#H-250 9/28/79

Memorandum 79-49

Subject: Study H-250 - Revision of Property Law

Matters authorized for study. The Law Revision Commission has three related topics on its agenda:

(1) Whether a Marketable Title Act should be enacted in California and whether the law relating to covenants and servitudes relating to land, and the law relating to nominal, remote, and obsolete covenants, conditions, and restrictions on land use, should be revised.

(2) Whether the law relating to possibilities of reverter and powers of termination should be revised.

(3) Whether Section 1464 of the Civil Code should be revised.

Prior Commission decisions. The Commission discussed these topics at its May 1978 meeting and made the following decisions:

> After considerable discussion, the Commission concluded that what is needed initially is an analysis that presents a detailed outline of the matters that are embraced within this topic. The outline should indicate the possible scope of the study of this topic if the study is given the broadest possible scope, a somewhat narrower scope, or the narrowest possible scope. The initial analysis should contain a detailed description or outline of each of the areas the consultant believes should be covered by the study and a fairly detailed statement of the problems that would be dealt with in each such area. The initial analysis should indicate areas covered by the Uniform Acts. After receiving the initial analysis, the Commission should be in a position to know what the study involves and have sufficient information to determine the scope of the study and the manner in which the study would be conducted.

Professor Blawie retained as consultant. The Commission made a modest contract with Professor James L. Blawie, Santa Clara Law School, to prepare the initial analysis. He has delivered the initial analysis--entitled "A Study of the Present Law of Property and Conveyancing in California With Critical Analysis and Suggestions for Change"--and you have received a copy.

General objective to be achieved at October meeting. The consultant's report outlines the possible scope of the property law study and the various problems and areas that might be covered in the study. At the October meeting, the Commission should determine the extent to which this study should be given priority, the scope of the study, particular

areas of the study that might be given highest priority, and the schedule for the study. The staff recommends that this study be given a high priority with the view to submitting a comprehensive statute for enactment in 1983. Various severable aspects of the study might be made the subject of recommendations to earlier sessions.

Obtaining input from various persons and organizations. A primary objective of the proposed reform in property law is to make titles more marketable. We have already written to the California Land Title Association, suggesting that representatives of the Association might attend meetings of the Commission when this subject is being considered to provide expert advice and statements of views on various matters that will be discussed. We have not yet received a response to this suggestion.

At the last meeting, Commissioner Love suggested that we develop some procedure for obtaining input from members of law faculties in California who are experts in property law. One method of doing this would be to write to the Dean of each California Law School, indicating that the Commission is commencing this study and that any interested member of the faculty will be placed on a mailing list to receive the materials prepared for Commission consideration if the particular faculty member is willing to review the materials received and send his or her comments to the Commission. Is this method satisfactory to obtain input from property law experts who are members of law faculties?

The staff believes that Garrett Elmore might be of assistance to the Commission on this study. We could make a contract with him to attend meetings when the subject is under consideration. We propose that he be paid $50 a day for attending meetings and be reimbursed for his travel expenses subject to the state regulations governing such reimbursement. Mr. Elmore for many years served as counsel to the State Bar Committee on Administration of Justice and has a wealth of knowledge as to past efforts in the property law field and the reason for existing provisions.

The staff also believes that Professor Blawie should be present at all future meetings (to the extent he finds it possible to attend), and we suggest that we make a new contract to provide for such attendance, compensation to be $50 per day plus travel expenses subject to the

regulations governing reimbursement for travel expenses. This proposal is based on the assumption that the initial analysis contained in Professor Blawie's background study is sufficient to permit the staff to carry on this project without the need for Professor Blawie to do any significant amount of additional research and writing. His task primarily would be to review and comment on staff-prepared materials.

The Commission should also consider what other groups might be interested in this study and be willing to participate in the effort to reform California property law.

The staff believes that the first matter on which an effort should be made to obtain input from interested persons and organizations is whether there are additional matters--not identified in the background study--that might be embraced in the property law study. Accordingly, we suggest that the background study be provided to those law professors who indicate their interest in this project with a request that they make suggestions for additional matters that might be covered in the study. We could also advise such persons of the general approach the Commission determines to take in making the study--such as to work on a project looking toward the adoption of the marketable title act provisions of the Uniform Simplification of Land Transfers Act (as proposed or as revised by the Commission), together with statutes to modernize the law of personal property, to cure other title problems, and to modernize the process of land recording--and request their comments on whether that appears to be the desirable approach to be taken in reforming the law in this area.

The background study touches on one area of the law--adverse possession--but does not attempt to develop this area in detail. The staff believes that there is a need for a study of the law relating to adverse possession. Persons who commented on our tentative recommendation relating to quiet title actions mentioned various deficiencies in the law relating to adverse possession, but consideration of those deficiencies was beyond the scope of the quiet title actions study. The staff suggests that the Commission consider retaining a consultant to prepare a background study on adverse possession. We believe that the consultant should be retained within the next few months. If the Commission agrees, the staff will commence a search for a consultant and

submit its recommendation as to a consultant and the compensation for the study to the Commission for approval at a future meeting.

Procedure at October meeting. We have provided you with a copy of Professor Blawie's background study. Although we will assume that you have read the study prior to the meeting, we believe that it would be desirable for Professor Blawie orally to present a summary of the substance of the study at the meeting. Members of the Commission and staff would then have an opportunity to ask questions concerning particular aspects of the study or to request further elaboration of particular matters discussed in the study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

A STUDY OF THE PRESENT LAW OF PROPERTY AND CONVEYANCING IN CALIFORNIA WITH CRITICAL ANALYSIS AND SUGGESTIONS FOR CHANGE*

*This study was prepared for the California Law Revision Commission by Professor James L. Blawie. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

California Law Revision Commission
Stanford Law School
Stanford, California 94305

A STUDY OF THE PRESENT LAW OF PROPERTY AND CONVEYANCING IN CALIFORNIA WITH CRITICAL ANALYSIS AND SUGGESTIONS FOR CHANGE

By James L. Blawie*

This study, pursuant to the charge of the Law Revision Commission, concerns itself with the law of titles and conveyancing of the State of California. That charge indicated that the law of titles to real and personal property was to be reviewed with a view toward pointing out areas in which further study might be made, and in which legislation might be desirable. The law relating to transfers, both inter vivos and testamentary, where it concerned titles, was to be reviewed as well. Special attention was to be given to the legislation of other states in this area, to model acts proposed by organizations and individuals, and to the uniform laws proposed by the American Law Institute and the Commissioners on Uniform State Laws.

Consistently with the charge, the literature, both periodical and textual, has been examined in its entirety back to 1926, and selectively before that.[1]

If action is to be taken by the Law Revision Commission in this area, or by the Legislature acting without formal recommendation of the Commission, it appears that several courses are available. First, the choice might be to do nothing, allowing the slow process of individual member bills to modify the law in effective but nonuniform and patchwork fashion. Second, the choice might be made to adopt curative and reverter statutes and to modify existing parts of the codes to make the California law less complex, more in line with current legal analysis, and more uniform with the laws of other states. Third, the choice might be to adopt a marketable title act to deal with the most troublesome aspects of real property titles, together with the reforms indicated in the second alternative. Fourth, the Uniform Simplification of Land Transfers Act might be adopted, together with statutes to modernize the law of personal property, to cure other title problems, and to modernize the process of land recording. Fifth, a drastic change in the land law, perhaps similar to the changes made by the British Law of Property Act of 1925, might be considered. Sixth, a return might be made to the process of title registration, or the Torrens System. Seventh, a basic change in the law of titles to real and personal property might be made, modifying the traditional names and definitions which lawyers learn in law school property courses, in favor of new concepts which combine and simplify those concepts, doing away with the 'medieval horrors' of the law of estates in the process.

All of these possibilities will be discussed in this study; but given practical realities, the most prudent course would appear to be to consider the first through fourth alternatives.

Changes of the types indicated in those alternatives could be made with minimal disturbance to the present law of property in the State of California, and great resultant improvement in the clearing of titles, avoidance of litigation, greater economy of cost and effort in the transfer of property, and the simplification of the public records.

Title Registration

Torrens title registration remains in theory an excellent land title system, and it is fair to say that Britain and the United States alone in the common law world do not use the system. However, the American experience has not been satisfactory, and the system has very little vitality. About nineteen states adopted it originally, as an optional alternative system. Nebraska dropped title registration in 1943 and California in 1955. Minnesota has made most practical use of the system, and Illinois and Massachusetts are the only other two jurisdictions which have made extensive use of the system. It has been suggested that with modern aerial photo mapping and administrative rather than judicial proceedings to clear title initially, the system might work well. The notion is that the system was abandoned just at the time it was becoming cheap and really feasible.[2] However that may be, it appears to be a waste of time to discuss title registration at this time.[3]

Trends in the Law of Titles

There are trends in the law of titles, just as there are trends in most affairs of persons. The American law of titles

took its form largely during the nineteenth century. Scholarly and judicial effort was expended through the 1920s mainly in defining and refining the concepts which had been received from the British law of titles in chattels and land. Following this era, and continuing until the 1940s, attention was focused on the reform and modernizing of the law which had taken on full legal form in the various states and which had been restated in the Restatement of the Law of Property of 1936. Concern was directed to particular problems, such as the Rule against Perpetuities, curing the land records of petty irregularities, clarifying and modernizing the law of property in regard to married and unmarried women and the like. The most recent era, dating from the mid forties, is the era of the marketable title statutes, and of large scale modernization of property law by expertly drafted statute.

California, perhaps more than most states, moved early and decisively to modernize its law of property. It has eliminated very early in its modern legal history such concepts as the fee tail, The Rule in Shelley's Case, the Destructibility of Contingent Remainders by failure to vest or by merger, tortious feoffment, the inalienability of contingent interests in property, the need for words of inheritance in deeds, the indefinite failure of issue rule in regard to transfers to issue. It has made provision for partition of future interests, for anti-social accumulations of property, for exercise of a general power of appointment or disposition in favor of creditors. California has adopted elegantly drafted statutes such as those eliminating the concept of worthier title, both inter vivos and testamentary,

thoroughly modernizing the Rule against Perpetuties but leaving its vital social function completely effective, and eliminating the 'traps for fools' aspects. Its powers of appointment statute is virtually an elegant textbook on the subject.

Yet, the legislation has been of patchwork nature. Imperfections and difficulties remain. For example, the Rule in Wild's Case has not been disposed of. California's doctrine of after-acquired title protects only the transferree of a fee simple estate in real property. Its real property title searchers must check title into the indefinite past. Contrary to practice within the state and in most other states, the title searcher is required to continue examining the land records for instruments which a person who no longer owns an interest in property, might have filed after the record first indicates that he transferred property away. These and other problems will be discussed in full.

Personal Property Titles

The attention of those concerned with the law of titles has been directed in recent years largely to the law of real property and of trusts. Relatively little attention has been paid to transfers of personal property.[4] The reason is not hard to find. Real property has often been made in the past the vehicle of a rough sort of estate planning. Real property left by will is likely to be left with a divided title. Title is often left to children or relatives in co-tenancy, or is divided into life estate in a surviving spouse with the property to go to the children after his or her death, or a provision for similar successive interests is made. Even in transfers by deed between living persons such provisions are not unknown.

In more sophisticated planned estates, or those involving larger amounts of property, the property is almost certain to be left in trust. Where personal property of record is concerned--that is, personal property which is significant in value or which cannot slip with little trace out of the estate of a deceased person, the property will almost always be given over to a trustee to hold and manage for the beneficiaries. Where co-tenancies or future interests in property are concerned, and no trust is provided for, the complex provisions of a will may make title unmarketable or uninsurable, or unmarketable or uninsurable without suit. Property left to a trustee, however, is almost always marketable no matter what the form of the gift or transfer. The trust instructions almost always give the trustee the full power of management and control, "to buy, sell, invest, reinvest, transfer..." Even if the trust instrument fails to give such powers, statute law gives such powers, or makes them available on application of the trustee to a directing court. The trustee is thus free in most instances to transfer by fee simple title, free and clear, personal property in the trust corpus, even though that property may have been put into trust with divided title and interests in various beneficiaries.

In non-trust transfers, problems as to divided title to personal property remain. The law of titles to personalty and realty is substantially the same in California. Similar problems are involved, and reform efforts should be directed toward simplifying the title to personal as well as real property. Even though the

problems created by divided interests in personal property do not contribute to the "crisis in conveyancing" and do not contribute materially to the case load of the courts, the modernization of concept in this area is desirable. Fortunately, code provisions as to real property may easily be modified to include personal property.

