changed now in California and under the
theory of “constructive eviction,” a tenant is relieved of his obligation to pay rent where, through no fault of his own, a complete or a substantial destruction of the rented premises occurs depriving the lessee of the beneficial enjoyment of the premises, provided that the tenant abandons the premises within a reasonable time. (See Sierad v. Lilly (1962) 204 Cal.App.2d 770, 22 Cal.Rptr. 580; and Clark v. Spiegel (1971) 22 Cal.App.3d 74, 99 Cal.Rptr. 86.)

California courts have construed a covenant to surrender the premises in good condition ordinarily as excluding natural wear and tear from its operation. Such covenants contemplate deterioration by reason of time and use with ordinary care for preservation but do not include wear and tear occasioned by abuse and neglect. (See Polster, Inc. v. Swing (1985, 2nd Dist.) 164 Cal.App.3d 427, 210 Cal.Rptr. 567.)

For the California approach to abatement of rent for constructive eviction in whole or part, see Segalas v. Moriarity (1989) 211 CA3d 1583, 260 Cal.Rptr. 246, Mod., Reh. Den. (1st Dist.) 212 CA3d 1081a and California Civil Code Sections 1933 and 1935.

OBLIGATION OF REPAIR

Textbook page 637

For an example of landlord liability for injuries occurring in a common area see Austin v. Riverside Portland Cement Co. (1955) 44 C2d 225.