The English Law of Property Act of 1925

The shortcomings of the common law system of titles, as well as the shortcomings of an antiquated system of real property conveyancing and the lack of an effective and country-wide recording or registration law, led inevitably to property law reform in England in 1925. Since there is little chance that the changes made by parliament in the English law of titles and conveyancing will interest California legislators, the effect of the Law of Property Act[5] will be set forth in short summary form.

The Act was adopted in 1922, but its effective date was delayed until 1925 to allow consolidation of sections of the act, and to allow members of the bar and conveyancing professionals to become familiar with the act through private study and special classes. The Law of Property Act consists of five different statutes,[6] thoroughly and expertly integrated to cover the entire law of property: The Law of Property Act, The Settled Land Act, The Trustee Act, The Administration of Estates Act, The Land Charges Act and The Land Registration Act.

The effect of these acts, as to titles and land transfer, was radical. Basic concepts underlying the act include the notion that legal estates in land are indivisible, so that there is always a legal owner with capacity and power to convey land in fee simple absolute. Divided titles, in the nature of future interests, restrictive covenants, or any other clog on the fee simple absolute title, are denominated as equitable interests. The person empowered to transfer the property in fee simple absolute is specified in each instance. For instance in the case of a transfer of a life estate followed by a remainder in fee simple absolute, the life tenant has the power to sell or act otherwise in reference to the fee simple title in the property. In selling or acting in reference to the title in a way which extends beyond his own interest, the life tenant is a trustee, and holds the proceeds charged with a trust. He is accountable to the remainder person and to any other person who holds a charge or claim on the title of the land transferred. However, the transferree takes the title transferred subject only to the terms of the deed or instrument of transfer or encumbrance. If the life tenant transfers with no such terms, the transferree takes a clear title. Where the person with the power to sell chooses to do so, he may sell in fee simple; however, he must make due provision to compensate the owners of "equitable interests" such as any conventional future interest. When due provision is made to protect the owners of these statutorily-denoted "equitable

interests," any such interest may be "overreached", the title transferred in fee simple absolute, and the "equitable interests" compensated in money or in other property. A basic premise of the property acts is that resort to judicial action should be unnecessary, so that the attendant waste of time, money and effort on all sides, may be avoided. The rights of all parties to a title are set out clearly, and the right to sell or encumber is lodged certainly and finally, generally in the person entitled to the possessory interest. The notion of clear title or declaratory relief actions and partition proceedings as a solution to problems created by divided titles was considered and rejected as being in itself a clog on the easy transfer of titles.

Although the acts talk almost entirely of land, nevertheless the acts provide that the law as to real and personal property is to be integrated and assimilated, and personal property title problems to be resolved insofar as possible consistently with the provision of the acts.

The Law of Property Act itself provides that the only legal estates are the fee simple absolute and the term of years absolute. (The term of years absolute would likely be viewed by an American lawyer as including the term of years absolute, on condition subsequent, determinable, and on executory limitation, since the statute provides that the term of years absolute may be created subject to reasonable conditions and provisions.) The life estate, determinable fee, fee on condition, fee on executory limitation, remainder, reversion, possibility of reverter, right of reentry, executory interest, and any co-tenancy are

defined as equitable interests only. In the case of a co-tenancy, certain designated persons among the co-tenants have the power to sell or act in reference to the title, being accountable to the other co-tenants.

Easements, mortgage liens, and other definite rights and privileges in land are legal estates if they are owned in the form of total ownership or for a term of years absolute.

No legal estate may be held as an undivided share in property, nor by an infant or incompetent person, since the designated estate owner who has the power to sell must always have the present right and power to convey or deal in reference to the entire title. In the case of a co-tenancy, the trustee of the legal title is to act in accord with the wishes of the co-tenants or the majority of them. Any dissatisfied co-tenant may compel sale or partition in reference to any co-tenancy or undivided interest. The partition action in reference to property is abolished, as is the Statute of Uses.

As to infancy or incompetence, trustees are specified in every interest who are to have the power to manage, sell and deal with the property. Where an infant and adult are co-tenants sharing a life interest, the adult is enabled to act in reference to the title as trustee. Where an infant and adult share a fee simple absolute or a term of years absolute, legal title is in other trustees.

The law of mortgages is entirely restated and simplified in a manner peculiar to English law alone, and the rights of mortgagees are protected effectively and simply.

With no effective recording act, and many titles unregistered, English abstracts of title prior to the act ran as many as fifty pages of type. The acts require that after their effective date, at each succession to title to property, the parties execute a "vesting assent" which removes all clogs on title, frees the property from all claims which might be brought by a former owner, and saves all rights and equities for collateral suit or recompense.

The purchaser of land must find the proper trustees, see that they are paid, and that they receive all necessary papers. In certain instances, the rights of an escrow agent, owner of a restrictive covenant right, equitable easement or charge, or the vendee under a contract for the sale of land, have interests which survive the transfer. English commentators speak of a curtain which the acts interpose between the purchaser and the former owners of divided interests and equities in the property transferred.

Nearly all uniquely real property concepts are abolished by the acts or are integrated with personal property concepts. Equitable conversion is gone, and the law of sales and of personal property applies to transfers of any kind of property. The Rule Against Perpetuities is continued in its application to possibilities of reverter and rights of reentry. Section 84 of the Law

of Property Act of 1925 is similar to the Michigan Marketable Title Act of 1945-47 discussed herein.

It will be seen that the law of titles and property transfer in England has been changed in such thorough going fashion that few American legislatures would be willing to consider the adoption of the entire pattern, even if modified. However, the pattern is fascinating, and certain elements of the Law of Property Acts deserve serious consideration.

Model and Uniform Acts in the Property and Conveyancing Area

The prime source of model acts in the property and conveyancing area will be found in Basye, Clearing Land Titles (1970, Supp. 1977), in Simes and Taylor, The Improvement of Conveyancing Through Legislation (1960) and Simes, A Handbook for More Efficient Conveyancing (1961). The footnotes to §1 of Basye provide a mine of references in this regard. Model acts are referred to in various parts of this paper, as relevant.

Among the Uniform Acts, only the Uniform Simplification of Land Transfers Act of 1976, 13 ULA, 1979 Pamphlet 208 remains completely relevant to the subject matter of this study. This act contains modern and relevant statutory material in the areas of curative provisions in reference to title and recording practice, reverter and marketable title provisions, and provisions in reference to liens and mortgages. The parts of the act relating to titles and conveyancing, but excluding the sections on liens and mortgages, are discussed in this paper.

The Uniform Land Transactions Act of 1975 refers to the contracts, undertakings and commercial aspects of the conveyancing process, and does not concern land titles or recording.[7] The Uniform Property Act of 1938, 9 ULA 254 (1942), was withdrawn in 1966, 9B ULA 632 (1966) and is no longer recommended for adoption. Virtually all of its provisions have been adopted into California law, or are well taken care of otherwise, so that the provisions of the Uniform Property Act no longer have much relevance.

The Uniform Land Registration Act was withdrawn in 1944. The Uniform Fraudulent Conveyances Act, 7A ULA 161 (1942) was adopted by California Civil Code §§3439-3439.12. The Uniform Land Sales Practices Act, 7A ULA 367 (1942) and other provisions relating to land sales were consolidated into the Uniform Land Transactions Act, referred to above. The Uniform Probate Code of 1969, 1975, 8 ULA 281, has no particular relevance to land titles or transfer, nor does the Uniform Fiduciaries Act of 1922, 7A ULA 129 (1942).

The Uniform Simplification of Land Transfers Act

The Uniform Simplification of Land Transfers Act of 1975, 13 ULA, 1979 Pamphlet 208 is an omnibus act full of elegant provisions for reform in the area of land titles and conveyancing.[8] It consists of seven articles, and is similar in structure to the Uniform Commercial Code. It was drafted and recommended as part of a large-scale project of the National Conference of Commissioners

on Uniform State Laws to modernize and unify legislation in regard to land title. The project started in 1975, and the Simplificatic of Land Transfers Act was one of its earliest products. The Act was originally recommended in 1976, and was amended in 1977 and reissued. It appears likely that few states will adopt it in its entirety, but that it will provide an invaluable source of draft model provisions for adoption by states to resolve various problems.

It has several significant provisions which are relevant for consideration by California legislators. A number of the provisions of the uniform act are discussed elsewhere herein.

Among the sections of significant interest is §2-301. This section eliminates any need for seal, attestation, or acknowledgment as prerequisites for recording.[9] It is part of the modern trend to make the land records complete and fully informati The tendency of the act is to let matter be rather freely recorded, rather than to exclude it; and further, to make the records readable and comprehensible without specialized knowledge or access to maps or plats. Section 2-301 makes almost anything relating to land titles rather easily recordable.

It is to be regretted that the uniform act does not adopt the modern pattern of "self-indexing" at §2-202. This pattern requires a person filing for record, to set out on the face of the instrument information as to the next preceeding stage of title. A grantee's deed, for instance, must show the source of title of his grantor, including record references. Part of the same movement discussed in this study has as its object the printing or typing of the names of all parties to an instrumen together with their street addresses.

Section 2-202 concerns fraud by escrow. In this pattern, an instrument is delivered to an escrow agent, to be delivered after certain conditions have been complied with by the transferree. In some instances, the unfaithful escrow agent makes wrongful delivery of the instrument before the instructions have been complied with. The majority and modern rule appears to be that such an instrument is effective if it comes into the hands of a bona fide person who has given value for it, despite the apparent lack of delivery. California law appears contra,[10] and adoption of this section would provide a good opportunity to modernize the law of conveyancing and make title more freely marketable.

Section 2-203 provides that deeds made out to any organization, officer, or association are good despite the questionable legal entity status of the transferree. California law appears contra, and the legislature might wish to consider this section.[11]

Section 2-205 provides for the sale of real estate subject to a future interest through a trustee, if a court deems this to be in the best interests of the parties. California's partition statute is more expertly drafted and much more inclusive. The section is substantially the Model Act Providing for the Sale of Real Estate Affected with a Future Interest, Simes and Taylor, The Improvement of Conveyancing Through Legislation 235 (1960), and similar legislation exists in over half the states.

Sections 2-302(d), 2-309 and 2-310 allow the recording of short form instruments which refer to already recorded master forms. These provisions are similar to Civil Code §2952, which allows recording of master forms relating to mortgages and deeds of trust, Karrell v. First Thrift, 104 Cal.App.2d 536, 232 P.2d 11 (1951). The broader uniform act section is to be preferred, in that the section generalizes this sensible method of cutting down the bulk of the record without loss of clarity.

Section 2-305 is substantially the Model Act Concerning The Evidentiary Effect of The Record, Simes and Taylor, The Improvement of Conveyancing Through Legislation 30 (1960). It adds little to current California law or practice.

Section 2-307 allows the filing of affidavits in reference to the title to real property. This section demonstrates another element of the modern trend to make the land records inclusive and thoroughly informative. If the land records are incomplete in some respect, or important information is missing from the records, or if a cloud appears of record, in reference to marital status of a grantor perhaps, this material may be supplied by an affidavit or declaration filed by a person with knowledge. Such affidavits have prima facie evidentiary effect and may be used to make a title marketable. Several states have similar statutes.[11] It is worth a reminder at this point, that a marketable title and a reverter act form part of this uniform act, so that the record, though inclusive, clears itself every thirty years. Hence, the volume of more informative records maintained under this uniform act never becomes a burden to the title searcher. Instead it helps him to ascertain the state of the title during the more recent statutory period.

Section 2-308 concerns the filing of notice to preserve an interest which is about to be barred by the passage of the statutory period of thirty years, or other provision of the act. It is really part of a marketable title or reverter act, made more general.

Section 2-310 allows the recording of a memorandum of lease. Since many lease forms used in state practice are uniform and rarely varied, this provision allows the filing of the variable and particular information, without the need to record the standard "boiler plate" parts of a particular lease. The provision keeps down the size of the record, and is similar in its effect to the provisions allowing the use of instruments which refer to recorded master forms.

Section 2-312 is another record-trimming provision. It allows a person filing a later deed or other instrument for record to incorporate the legal description in an earlier instrument of record by reference. The expectation is that exact recorder's number and book and page number reference will be made, and that later copying errors will be avoided. In line with this, §2-311 allows the incorporation of an entire earlier recorded instrument by reference. Sections 2-310 through 2-312 might well be considered by the California Legislature.

Sections 3-401 through 3-411 are referred to as curative provisions. Section 3-409 provides that possibilities of reverter, rights of entry, or resulting trusts which restrict fee simple titles in land are extinguished in thirty years unless a notice to preserve is recorded. It appears to add little to the marketable title provisions of the uniform act.

Section 3-206 provides that six months after the recorded expiration date of an option for the sale of land, or of a simple land sale contract, or six months from the date of recording if the instrument has no expiration date, a bona fide purchaser takes clear of the record, unless a lis pendens is recorded. California's similar legislation, discussed elsewhere in this paper, applies to options for the sale of land, and clears the record after a year. It does not deal with clearing the record of the simple contract of sale.

Section 3-207 refers to the effect of indefinite references contained in recorded instruments, to other title interests.[12] Such indefinite references do not constitute notice and are not in the chain of title. This section stems from the Model Act Concerning Indefinite References, Simes and Taylor, The Improvement of Conveyancing Through Legislation 101.

Section 3-208 is a very useful provision which frees title searchers from the need to make extra-record inquiry as to the exercise of a recorded power of disposition or appointment. This provision is similar to UCC §2-403(2) and places on the donee of a power the duty of recording an execution of the power or other act relating to it. The section allows title searchers to stay with the record and frees them from another extra-record cloud.

Sections 3-301 - 3-309 are the marketable title provisions discussed in full elsewhere in this paper.

The rest of the uniform act refers to liens and encumbrances and while excellently drafted, is not relevant to this study. Article 6 of the uniform act has to do with the establishment of a tract index and the duties of the recorder in regard to such index. It is an admirable system, but appears likely to be bypassed sooner or later by the adoption of a system of tract index recording keyed to a central computerized land record system. This possibility is discussed further below.

Restrictions and Forfeitures as Clogs on Title

Of the many possible clogs on title, the ones most important for this study are the ones provided for in the property law itself. These interests are the possibility of reverter, the right of reentry (more properly called the power of termination), and the real covenant and equitable servitude, which two terms are conventionally grouped under the title restrictive covenants.[13]

Any of the present titles in property, real or personal, may be subjected to such interests.[14] Hence, a life estate may be made subject to a possibility of reverter or a power of termination, as may an estate for years or in fee. The same applies to restrictive covenants regulating the use of those present estates.[15] This area of the law presents clearly the classical struggle, on the one hand being the owners of property who wish to control its course even after it has left their hands, and on the other hand, those who work to acquire property, or for whose benefit property should be freed of past equities so that they may have access to it. The reverter, the reentry and

the restrictive covenant are among the most effective of the devices used to control the use and title of property into the future. Through the use of reverter and reentry an owner may transfer property, subjecting the transferree to conditions, the breach of which may terminate the title given, causing the property to be forfeited to the transferror. Through restrictive covenants, the transferror may control the use of property indefinitely into the future, being able to collect damages and enjoin use contrary to the covenants in the instrument of transfer. All of these interests were subject to no limit in time at common law. Although the Rule Against Perpetuities applied to the similar interest in a third party, called the executory interest, the Rule had no application in American practice to the reverter, reentry or restrictive covenant.[16]

As to the possibility of reverter and the right of reentry, the two interests are created by similar though distinct words and are similar in their effect. In fact, it was not really certain until the end of the nineteenth century that the American law included the possibility of reverter. California made this interest part of the California law, as a distinct property interest, only in the twentieth century.[17] The concept of the possibility of reverter, which is said to end the preceeding estate automatically at the happening, nonhappening or cessation of a specified event, is really a superflous concept. The related interest, the right of reentry as it was called historically, or the power of termination, as it is properly called according

to legal definition, accomplished much the same ends. However, when the condition attached to the prior estate is breached, the owner of the power of termination must execute the power by giving notice and making demand; and in California, making the notice effective by maintaining suit for possession or to clear title.[18] Learned authors have pointed out that there is little difference between the two in modern times, in that even the owner of a possibility of reverter must bring suit to make his interest effective.[19] Further, even though his title should be dated back to the time the determining event occurred, in practice, little difference appears in the form of the judgment in modern times. The inevitable conclusion is that the law is needlessly complicated, and that the concept more consistent with modern practice should alone survive, namely, the power of termination or right of reentry.

These complexities, together with the pragmatic fact that rights of reentry and possibilities of reverter have been practical factors in clouding land titles, has led to a considerable drive to control these interests and their close kin, the restrictive covenant.[20] The main ideas advanced have been the subjecting of these interests to the Rule Against Perpetuities by statute,[21] consolidating reverter and reentry into one concept, the power of termination,[22] subjecting these interests via reverter acts either to a fixed life of so many years,[23] and subjecting these interests to reverter acts and marketable title acts which give such interests a life of so many years, which life may be renewed for a further term of years by recording a notice to preserve at the right time.

Marketable Title Acts - General

Attention in recent years has been directed largely to marketable title acts as a means of resolving problems of conveyancing, recording, future interests, covenants and restrictions, unused easements, and as a means of clearing title and restricting the required period of search of a title examiner.[24]

Marketable title acts are now in effect in Connecticut, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin, Kansas, North Carolina, Ohio, Maine, Oklahoma, Florida, Utah, Vermont, Wyoming, Ontario, and perhaps Massachusetts.

The marketable title acts operate through the mechanics of the land recording acts, and are concerned with clearing land titles and simplifying conveyancing.[25] The Model Marketable Title Act, which occupies only four or five pages as usually printed, was formulated as part of the Michigan Research Project of 1959, and appeared in 1960.[26] It is based essentially on the earlier Michigan Marketable Title Act drafted by a group which included Professor Ralph W. Aigler. The Michigan statute itself is still regarded as a model act, to be considered together with the Model Marketable Title Act. The Michigan Project considered the marketable title acts then in existence, together with the experience and practical problems in application of those acts, and drafted the Model Marketable Title Act accordingly. Finally, the Uniform Simplification of Land Transfers Act of 1976 incorporated the substance of the Model Act in sections 2-302 through 2-304 of the Uniform Act. At the present time, states

considering the adoption of a marketable title act have available the three expertly drafted acts, and might well choose to adopt any one of the three, or to draft a composite. The Uniform Act includes as well miscellaneous curative provisions, and provisions as to liens and mortgages.

The basic theory of the acts is that interests which clog or divide the fee simple title, with certain exceptions, are cleared from the record by the lapse of a period of time.[27] The period is thirty or forty years, if no new notice to preserve outstanding interests is recorded during that time. The duty of the title searcher is to trace title to land back for the requisite number of years, and to the first deed in fee simple before that time in the same chain of title. This root deed and conveyances and encumbrances made after it in the same chain of title, form the only matters of record of which notice must be taken. Most interests other than fees, life estates, and leasehold interests, are thus automatically cleared from the title by the lapse of time, and their disappearance behind the root deed.[28]

For example, if property is devised to A in fee simple, subject to a condition which allows the testator or his successors to reenter in case of breach of the condition, A takes the title in fee simple subject to a condition subsequent. If A deeds away the property without mentioning the condition in his deed, to B and the statutory period passes after the grant to B, B's deed becomes the root deed. If no reference to A's right of reentry is made in any succeeding instrument in the chain of title,

and if A fails to file further notice as provided in the statute, the present owner of the fee simple title holds it free of A's right to reenter. This is true regardless of extra record notice or knowledge of the parties. Disabilities in any of the parties are irrelevant.

Hence, the basic idea of the marketable title statute is similar to the basic idea of statutes of limitations or adverse possession. One who searches back to the root title and finds no cloud, may assume that the title is marketable. The effect of the statute is not merely to bar the right of action of the owner of an outstanding right or interest but actually to extinguish his title. Savings provisions are made as to the retroactive effects of the marketable title statutes, and they have withstood all constitutional tests when adopted in the model form.[29]

A prime motive of the drafters of the model marketable title acts was to clear title to land within a state comprehensively and without the expense of litigation.[30] It is basic textbook law that only titles to land in fee simple absolute or in the form of fixed term leases are readily marketable.[31] Land held in any other type of title is effectively removed from the ordinary marketplace. Specialized brokers may usually be found in metropolitan centers who can dispose of such rarified interests as fees simple determinable or powers of termination, but only at a much reduced price to a sophisticated buyer in a limited market. The more land is put into such titles, the less the ability of the ordinary buyer to be able to purchase

free and clear at a reasonable price without threatened future litigation. In a state where no device is provided to clear titles without litigation, the amount of land affected by such titles continues to increase as the time from the origin of land title in the state increases.

Contracts for the sale of land usually call for marketable title to be proferred by the seller. In California practice, the contract commonly calls for insurable title to be proferred. If marketable title is proferred either inside or outside California, no difficulty arises. If title is produced which is insurable but not marketable in California and other states which follow the same legal principles, the buyer may be compelled to accept the title if the seller pays the cost of insuring the buyer against loss of the property or the full use of it. The marketable title acts would thus serve the valuable function in California of making many more titles both marketable and insurable. The 'marketable title' referred to in the act is carefully stated not to define marketable title as a legal concept for purposes of the jurisprudence of a state. Nevertheless, for purposes connected with the transfer of land title, virtually the only practical area of use of the marketable title concept, the buyer must take a title cleared by the operation of the marketable title act, if all other factors are in order.

The owner of an interest subject to being barred by the operation of the marketable title act has a long period of grace (typically one to three years) after the effective date of the

act, during which time notice may be recorded to preserve the interest. Provision is made in most such acts as to the form of the notice and details of filing. An attentive person who cares about preserving his interest has little difficulty or expense in doing so. Recording of a simple instrument approximately every twenty to forty years, depending on the period provided in the statute, will protect the interests indefinitely. Yet, the fact remains that very few persons ever file such notices, and that almost all land titles in fee simple are cleared by the passage of time.

Certain interests survive the bar of the act. According to the basic theory of such acts, the number of exceptions should be severely limited. Since the whole idea of the marketable title acts is to clear titles and restrict required title search, the exceptions should be kept as few as politically feasible in the legislative process. It is better to trade off an extended period under the act, say forty instead of thirty years, than it is to make exceptions of certain interests. Marketable title acts arouse a great deal of unfounded emotion when they are being considered by legislators. Most of these fears turn out to be unfounded.

It is the common experience in a state that the forty-year act originally adopted to prevent the insertion of too many exceptions is later amended into a thirty year act with little or no opposition, or a thirty year act into a twenty.

Such is the nature of the marketable title acts. Reaction to adoption of the acts has been uniformly favorable.[32] Even those originally opposed have been won over by the salutory effect of the marketable title acts in operation. In the California context, it should be possible for title companies to provide title information and to insure titles with less search and fewer risks as to titles which formerly required special policies of title insurance. Though title is rarely searched by California attorneys or residents, the job, if undertaken, would be much simplified.

It is worth noting that Professor Simes, who drafted a host of model acts to eliminate title and recording problems, was of the opinion that the Model Marketable Title Act alone would substantially accomplish the intention of the model acts, so that the separate adoption of such model acts was not really necessary.[33]

Analysis of the Model Acts -- The Michigan Statute

The Michigan Statute, Michigan Compiled Laws Annotated §§565.101-565.109 (1967), remains in its own right a model statute and has formed the basis of statutes in other states. The statute, first adopted in 1945, P.A. 1945, No. 200 §1, eff. Sept. 6, was the first true model act, though eleven somewhat similar acts had been adopted by ten other states and by Ontario before 1945. Professor Aigler and the committee which produced the act under the auspices of the Michigan State Bar Association, used these acts and the existing literature in preparing the Michigan Act.

In its original form, available at 44 Mich. L. Rev. 45 (1945), the statute had fewer exceptions than its present version

The original Michigan statute started out with a preamble, meant to clarify legislative intent. Opinion has differed as to the value of such a preamble, some stating that it weakens the act and should be omitted, while others maintain that it should be retained in any later statute modeled on it, or even enlarged as a signal to the courts that the act is to be interpreted liberally without any nit-picking.

The "original Michigan statute" is Mich. Pub. Acts 1945, No. 200:

> AN ACT to define a marketable record title to an interest in land; to require the filing of notices of claim of interest in such land in certain cases within a definite period of time and to require the recording thereof; to make invalid and of no force or effect all claims with respect to the land affected thereby where no such notices of claim of interest are filed within the required period; to provide for certain penalties for filing slanderous notices of claim of interest, and to provide certain exceptions to the applicability and operation thereof.
>
> *The People of the State of Michigan enact:*
>
> Section 1. Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by application of the provisions of succeeding sections of this act and subject also to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed and which have been recorded during said 40 year period: *Provided, however,* That no one shall be deemed to have such a marketable record title by reason of the terms of this act, if the land in which such interest exists is in the hostile possession of another.
>
> Sec. 2. A person shall be deemed to have the unbroken chain of title to an interest in land as such terms are used in the preceding section when the official public records disclose:
>
> (a) A conveyance or other title transaction not less than 40 years in the past, which said conveyance or other title transaction

purports to create such interest in such person, with nothing appearing of record purporting to divest such person of such purported interest; or,

(b) A conveyance or other title transaction not less than 40 years in the past, which said conveyance or other title transaction purports to create such interest in some other person and other conveyances or title transactions of record by which such purported interest has become vested in the person first referred to in this section, with nothing appearing of record purporting to divest the person first referred to in this section of such purported interest.

Sec. 3. Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all interests, claims, and charges whatsoever the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred prior to such 40 year period, and all such interest, claims, and charges are hereby declared to be null and void and of no effect whatever at law or in equity: *Provided, however*, That any such interest, claim, or charge may be preserved and kept effective by filing for record during such 40 year period, a notice in writing, duly verified by oath, setting forth the nature of the claims. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said 40 year period. For the purpose of recording notices of claim for homestead interests the date from which the 40 year period shall run shall be the date of recording of the instrument, nonjoinder in which is the basis for such claim. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

(a) Under a disability,

(b) Unable to assert a claim on his own behalf,

(c) One of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

Sec. 4. This act shall not be applied to bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease, by reason of failure to file the notice herein required. Nor shall this act be deemed to affect any right, title or interest in land owned by the United States.

"Sec. 5. To be effective and to be entitled to record the notice above referred to shall contain an accurate and full description of all the land affected by such notice which description shall be set forth in particular terms and not by general inclusions. Such notice shall be filed for record in the register of deeds office of the county or counties where the land described therein is situated.

The register of deeds of each county shall accept all such notices presented to him which describe land located in the county in which he serves and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded and each register shall be entitled to charge the same fees for the recording thereof as are charged for recording deeds. In indexing such notices in his office each register shall enter such notices under the grantee indexes of deeds under the names of the claimants appearing in such notices.

Sec. 6. This act shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined herein, to rely on the record title covering a period of not more than 40 years prior to the date of such dealing and to that end to extinguish all claims that affect or may affect the interest thus dealt with, the existence of which claims arises out of or depends upon any act, transaction, event or omission antedating such 40 year period, unless within such 40 year period a notice of claim as provided in section 3 hereof shall have been duly filed for record. The claims hereby extinguished shall mean any and all interests of any nature whatever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental.

Sec. 7. Nothing contained in this act shall be construed to extend the periods for the bringing of an action or for the doing of any other required act under any existing statutes of limitation nor to affect the operation of any existing acts governing the effect of the recording or of the failure to record any instruments affecting land nor to affect the operation of Act No. 216 of the Public Acts of 1929 nor of Act No. 58 of the Public Acts of 1917 as amended by Act No. 105 of the Public Acts of 1939.

"Sec. 8. No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.

Sec. 9. No interest, claim or charge shall be barred by the provisions of section 3 of this act until the lapse of 1 year from its effective date, and any interest, claim or charge that would otherwise be barred by said section 3 may be preserved and kept effective by the filing of a notice of claim as required by this act during the said 1 year period.

Section 1 is the heart and major part of the act. It states that the owner of land who has an unbroken chain of title extending back forty years, has marketable record title to the land, subject only to exceptions allowed by the act and to interests and defects in the muniments of which the chain of title is formed. The act runs in favor of owners of land which is not in the possession of someone else.

Section 1 has been criticized because it does not state specifically that the act works in favor of the fee simple owner. Its wording is indefinite enough so that the act could be interpreted to apply to the owner of any interest in property. However, the provision in the Michigan act that the land must not be in the hostile possession of someone else, restricts claimants of clear title to present owners of interests who have the right of present possession or whose land is unoccupied. Those appear to be owners in fee simply only, and the provision has been so interpreted by the Michigan courts and those of other states.

Section 2 sets out the root title concept, whereby the first deed in fee preceeding a time forty years in the past from the present date, is the earliest deed or instrument which a searcher or person concerned with the title must notice. After the root deed, the person concerned is charged with notice only of the root deed and instruments which stem from the root deed. If no subsequent instruments appear, the owner under the root deed is confirmed in his title and the title cleared.

Some question has been raised as to the applicability of §§2(a) and (b) to the transfer of title by quitclaim deed, in light of the wording therein, "which said conveyance or other title transaction purports to create such interest in such person..."[34] Question, does a quitclaim purport to create an interest in the transferree? The Model Marketable Title Act contains effectively the same provision in its §§1 and 8(e). The Uniform Act, §3-302, clears up this potential source of trouble by the following provision: "and the conveyance or other title transaction, whether or not it was a nullity, purports to create the interest in or contains language sufficient to transfer the interest..." (emphasis added).

Section 3 provides that the title is cleared of all interests, claims and charges after expiration of the forty year period, dated backward from the time of search. These interests include legal and equitable claims such as executory interests, covenants, restrictions and servitudes, equitable charges, powers of termination or rights of entry, possibilities of reverter, easements, rights under contract of sale or option, powers, and all other rights or interests not specifically saved by the statute. Disabilities are irrelevant, and those disabilities which might prevent the loss of a cause of action, or toll the running of an adverse possession or prescription statute have no effect on the marketable title statute.

The reason for such provision appears to be the conviction of the drafters that virtually no one, even the unborn owner of a contingent interest, is without effective representation under modern codes. Whether by the doctrine of virtual representation, by the appointment of a guardian ad litem, next friend, trustee appointed for the purpose, relative, public administrator or guardian, or in some other fashion,it appears that the owner of any interest is taken to be effectively represented under the statute for purposes of suit or filing of notice.

A simple acknowledged notice to preserve in due form may be filed and later refiled by the owner of an interest or his representative, and prevents the statute from barring the noticed interest until the notice also "passes behind the root deed," in the land records.

Section 4 provides only two exceptions from the act. These are lessors or lessors' assignees whose land is presently leased under a long term lease, who need not file notice to preserve the reversion. Interests of the United States in land in the state are also excepted.

There is general agreement that the provision protecting the right of the landlord to get the land back after the expiration of the lease is necessary. As to the right of the federal government, it has been objected that the state has no right to legislate in relation to federal land anyway, and where the federal government has chosen to subject itself to state land law, the provision might somehow confuse things. However, the provision has not caused any difficulty in any state which has such a provision, to date.

Section 5 requires any notice filed to preserve an outstanding interest subject to bar, to contain a full and accurate legal description of the land affected, in particular terms. To make the job of the title searcher easier, the act requires the recorder to keep a separate tract record book which is to contain these notices so that only a single reference to a volume constantly kept up to date is necessary for the title searcher, in addition to his ordinary thirty or forty year search in the main records. The provision is obviously meant for the great majority of states such as California which maintain grantor-grantee public land records. Such filed information would appear as a matter of course in the ordinary title search in a jurisdiction which kept tract records, or in a search done by a title company in usual fashion under which records are kept in an arbitrarily based tract index.

Section 6 sets out a mandate of liberal construction to clear titles of all clogs whatever except those preserved under the act.

Section 7 is a saving provisions as to existing statutes.

Section 8 makes slandering title by filing baseless notices to preserve nonexistent interests a tort with special damages including attorneys' fees, costs of action, and all resultant damages.

Section 9, the final section, gives owners of interests subject to being barred because of record longer than forty years at the effective date of the act, one year after the effective date to file notice to preserve such claims.

In subsequent amendments, the original act was changed as to Section 3. The present act also excepts the claims of mortgagors and mortgagees until after the mortgage becomes due and payable unless the mortgage has no due date or has been executed by public utility or public service companies. It excepts visible or apparent easements or similar interests, whether in present use or not. Land interests owned by the State of Michigan or its political subdivisions and agencies are also excepted.

In subsequent comment, these additional exceptions have been criticized, but similar exceptions are common in subsequent state marketable title statutes.

Section 5 remains much the same, but the accurate and full legal description to be filed by the owner of the outstanding interest is deemed to be sufficient if it is the same as the description in the recorded instrument by which the outstanding interest was created.

Section 6 was amended to give owners of interests likely to be barred at the effective date of the act three years rather than one year to file notice to preserve their interests.

The Model Marketable Title Act

The Model Marketable Title Act was drafted by Professor Lewis M. Simes and Clarence B. Taylor as part of the Michigan Research Project at the University of Michigan Law School, in 1959. At that time, they had the advantage of the practical experience of ten states and a Canadian province with such acts, and in particular, the benefit of fourteen years of experience with the

Michigan statute drafted with the assistance of Professor Aigler. After much study and consideration, Simes and Taylor decided that the Michigan statute offered the best foundation on which to build the structure of their Model Act. The work was completed in 1959, and went into general circulation with the publication of the landmark text Simes and Taylor, Improvement of Conveyancing by Legislation (1960), and of Simes' Handbook for More Effecient Conveyancing (1961).

Model Marketable Title Act

Section 1. *Marketable Record Title.* Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, shall be deemed to have a marketable record title to such interest as defined in Section 8, subject only to the matters stated in Section 2 hereof. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in

(a) the person claiming such interest, or

(b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Section 2. *Matters to Which Marketable Title Is Subject.* Such marketable record title shall be subject to:

(a) All interests and defects which are inherent in the muniments of which such chain of record title is formed; *provided,* however, that a general reference in such muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction or other interest.

(b) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with Section 4 hereof.

(c) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title.

(d) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started; *provided,* however, that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section 3 hereof.

(e) The exceptions stated in Section 6 hereof as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, and as to interests of the United States.

Section 3. *Interests Extinguished by Marketable Title.* Subject to the matters stated in Section 2 hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person *sui juris* or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

Section 4. *Effect of Filing Notice or the Equivalent.*

(a) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said forty-year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is

(1) under a disability,

(2) unable to assert a claim on his own behalf, or

(3) one of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him or on his behalf as provided in Subsection (a), and such possession continues to the time when marketability is being determined, such period of possession shall be deemed equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in Subsection (a).

Section 5. *Contents of Notice; Recording and Indexing.* To be effective and to be entitled to record the notice above referred to shall contain an accurate and full description of all land affected by such notice which description shall be set forth in particular terms and not by general inclusions; but if said claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in such recorded instrument. Such notice shall be filed for record in the registry of deeds of the county or counties where the land described therein is situated. The recorder of each county shall accept all such notices presented to him which describe land located in the county in which he serves and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded and each recorder shall be entitled to charge the same fees for the recording thereof as are charged for recording deeds. In indexing such notices in his office each recorder shall enter such notices under the grantee indexes of deeds under the names of the claimants appearing in such notices. Such notices shall also be indexed under the description of the real estate involved in a book set apart for that purpose to be known as the "Notice Index."

Section 6. *Interests Not Barred by Act.* This Act shall not be applied to bar any lessor or his successor as a reversioner of his right to possession on the expiration of any lease; or to bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use; or to bar any right, title or interest of the United States, by reason of failure to file the notice herein required.

Section 7. *Limitations of Actions and Recording Acts.* Nothing contained in this Act shall be construed to extend the period for the bringing of an action or for the doing of any other required act under any statutes of limitations, nor, except as herein specifically provided, to affect the operation of any statutes governing the effect of the recording or the failure to record any instrument affecting land.

Section 8. *Definitions.* As used in this Act:

(a) "Marketable record title" means a title of record, as indicated in Section 1 hereof, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 3 hereof.

(b) "Records" includes probate and other official public records, as well as records in the registry of deeds.

(c) "Recording," when applied to the official public records of a probate or other court, includes filing.

(d) "Person dealing with land" includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(e) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(f) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, or sheriff's deed, or decree of any court, as well as warranty deed, quitclaim deed, or mortgage.

Section 9. *Act to Be Liberally Construed.* This Act shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 1 of this Act, subject only to such limitations as appear in Section 2 of this Act.

Section 10. *Two-Year Extension of Forty-Year Period.* If the forty-year period specified in this Act shall have expired prior to two years after the effective date of this Act, such period shall be extended two years after the effective date of this Act.

Section 1 is substantially similar to Section 1 of the original Mighigan statute, likewise providing for a forty year search, and being a bit more detailed and verbose.

The number of notices to preserve filed under the forty year statutes has been very few, Simes & Taylor, Improving Conveyancing Through Legislation 353 (1960), but the authors and commentators appear to prefer less than a forty year period with reference to future interests, mortgages and easements.[35]

Section 2 is much more detailed than the original Michigan statute in reference to such matters as interests revealed in the muniments of title which are preserved as against the fee simple title without recording of notice, the claims of adverse possessors which are preserved as in the original Michigan act, and the nature of the notice to be filed to preserve outstanding interests. A proviso is added, that a recording which refers

to an interest already barred does not revive that earlier interest.

Section 3 is substantially the same as the Michigan act's section 3, barring all outstanding legal and equitable interests affecting the basic title, after the instrument in which such interests are referred to most recently in the chain of title disappears behind the root title.

Included are interests legal or equitable, present or future, however denominated.

Section 4 provides for the filing of notice to preserve any such interest liable to being barred. Disability or the fact that the owner of the interest might be as yet unascertained, or lack of notice or knowledge, are not effective to prevent the bar. If the owner of a possessory interest is in possession, and remains so through the time of suit, his possession serves as notice and he need not file the statutory notice to preserve his interest.

This last provision was added to protect the position of the owner of real property who cannot produce proof of ownership by instrument or recorded document. Thus, an owner of the basic fee simple title need not be in possession as long as no one else is in possession, as long as that owner's title appears of record. However, if the owner's title does not appear of record, his possession will save his interest from the operation of the marketable title act.

This provision was added to meet practical problems of land holding in Michigan.[36] It appears that recording was not universal or perfect in earlier times, and that some owners could not produce deed or record proof of ownership. Again, a large number of parcels of land were unoccupied in the less accessible parts of the state, though in private ownership. This made it necessary to provide for protection of fee simple title even though the owner might not be in actual possession. Under the Michigan statute and under the Model Act, the owner need not be in possession to claim a clear title, as long as no one is in hostile possession.

Section 5 sets out the required contents of the notice to preserve an outstanding interest, and details as to recording and indexing. Once again, a tract or plat record of the notices filed is required, grouping them under a geographic description of the affected property and with the record being kept up to date. In addition, provision is made that such notices be indexed as well in the grantee index. Such notices, as a bit of calculation by one familiar with the grantor-grantee method of keeping land records will reveal, will not ordinarily be found in the usual title search. Hence, the tract index is the meaningful one.

Section 6 sets out the exceptions to the bar of the act. Again, the interests of the lessor and the lessor's assignee at the end of a lease term are excepted. Easements and related interests demonstrated by physical evidence of use are excepted, as are land interests of the United States.

Section 7 is a saving provision defining the effect of the act on existing legislation. The effect is to be miminal or none at all.

Section 8 defines key words used in the act.

Section 8(e) has been criticized because it appears to require some instrument other than a quitclaim deed to constitute the source of title if a titleholder is to have the advantage of the Act.[37] The Uniform Act, as indicated below, has eliminated this apparent exclusion of the quitclaim deed.

Section 9 sets out a rule of liberal construction.

Section 10 gives a two year period of grace within which time persons who own outstanding interests which would otherwise be barred at the effective date of the act or shortly afterward, may record notice to preserve their interests.

The Uniform Simplification of Land Transfers Act

The Uniform Simplification of Land Transfers Act was recommended in 1976 and has as yet not been adopted in any jurisdiction. The Act is a combination of curative land transactions provisions, combined with a marketable title act based on the Model Marketable Title Act, provisions permitting the appointment of a trustee empowered to transfer real estate divided into present and future interests in effect much like those of California Code of Civil Procedure §§872.010-874.240, recording, liens and duties of the recorder. Sections 3-301 through 3-309 set out a slightly modified Model Marketable Title Act.

PART 3

MARKETABLE RECORD TITLE

Introductory Comment

This Part derives from the Model Marketable Title Act, which traces its history to legislation earlier adopted in Michigan, Wisconsin, and Ontario. The Model Act was prepared by Professor Lewis M. Simes and Clarence B. Taylor for the Section of Real Property, Probate and Trust Law of the American Bar Association and for the University of Michigan Law School. It is discussed in L. M. Simes & C. B. Taylor, *The Improvement of Conveyancing by Legislation* (Ann Arbor: University of Michigan Law School, 1960), pp. 6–16. Legislation based upon the Michigan Act or the Model Act exists in Indiana, South Dakota, Nebraska, North Dakota, Ohio, Oklahoma, Utah, Connecticut, Iowa, Florida, and Vermont. Marketable title legislation on somewhat different patterns is found in a number of other states.

The basic idea of the marketable title act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record.

Provisions for rerecording and for protection of persons using or occupying land are designed to prevent the possibility of fraudulent use of the marketable record title rules to oust true owners of property.

The most controversial issue with respect to marketable title legislation is whether or not an exception should be made for mineral rights. This Act follows the Model Act in making no such exception. Any major exception largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception.

Section 3–301. [Definitions]

In this Part, unless the context otherwise requires:

(1) "Marketable record title" means a title of record, as indicated in Section 3–302, which operates to extinguish interests and claims, existing before the effective date of the root of title, as stated in Section 3–304.

(2) "Records" includes probate and other official records available in the recording office.

(3) "Person dealing with real estate" includes a purchaser of real estate, the taker of a security interest, a levying or attaching creditor, a real estate contract vendee, or another person seeking to acquire an estate or interest therein, or impose a lien thereon.

(4) "Root of title" means a conveyance or other title transaction, whether or not it is a nullity, in the record chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by him, upon which he relies as a basis for the marketability of his title, and which was

the most recent to be recorded as of a date 30 years before the time marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(5) "Title transaction" means any transaction purporting to affect title to real estate, including title by will or descent, title by tax deed, or by trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, or sheriff's deed, or decree of a court, as well as warranty deed, quitclaim deed, or security interest.

Comment

The definition of root of title has been expanded to make it clear that a quitclaim deed or a forgery can be a root of title.

Section 3-302. [Marketable Record Title]

A person who has an unbroken chain of title of record to real estate for 30 years or more has a marketable record title to the real estate, subject only to the matters stated in Section 3-303. A person has an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than 30 years at the time the marketability is to be determined, and the conveyance or other title transaction, whether or not it was a nullity, purports to create the interest in or contains language sufficient to transfer the interest to either:

(1) the person claiming the interest, or

(2) some other person from whom, by one or more conveyances or other title transactions of record, the purported interest has become vested in the person claiming the interest; with nothing appearing of record, in either case, purporting to divest the claimant of the purported interest.

Comment

This is the basic section which frees the holder of marketable record title from adverse claims antedating his root of title, even if the root of title is a forgery. See Marshall v. Hollywood, 244 So.2d 743 (Fla.App.1969), affirmed 236 So.2d 114 (Fla.1970).

Section 3-303. [Matters to Which Marketable Record Title is Subject]

The marketable record title is subject to:

(1) all interests and defects which are apparent in the root of title or inherent in the other muniments of which the chain

of record title is formed; however, general reference in a muniment to easements, use restrictions, encumbrances or other interests created prior to the root of title is not sufficient to preserve them (Section 3–207) unless a reference by record location is made therein to a recorded title transaction which creates the easement, use, restriction, encumbrance or other interests;

(2) all interests preserved by the recording of proper notice of intent to preserve an interest (Section 3–305);

(3) an interest arising out of a title transaction recorded after the root of title, but recording does not revive an interest previously extinguished (Section 3–304); [and]

(4) the exceptions stated in Section 3–306[; and] [.]

[(5) interests preserved by the [Torrens Title Act.]]

Comment

This section states the types of claims to which a marketable record title is subject. As mentioned in the introductory comment, any extension of this list may defeat the whole purpose of marketable title legislation.

Section 3–304. [Interests Extinguished by Marketable Record Title]

Subject to the matters stated in Section 3–303, the marketable record title is held by its owner and is taken by a person dealing with the real estate free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon an act, transaction, event, or omission that occurred before the effective date of the root of title. All interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether the interests, claims or charges are asserted by a person who is or is not under a disability, whether the person is within or without the state, whether the person is an individual or an organization, or is private or governmental, are null and void.

Comment

This section is designed to make absolutely clear what has already been indicated in Section 3–302, that all interests except those indicated in Section 3–303 are extinguished by marketable record title.

Section 3-305. [Effect Upon Marketable Record Title of Recording Notice of Intent to Preserve an Interest]

A person claiming an interest in real estate may preserve and keep the interest, if any, effective by recording during the 30-year period immediately following the effective date of the root of title of the person who would otherwise obtain marketable record title, a notice of intent to preserve the interest (Section 2-308). No disability or lack of knowledge of any kind on the part of anyone suspends the running of the 30-year period. The notice may be recorded by the claimant or by another person acting on behalf of a claimant who is:

(1) under a disability;

(2) unable to assert a claim on his own behalf; or

(3) one of a class, but whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest.

Comment

A simple method is provided for persons whose title depends solely upon documents which have been of record for more than 30 years to prevent a later recorded document from cutting off the effect of the documents upon which they rely. Suppose real estate was owned by A in 1930 and that he conveyed to B in 1940, to C in 1950, and to D in 1960. If this Act became effective in 1977, then in 1981 C has a marketable record title free of all claims of A and B and superior to that of D. If C does not record a notice of intent to preserve his interest by 1990, D will obtain a marketable record title and C's interest will be extinguished.

Section 3-306. [Interests Not Barred by Part]

This Part does not bar:

(1) a restriction, the existence of which is clearly observable by physical evidence of its use;

(2) interests of a person using or occupying the real estate, whose use or occupancy is inconsistent with the marketable record title, to the extent that the use or occupancy would have been revealed by reasonable inspection or inquiry;

(3) rights of a person in whose name the real estate or an interest therein was carried on the real property tax rolls within 3 years of the time when marketability is to be determined, if the relevant tax rolls are accessible to the public at the time marketability is to be determined;

(4) a claim of the United States not subjected by federal law to the recording requirements of this State and which has not terminated under federal law;

[(5) mineral interests including oil, gas, sulphur, coal, and all other mineral interests of any kind, whether similar or dissimilar to those minerals specifically named.]

Comment

This list of exceptions is designed to be as limited as possible, given the restrictions imposed by federal law and the need to avoid use of marketable record title for fraudulent purposes. The provisions on use or occupancy and on tax assessment should virtually eliminate situations in which more than one person can claim marketable record title to the same property. Paragraph (3) derives from the Florida Marketable Record Title Act, F.S.A. Sec. 712.03(6).

Section 3-307. [Effect of Contractual Liability as to Interests Antedating Root of Title]

This Part does not free a person from contractual liability with respect to an interest antedating his root of title to which he has agreed to be subject by reason of the provision of a deed or contract to which he is a party, but a person under contractual liability has power to create a marketable record title in a transferee not otherwise subjected to the interest antedating root of title by the provisions of this Part.

Comment

This section is meant to overcome a possible constitutional problem of impairment of the obligations of contracts. Its application is limited so that it should pose no problem for the title examiner.

Section 3-308. [Limitations of Actions]

This Part shall not be construed to extend the period for the bringing of an action or for the doing of any other required act under a statute of limitations.

Section 3-309. [Abandonment in Fact]

This Part does not preclude a court from determining that a restriction has been abandoned in fact, whether before or after a notice of intent to preserve the restriction has been recorded.

The marketable title section of the Uniform Act, 13 ULA, 1979 Pamphlet 247-252, set out above, contains the following elements.

Section 3-301 sets out definitions of terms used in the act, much like the definitions in Section 8 of the Model Marketable Title Act. There is no preamble nor statement of legislative intent or purpose.

Section 3-302 is the basic provision of the Uniform Act, and is much like Section 1 of the Model Act. It provides that the owner of an unbroken chain of title extending back thirty years and to a root deed, has a marketable title subject only to the exceptions set out in the act.

The dispute which had given rise to litigation earlier, whether a forged or wild deed might serve as the root of title,[38] is resolved in the Uniform Act as it was in Marshall v. Hollywood, 224 So.2d 743 (D.C.A. Fla. 1969), affirmed 236 So.2d 114 (Fla. 1970). That is, that such a forged or wild deed, if allowed to become the root deed, would in fact be the true source of marketable title. The reason given by commentators is to the effect that any other rule would require search beyond the root deed or outside the land records themselves, thus defeating the very purpose of marketable title acts.

There is a provision for a thirty year required search period in this section, while the Model Act provides for a forty year period. As Professor Simes has stated, there was no compelling reason to choose the forty year period, and much longer and shorter periods were discussed and considered. Most of those connected

with the project favored terms from twenty to fifty years, and finally the forty year figure was chosen as a good compromise and the one least likely to cause controversy in legislatures considering the Model Act.[39] There were differences of opinion as to whether such interests as restrictive covenants and mortgage liens should be cut off at the one point or the other. Finally, it was determined that the forty year period should satisfy almost everyone, being the effective adult lifetime of an ordinary person. It was thought that persons concerned with the interests likely to be barred would be much less likely to press for exceptions to be written into the legislation to protect their interests, if a sufficiently long period of validity were provided without the trouble and expense of preparing and filing notice to preserve under the act. Subsequent experience under the marketable title acts indicates that states have shortened the initial forty year search period, but that none have lengthened it. As attorneys, judges, title searchers, mortgage brokers and lending institutions have gained experience under the acts, it appears that they have lost their initial fears that title or lien interests would be adversely affected by a forty year or even shorter period. Proposals to shorten the search period from forty to thirty years have aroused little or no opposition in states with long-standing marketability of title statutes. All of this appears to have contributed to the decision to shorten the required search period from the forty years of the Michigan and Model Acts to the thirty years of the Uniform Act.

Section 3-303 sets out the matters to which record title is subject, and is similar to Section 2 of the Model Act. However, several of the exceptions set out at this point in the Model Act are shifted instead to the exceptions in Section 3-306. The exceptions section of the Model Act is also Section 6. To a good extent, the transfer of material from the earlier section to the later one represents a bit tighter drafting of the Uniform Act.

In the Uniform Act, §3-303 declares that the marketable record title defined in §3-302 is subject to interests and defects apparent in the root of title, or in the other muniments of title which make up the chain of title. It requires such interests and defects to be set out specifically or by exact reference; if not, the land title is clear of those interests or defects. The section provides for recording of notice to preserve interests which might otherwise be barred, and preserves interests recorded after the root of title, with the proviso that such recording will not revive a barred interest.

Section 3-304 is nearly identical to Section 3 of the Model Act, the only changes being in the non-significant change of a few words and punctuation. It gives the owner or the transferree of an interest in real property a clear title after the passage of thirty years, and the disappearance of conflicting interests behind the root title. The interests may be restrictive covenants, future interests, or claims, interests, liens or charges of any sort, no matter by whom owned, whether in or out of state or subject to a disability. Just as in the Model Act, the

Uniform Act performs its magic of clearing the title of all clouds and defects by the passage of thirty years alone, provided that no notice to preserve is filed. Experience under the marketable title acts in the various states has demonstrated that almost all outstanding claims are in fact eliminated in this way, and that virtually no notices to preserve are filed. The saving in judicial resources, the freeing of the marketplace in land and the transfer of land speedily and cheaply are the direct results.

Section 3-305 is a near-verbatim copy of Section 4(a) of the Model Act. The material in Section 4(a) of the Model Act dealing with the rights of a possessor is treated as part of Section 3-306 of the Uniform Act. Section 3-305 contains the provisions as to the filing of notice to preserve an outstanding interest, so that the interest may be protected from the thirty-year bar of the act. As in the Model Act, disability, inability to assert a claim, or the status of being a person unascertained, do not prevent the thirty year bar from operating.

Section 3-306 of the Uniform Act sets out the exceptions which are not barred by the passage of the thirty year search period. These exceptions are stated with more specificity than in the Model Act and certain provisions only implicit in the Model Act provisions, or absent from them, are set out, together with material transferred from Section 2 of the Model Act.

Section 3-306 excepts restrictions the existence of which is clearly observable by physical evidence of use, interests of users and possessors of the land where the use or possession is inconsistent with the marketable record title and is obvious on reasonable inspection, rights of persons in whose names the property was carried on the tax rolls within three years of the time marketability is determined, and rights of the United States.

An optional provision as to mineral rights is included. The provision is to be included only if this exception cannot be avoided in the legislative process, and if mineral rights are an important element in the state's economy and law. It is obviously suited to California's needs.

The Michigan Act and the Model Act were subject to change in the legislative process of states in which mining, oil and gas production was of great importance. The pros and cons of the subject were set out in the legal periodical literature of the past thirty years or more. In brief, the more exceptions, the less a marketable title act serves its purpose. If the number of exceptions goes beyond a handful, the act might as well not be adopted. On the other hand, mining and extraction processes are so important to the economies of many states that anything which impedes those processes is inadvisable. Yet, the large-scale reservation of mineral rights, a common pattern in Western and California conveyancing, leaves many titles clogged as previous owners play the roulette wheel of mineral strike chances.

Section 3-307 is unlike any provision of the Michigan or Model Acts. It is inserted to avoid the possibility of the act's being declared unconstitutional as impairing the obligation of contracts. It offsets weaknesses in this respect revealed by subsequent experience under the marketable title acts in the various adopting states. It should serve the purpose of avoiding a declaration of unconstitutionality under the basic law of any state or of the United States. The section represents overcaution to some extent, since those acts based on the Michigan or Model Acts have stood the constitutional test very well, whether the challenge has gone on due process or contract clause grounds.

Section 3-308 provides that the Uniform Act marketable title section shall not affect existing parts of the law of the adopting state.

Section 3-309 leaves it up to a court to determine if an outstanding interest has in fact been abandoned, whether before or after a notice to preserve is filed.

This section ends the marketable title provisions of the Uniform Act. Provisions in the Model Act as to the recording of notice, the maintenance of a tract index for the filing of notices to preserve, as to liberal construction, and as to the allowance of a period of grace for the filing of notice as to interests outlawed at or shortly after the effective date of the marketable title act, are set out in other parts of the Uniform Act in more general contexts relating to some or all of the Uniform Act's provisions.

Experience with Marketable Title Acts

The marketable title acts have been an unqualified success in the states in which they have been adopted. They have received the critical acclaim of textwriters, attorneys, judges and law revision commissions in various parts of the country. Despite misgivings expressed here and there at the time the acts were being considered, experience under the acts has demonstrated that abstract possible difficulties have in fact presented no problem in practice. At this time, it appears that there is no reason why every state should not adopt a marketable title act. To date, each adopting state has made variations in the act as adopted, but virtually all existing statutes are based on either the Michigan or the Model Acts.[40] The Uniform Act, which builds on and incorporates both previous acts in its marketable title sections, also contains minor additions and changes. These additions and changes have incorporated the results of litigation, have corrected minor omissions and difficulties in the Model and Michigan Acts, and incorporate slight changes dictated by nearly thirty-five years of experience. There seems to be little reason for California to adopt the Uniform Act in its entirety, but if the legislature decides to adopt a marketable title act, it probably should contain the provisions of the marketable title sections of the Uniform Act.

Dean Cribbet, recently President of the Association of American Law Schools, favors a term of twenty years for the

statutory period in marketable title acts.[41] Professor Payne states that there are four basic problems to be considered by drafters of marketable title legislation.[42] First, the statutory period must be decided upon, considering all interests affected. He states that even without MTAs, periods of search established by custom or by title standards set by bar associations, limited to only thirty or forty years have caused no practical inconvenience. Second, it must be decided whether a claimant to clear title must be in possession at the time the statute operates to clear title. There is no uniformity in the adopted statutes in this regard,[43] but the Michigan, Model and Uniform MTAs make possession irrelevant unless someone else is occupying the land. In this instance, where someone else is in hostile possession, the MTA does not operate to clear the title. Third, it must be decided who is to have the benefit of the act. Most statutes and the Michigan, Model and Uniform Acts make the bona fides of a claimant or existence of extra record notice or knowledge irrelevant. Fourth, the knotty question of exceptions from the operation of the act must be considered. It is in this regard that many existing state MTAs depart from the ideal. But it must be remembered always that the very purpose of the MTAs is to make search necessary only for the time specified in the statute; a statute with many exceptions is of little value in clearing title.

Exceptions from the Operation of the Marketable Title Acts

There are several exceptions to the operation of the marketable title acts which do not appear on the faces of such acts. The Federal Soldiers and Sailors Civil Relief Act of 1940 operates in regard to land title as well as to other interests of service persons.[44] The effect of zoning, building and use ordinances and codes is not considered.[45] Professor Simes, acting in regard to the practical impossibility of motivating all or even most owners within a tract development to file notice to preserve the tract restrictive covenants, recommended that the Model MTA be amended to add such an exception, Simes & Taylor, Improving Conveyancing Through Legislation 228.

While the Model Act excepts only the reversionary rights of lessors, the rights of the United States, and the rights of certain easement holders, Model Marketable Title Act §§2(e), 6, certain states, such as Nebraska, have exempted several, even many interests, Neb. Rev. St. §§76-290, 76-298 (1958). Several states, including Michigan, Nebraska, North Dakota, Ohio and South Dakota have made exceptions for the vendee under an installment land sale contract.[46]

Exceptions as to easements appear in augmented form in virtually all the state statutes, despite the expert advice to the contrary. Ohio Rev. Code Ann. §5391.53(B) (1970) excepts railroad and public utility easements, and Utah Code Ann. §57-9-6 (1953) excepts the same and pipeline and highway easements.

Other states have excepted visible or apparent easements, or even all easements of record. As to such exceptions, see the attached marketable title statutes, or Barnett's excellent article.

The Reimbursement Fund

It has been suggested[47] that persons whose interests are cut off by the operation of a marketable title act, and who are concerned about it and suffer substantial loss, should be able to make a claim for compensation against a fund provided for the purpose. The suggestion is made by analogy to the funds commonly provided by statutes establishing Torrens title registration systems, to compensate persons who suffer loss in title thereby. Since California has provided for such funds as to brokers, lawyers and notaries public, the idea may appeal to California legislators. Such a fund would remove the last bit of potential inequity in the operation of a reverter or marketable title act.

Mineral Rights, Natural Resources and Reform Acts.

States which have a substantial industry devoted to extracting coal, oil, gas, minerals or timber, have made provision to prevent an unduly heavy burden from falling on those interests due to the operation of reverter or marketable title acts.[48] Part of the problems lies in that the manner in which title to these interests is held varies from state to state, and even within states. It varies from easement right to subsurface estate and contract rights. The North Dakota

Supreme Court, for instance, defined a mineral estate as separate from the surface estate, with its title also constituting a root title protected by the North Dakota marketable title act.[49] The Minnesota Supreme Court likewise held that its marketable title act, though silent on the subject, meant to exclude mineral rights, Wichelman v. Messner, 250 Minn. 88, 103, 83 N.W.2d 800, 814 (1957). Ohio, Oklahoma and Utah have statutory provisions on the subject, Ohio Rev. Code Ann. §5301.53 (E) (1970), Okla.St. Ann. T. 16 §76 (1963), Utah Code Ann. §57-9-6 (1953). Utah excepts water rights in the same section.

Questions of Title not Resolved by the Marketable Title Acts

Yet, the adoption of marketable title legislation will aid in resolving title difficulties only in the field of real property. Even in that field, ancillary and curative statutes in addition to marketable title legislation are desirable.

Land which is left to others at the death of the owner does not provide the problem. A moment's reflection will indicate that such titles eventually end up in the land records, and usually directly by a filing of the decree of distribution which sets out the titles to real property left by the deceased. In California practice, for instance, the proceeding to establish the fact of death in respect to the title to real property requires the executor or administrator to detail and set out by legal description all real property interests owned by the decedent at death, and the decree of distribution which terminates the proceedings is recorded as a matter of course to give evidence

of record of the transfer of the title or interest in real property. Hence, a marketable title statute will also cure defects and clogs on the title to property left by will or intestate.

In other respects, aspects of the law of real property cause continuing difficulty which is eased to some good extent by the marketable title statutes. To take care of all such problems connected with the title to land, a series of statutes, most of which make little practical change in existing practice, should be adopted. These curative statutes, really of patchwork nature, have been the subject of intense professional study, and model acts and suggested correctives have been formulated and published. The problems, with the proposed correctives, are discussed herein.

Yet, before turning to such corrective statutes, another problem must be discussed. In modern times, the major part of the value of property lies not in real, but in personal property. A great part of the professional effort given to titles, however, has been dedicated to resolving problems connected with the transfer and encumbrancing of real property. Much less attention has been given to very similar problems which involve the title to personal property.

The reason for the lesser attention devoted to resolving personal property title problems is straightforward and has already been referred to. Complex title interests created in personal property, whether by deed or by will, are almost always created using the vehicle of the trust instrument. Such transfers

into trust not uncommonly create titles subject to general and special powers, life estates and remainders in fee, fee interests to be divested by executory interests or by exercise of powers of termination, and like complex titles. Property is rarely tied up unreasonably and litigation rarely results simply because the trustee has and does exercise his power to sell particular property subject to one or the other of such interests, and to substitute money or other property instead of the original property. Title to property in trust, whether real or personal, remains marketable and the trustee is nearly always able to act with the tacit or open agreement of the owners of various interests in the trust assets.

Real property transferred out of the trust context raises problems if the title is divided. Solutions have been worked out to solve real property title problems, and have been enacted into law. Personal property transferred out of the trust context raises similar problems, yet relatively little attention has been given to such problems, whether in California or elsewhere. For instance, as recently as 1976, the California Partition statute came into effect in modified form, C.C.P. §872-210 through 874-240. It could and should have extended its provisions indifferently to personal property. A minor change of words would accomplish this result, by eliminating paragraph (1) entirely from the statute, and eliminating the word real before the word property in paragraph (2).

The statute is a good example of the fact that persons sophisticated in the law occasionally forget that personal property in American law, and in the law of California, is owned by the same titles, present and future, as is real property. Problems involving the resolution of differences between the owners of present interests in personalty and the owners of future interests in the same personalty are rarely litigated, but if they are, it is rather certain that valuable interests are involved. It is this very applicability of the same title-complicating divided interests concepts to personal property which makes legislation beyond marketable title statutes desirable. Many of the curative amd reverter statutes are designed to simplify the medieval rigor of a property law largely formulated in the 13th to 16th centuries in terms of real property, yet applied to personal property in the United States.

Judicial Treatment of Reverter and Reentry

In California, perhaps more than in any other state, judges have been vigorous in preventing forfeiture for breach of the conditions and determining events attached to estates in fee simple on condition subsequent or fee simple determinable. As Professor Simes has pointed out,

> Both in California and in other jurisdictions, courts have gone very far in refusing to find that the language of an instrument creates a right of entry or possibility of reverter.[50]

There has also been a willingness to permit the use of equitable defenses to prevent the forfeiture. This has been done indirectly by interpreting or treating reverter and reentry provisions as effective in creating restrictive covenants rather than estate interests, and directly by treating reverter and reentry as such, but barring the implementation of such interests upon breach of condition or occurence of the determining event on the grounds of unclean hands, changed conditions, waiver and similar equitable principles. The doctrine of substantial compliance applies as well.[51] There is a general tendency to treat tract development restrictive covenants, though phrased as conditions subsequent sufficient to terminate title, instead as equitable servitudes.[52] But this tendancy is not reliable, and forfeiture has been ordered even in recent cases.[53]

There has been a willingness of the California courts to apply the doctrine of changed conditions to attempts to enforce reverter and reentry rights,[54] to such an extent that Professor Turrentine has suggested that the principle should be embodied in a statute in the Civil Code.[55] In the cases cited, the courts have usually relied on Civil Code §1069, directing that grants be construed in favor of the grantee, and on Civil Code §1442, which prohibits a forfeiture. Though §1442 is "out of place" in the code as a property section, being in the section dealing with obligations, it appears that §1442 might be modified along the lines suggested by Professor Turrentine.

The Reverter Acts

In addition to the marketable title acts, many states have adopted legislation to solve problems raised by the operation of the common law of estate interests, or the statutory analogue. Such "reverter" statutes are common in marketable title states, but appear also in other jurisdictions.[56]

Historically, reverter acts precede the adoption of the marketable title acts, as to most states which have adopted both. However, other states, coming new to the decision to control the adverse effects of future interests, have gone directly to the marketable title acts, sometimes adopting as well reverter acts and curative statutes of one kind or another. It has become customary to write of acts which concern the adverse effects of future interest law as reverter acts, and of statutes which concern largely mechanical and ministerial problems which arise during the preparation of instruments and the recording of them, as curative. There is a great deal of overlap, and a single statute may concern both curative and reverter aspects. For instance, the Curative section of the Uniform Simplification of Land Transfers Act contains the following reverter provision, 13 ULA, 1979 Pamphlet, 258:

> **Section 3-409.** **[Extinguishing Possibility of Reverter and Right of Entry for Condition Broken]**
>
> A possibility of reverter, a right of entry for condition broken (power of termination), or a resulting trust that restricts a fee simple estate in land is extinguished by the passage of 30 years after it or a notice of intent to preserve the interest was most recently recorded. [This section does not apply to claims conferred by the [Torrens Title Act].]

Since marketable title acts control many if not most of the adverse effects of future interests and restrictive covenants, some jurisdictions have not undertaken much further in the way of title and conveyancing reform. However, since marketable title acts refer to real property only, the adverse effects of the old common law of titles remain in reference to personal property. It appears that those jurisdictions which have proceeded to extend the Rule Against Perpetuities to the reverter and reentry, and to adopt reverter acts, curative statutes, and provisions referring to the termination of the effects of restrictive covenants have acted in a way calculated to deal with all problems in this area, and not just with real property problems of conveyancing and land title.

Among the several future interests which form part of the law of estates, the possibility of reverter which remains with the transferror of property, real or personal, after the transferror has alienated an interest in fee simple determinable, and the right of reentry which remains with the transferror after property is transferred in fee simple subject to a condition subsequent, have created the most problems. These interests are, by general American law, not subject to the Rule Against Perpetuities or to any other time limit on their effectiveness. Thus, the two interests form the most durable and troublesome of the clogs on title. As to real property in particular, these interests once recorded in the public records, remain permanently as part of the chain of title, making the title effectively unmarketable.

Other interests also give difficulty, notably restrictive covenants, executory interests and easements. To a great extent, the marketable title acts are effective as to these interests in real property. The MTAs have no reference to personal property, and the complexities of the old law of title remain to cause anguish to the owners of interests in personal property divided concurrently among co-tenants, or successively in present and future interests. A partition statute such as California's Code of Civil Procedure §872.210 and following sections, goes a long way toward solving such problems, especially when it is combined with the particular willingness of California courts to construe conditions and limitations as covenants, or as having no effect, or the enforcement of which is barred by laches, waiver, change of condition or other equitable defenses.

However, the problem remains. Informed opinion is to the effect that a transferror is primarily interested in controlling the use of the property transferred, and never really expects to get the property back if a condition is breached or a limitation ends the interest given. The transferror is usually paid full value and any return of the property he has transferred subject to a restrictive provision is an unjustified windfall. Such interests as the right of reentry and the possibility of reverter have become the particular target of title reformers. As to land given gratis for public purposes, there may be an expectation of recovering the land if public use ceases.

It is unclear whether the California partition statute applies to such interests as the reverter and the reentry, or whether it is restricted to more conventional interests such as co-tenancies, remainders and reversions. That the problem is one to be concerned with is indicated by the fact that restrictive covenants in California deeds are often phrased as conditions subsequent rather than covenants, and that transferrors have even in recent years succeeded on occasion in enforcing the forfeiture via such conditions.[57] C.C.P. §872.210 authorizes a freeholder or tenant for years to file suit for partition of real property "where such property or estate therein is owned by several persons concurrently or in successive estates." The definitions therein help in no way in determining whether this would allow an owner of a tract house to petition to have the condition effect of the restrictions in his deed barred and compensated, leaving such restrictions enforceable only as covenants. Whether future interests in personalty in the nature of reverter and reentry can be partitioned and compensated is an open question, although the literal wording of the California partition statute seems to indicate that personalty may be so partitioned. In any case, partition under the California statute may only take place "if in the best interests of the parties," and is available as a matter of judicial grace rather than as a matter of right.

Yet, the California Partition Statute is quite similar in its effect to the provisions of the Uniform Simplification of Land Transfers Act, 13 ULA, 1979 Pamphlet, 229, and bears resemblance as well to similar provisions of the English Law of Property Act of 1925. The Uniform Act provision is contained in § 2-205.

Sectior 2-205. [Sale of Real Estate Affected with Future Interest]

(a) If real estate not held in trust is subject to a future interest or power of appointment, the [ ] court, upon the petition of a person having an interest therein, either present or future, vested or contingent, and after notice as required in subsection (b), may appoint a trustee and authorize him to sell, grant a security interest in, or lease the real estate, or a part of it, if the sale, grant of a security interest, or lease appears to the court to be in the interest of the parties; and the sale, grant of a security interest, or lease is effective against all the parties who are or may become interested in the real estate, whether ascertained or unascertained, living or unborn.

(b) Notice of the petition under subsection (a) must be given in a manner the court directs to all persons interested in the real estate, and to all persons whose issue, not in being, may become interested in it. The court of its own motion shall appoint a guardian for the proceeding to represent all minors not otherwise represented, all persons not ascertained, and all persons not in being, who are or may become interested in the real estate.

(c) A trustee appointed under subsection (a) must receive and hold, invest, distribute, or apply the proceeds of a sale, grant of a security interest, or lease to or for the benefit, and according to the respective rights and interests, of the persons who would have been entitled to the land if the sale, grant of a security interest, or lease had not been made. Upon request of an interested party, the court may require the trustee to provide a bond. The court in which the petition is filed in accordance with this section has jurisdiction of all matters thereafter arising relative to the trust unless the administration of the trust is transferred to the jurisdiction of another court.

Comment

This section derives from Model Act Providing for the Sale of Real Estate Affected with a Future Interest, which in turn is patterned after Massachusetts legislation. The Model Act was prepared by Professor Lewis M. Simes and Clarence B. Taylor for the Section of Real Property, Probate and Trust Law of the American Bar Association and for the University of Michigan Law School. It is discussed in L. M. Simes & C. B. Taylor, The Improvement of Conveyancing by Legislation (Ann Arbor: University of Michigan Law School, 1960), pp. 235–38. Similar legislation exists in over half the states.

The inapplicability of the Rule Against Perpetuties to the reverter and reentry has strengthened their effect in clouding title. Such interests apparently were subject to the Rule at common law, and certainly are in recent British law. However, they are not subject to the Rule in the United States except as provided by statute.

All of these factors, together with a desire to free the fee simple title to realty or personalty after a reasonable time, has led not only to the marketability of title statutes to free up realty, but also to statutes subjecting all such interests whether in realty or personalty, to the Rule Against Perpetuties.[58] Other statutes have eliminated the reverter as a recognized title, leaving only the right of reentry as an interest in the transferror. Related statutes which usually refer to restrictive covenants as well, forbid the enforcing of such rights where the conditions and covenants have become simply nominal, or where they are frivolous or serve a mere whim or caprice of the transferror.

Such statutes have a good deal to recommend them and there appears to be no good reason why some of them should not be made part of California law.

The Minnesota statute, Minn. St. Ann. §500.20 is a tightly-drafted one, dating in its present form from 1937.

500.20 Defeasible estates

Subdivision 1. Normal conditions and limitations. When any conditions annexed to a grant, devise or conveyance of land are, or shall become, merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a basis of forfeiture of the lands subject thereto.

Subdivision 2. Restriction of duration of condition. All covenants, conditions, or restrictions hereafter created by any other means, by which the title or use of real property is affected, shall cease to be valid and operative 30 years after the date of the deed, or other instrument, or the date of the probate of the will, creating them; and after such period of time they may be wholly disregarded.

Subdivision 3. Time to assert power of termination. Hereafter any right to reenter or to repossess land on account of breach made in a condition subsequent shall be barred unless such right is asserted by entry or action within six years after the happening of the breach upon which such right is predicated.

It deals with conditions which are nominal and of no actual and substantial benefit to the owner, deprives him of the right to proceed on them,[59] applies a thirty year total life to such conditions, and to covenants and restrictions; this applies to possibilities of reverter, rights of reentry, restrictive covenants, and perhaps to executory interests. It sets a statute of limitations of six years, giving the person having the advantage of the condition that long to commence action, after the condition has occurred.

The California case law appears to have progressed as far as section one of the Minnesota Act, and the time limit allowed by section 3 appears to be in excess of that allowed by California statute, but the heart of the statute lies in section 2. Californ-

has no such provision in regard to the life of the interests affected. Insofar as the act applies to restrictive covenants written into the deeds to tract housing, the period of thirty years is probably too short, and such tract housing covenants are probably best left out of such a statute.

Kentucky's statute is quite similar in effect, though not in wording, Ky. Rev. St. §381.218, .219 (Baldwin 1969).[60]

> **381.218. Abolition of fee simple determinable and possibility of reverter.**—The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry. (Enact. Acts 1960, ch. 167, § 4, effective June 16, 1960.)
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> **381.219. Termination after thirty years of rights of entry created after July 1, 1960.**—A fee simple subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty (30) years from the effective date of the instrument creating such fee simple subject to a right of entry. If such contingency occurs within said thirty (30) years the right of entry, which may be created in a person other than the person creating the interest or his heirs, shall become exercisable notwithstanding the rule against perpetuities. This section shall not apply to rights of entry created prior to July 1, 1960. (Enact. Acts 1960, ch. 167, § 5, effective June 16, 1960.)
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> **381.221. Termination and preservation of forfeiture restrictions created before July 1, 1960.**—(1) Every possibility of reverter and right of entry created prior to July 1, 1960, shall cease to be valid or enforceable at the expiration of thirty (30) years after the effective date of the instrument creating it, unless before July 1, 1965, a declaration of intention to preserve it is filed for record with the county clerk of the county in which the real property is located.
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> (2) The declaration shall be entitled "Declaration of Intention to Preserve Restrictions on the Use of Land," and shall set forth:
>
> (a) The name of the record owner or owners of the fee in the land against whom the possibility of reverter or right of entry is intended to be preserved;
>
> (b) The names and addresses of the persons intending to preserve the possibility of reverter or right of entry;
>
> (c) A description of the land;
>
> (d) The terms of the restriction;
>
> (e) A reference to the instrument creating the possibility of reverter or right of entry and to the place where such instrument is recorded. The declaration shall be signed by each person named therein as intending to preserve the possibility of reverter or right of entry and shall be acknowledged or proved in the manner required to entitle a conveyance of real property to be recorded. The county clerk shall record the declaration in the record of deeds and shall index it in the general index of deeds in the same manner as if the record owner or owners of the land were the grantor or grantors and the persons intending to preserve the possibility of reverter or right of entry were the grantees in a deed of conveyance. For indexing and recording the clerk shall receive the same fees as are allowed for indexing and recording deeds. (Enact. Acts 1960, ch. 167, § 6, effective June 16, 1960.)

381.222. Exceptions to KRS 381.219 and 381.221.—KRS 381.219 and 381.221 shall not apply to any possibility of reverter or right of entry contained in a deed, gift or grant from the commonwealth or any political subdivision thereof; nor shall they apply where both the fee simple determinable and the succeeding interest, or both the fee simple subject to a right of entry and the right of entry, are for public, charitable or religious purposes; nor shall they affect any lease present or future or any easement, right of way, mortgage or trust, or any communication, transmission, or transportation lines, or any public highway, right to take minerals, or charge for support during the life of a person or persons, or any restrictive covenant without right of entry or reverter. (Enact. Acts 1960, ch. 167, § 7, effective June 16, 1960.)

381.223. Application of KRS 381.215 to 381.223.—Except as provided in KRS 381.221, KRS 381.215 to 381.223 shall apply only to inter vivos instruments and wills taking effect after July 1, 1960, and to appointments made after July 1, 1960, including appointments by inter vivos instrument or will under powers created before July 1, 1960. (Enact. Acts 1960, ch. 167, § 9, effective June 16, 1960.)

The Kentucky statute was adopted in 1960. Two years before that, Adams, in a note, "Promoting the Marketability of Land Title," 46 Ky. L.J. 605, 612 (1958) suggested that Kentucky adopt a statute closely modeled on the Minnesota Act.

391.— Defeasible Estates. (1) Normal conditions and limitations. When any conditions annexed to a grant, devise or conveyance of land are, or shall become, merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a basis of forfeiture of the lands subject thereto.

(2) Restriction of duration of condition. All covenants, conditions, (possibilities of reverter, servitudes,) or restrictions hereafter created by any other means, by which the title or use of real property is affected, shall cease to be valid and operative (40) years after the date of the deed, or other instrument, or the date of the probate of the will, creating them; and after such period of time they may be wholly disregarded.

(3) Time to assert power of termination. Hereafter any right to reenter or to repossess land on account of breach made in a condition subsequent shall be barred unless such right is asserted by entry or action within six years after the happening of the breach upon which such right is predicated.[25]

Adams suggested that Kentucky adopt at the same time a marketable title statute modeled on the original Michigan Act, which he says has all the good points of such statutes without the later complications, exceptions, and undesirable features of similar legislation.

Another reverter statute is proposed by a learned author for Kansas.[61] This statute is notable for the elegance and polish of its phrasing, its exceptions and its savings provisions.

A Proposed Statute for Kansas

An Act Relating to the Limitation of Reverter and Forfeiture Provisions and Covenants in Conveyances and Devises of Real Estate

1. *Reverter and Forfeiture Provisions and Covenants of Unlimited Duration in Conveyances and Devises Against Public Policy.*

It is hereby declared by the legislature of the state that reverter or forfeiture provisions and covenants of unlimited duration in the conveyance or devise of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of the state for the reasons that:

(a) land is the one basic resource of the state's economy and any private arrangement which prevents its most economical use is against the public interest;
(b) unrealistic and obsolete restrictions reduce the value of land, thus reduce the tax base, and require proportionately higher taxes on unrestricted land; and
(c) land use planning by public authorities in the public interest has now reduced the need for, and utility of, private restrictions for private purposes.

2. *Limitation of Duration of Reverter or Forfeiture Provisions; Prospective Application.*

All reverter or forfeiture provisions hereafter created by any means by which the title or use of real estate or any interest therein is affected shall cease to be valid and operative

[illegible] years after the date of the deed or other instrument or the date of the probate of the will creating them, and after such period of time they may be wholly disregarded unless the creating contingency occurs within such 30 year period.

Limitation of Duration of Covenants.

If a covenant or restriction concerning the use of land is hereafter created and is unlimited as to time or is limited to a period longer than 30 years, it shall cease to be valid and operative 30 years after the date of the deed or other instrument or the date of the probate of the will creating it.

3. *Enforcement of Restriction Prohibited When Person Seeking Enforcement Has No Substantial Interest in Continuing the Restriction in Effect.*

No restriction on the use of land created at any time by any means, whether or not made enforceable by reverter or forfeiture provisions, shall be enforced by injunction or judgment compelling a conveyance of the land burdened by the restriction or an interest therein, nor shall such restriction be declared or determined to be enforceable, if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions, or other cause, its purpose is not capable of accomplishment, or for any other reason.

4. *Limitation of Duration of Reverter or Forfeiture Provisions; Retroactive Application.*

All reverter or forfeiture provisions heretofore created by any means by which the title or use of real estate or any interest therein is affected shall cease to be valid and operative 40 years after the date of the deed or other instrument or the date of the probate of the will creating them, and after such period of time they may be wholly disregarded unless the creating contingency occurs within such 40 year period.

Preservation of Existing Rights.

Any rights existing at the effective date of this act as the result of the occurrence of the creating contingency specified in any reverter or forfeiture provision created before the effective date of this act may be enforced by an action brought within one year of the effective date of this act after which time no such action may be brought.

Exceptions to the Application of This Act.

This act shall not invalidate or affect:

(a) a right of entry for default in payment of rent reserved in a lease or for breach of covenant contained in a lease;

(b) any rights of a mortgagee based upon the terms of the mortgage, or any rights of a trustee or a beneficiary under a trust deed in the nature of a mortgage based upon the terms of the trust deed, or any rights of a grantor under a vendor's lien reserved in a deed.

Effect of Partial Invalidity.

If any provision of this act or the application of any provision thereof to any property, person, or circumstances is held to be invalid, such provision as to such property, person or circumstances shall be deemed to be excised from this act, and the invalidity thereof as to such property, person, or circumstances shall not affect any of the other provisions of this act or the application of such provision to property, persons, or circumstances other than those as to which it is invalid, and this act shall be applied and shall be effective in every situation so far as its constitutionality extends.

A similar draft is proposed for adoption in North Carolina.[62]

Section 1. *Declaration of Policy.*—It is hereby declared as a matter of state policy:

(a) That land is the basic resource of the economy and that any private arrangement that prevents its most economical use, marketability and development for the needs of the people of the state for residences, industry, agriculture and commerce is against the public interest;

(b) That unrealistic and obsolete restrictions placed on land by private arrangements may tend to operate to reduce the tax base because their effect is a depressant on land values and thus they operate to require proportionately higher taxes on lands not so restricted and are thus against the public interest;

(c) That land use planning by public authorities in the public interest has reduced the need for and utility of private restrictions on the use of land for private purposes; and

(d) That reverter or forfeiture provisions of unlimited duration in the conveyance of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of this state.

Section 2. *Thirty Year Limit on Possibilities of Reverter and Rights of Entry Created After the Effective Date of the Act.*—(a) A special limitation or a condition subsequent, which restricts a fee simple estate in land, and the possibility of reverter or right of entry for condition broken thereby created, shall, if the specified contingency does not occur within thirty years after the possibility of reverter or right of entry was created, be extinguished and cease to be valid. Any estate of fee simple determinable or any fee simple estate subject to a condition subsequent shall become a fee simple absolute if the specified contingency does not occur within thirty years from the effective date of the instrument creating the possibility of reverter or right of entry.

(b) Application of Act. This section of this act shall apply only to inter vivos instruments taking effect after its effective date, to wills where the testator dies after such effective date, and to appointments made after such effective date, including appointments by inter vivos instruments or wills under powers created before such effective date.

Section 3. *Limitation on the Duration of Possibilities of Reverter Rights of Entry Existing at the Effective Date of the Act If Notice of Intention to Preserve Not Filed.*—A special limitation or a condition subsequent, which restricts a fee simple estate in land, and the possibility of reverter or right of entry for condition broken thereby created, shall be extinguished and cease to be valid, unless within the time specified in section 3(c) of this act, a notice of intention to preserve such possibility of reverter or right of entry is recorded as provided in this act. Such extinguishment shall occur at the end of the period in which the notice or renewal notice may be recorded and any fee simple determinable or estate of fee simple subject to a condition subsequent shall become a fee simple absolute. No disability or lack of knowledge of any kind will prevent the extinguishment of such interests in the event no notice of intention to preserve is filed within the times specified in section 3(c) of this act.

(a) Who May Record Notice to Preserve.—Any person having a possibility of reverter or right of entry may record in the office of the register of deeds for the county in which the land is situated a notice of intention to preserve such interest, if duly acknowledged by such person. Such notice may be filed for record by the person claiming to be the owner of such interest, or by any other person acting on his behalf if such claimant is

(1) under a disability,
(2) unable to assert a claim on his own behalf, or
(3) one of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of intention.

(b) Contents of Notice; Recording; Indexing.—To be effective and to be entitled to record, such notice shall contain an accurate and full description of all land affected by such notice, which description shall be set forth in particular terms and not be general inclusions; but if such claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in the recorded instrument. Such notice shall also contain the name of any record owner of the land at the time the notice is filed and the terms of the special limitation or condition subsequent from which the possibility of reverter or right of entry arises. The register of deeds of each county shall accept all such notices presented to him which are duly acknowledged and certified for recordation and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded, and each register of deeds shall be entitled to charge the same fees for the recording thereof as are charged for the recording of deeds. In indexing such notices in his office each register shall enter such notices under the grantee indexes of deeds under the names of persons on whose behalf such notices are executed and filed and under the grantor indexes of deeds under the names of the record owners of the possessory estates in the land to be affected against whom the claim is to be preserved at the time of the filing.

(c) When Notice of Intention to Preserve May Be Recorded.—An initial notice may be recorded not less than twenty-eight years, nor more than thirty years, after the possibility of reverter or right of entry was created, *provided, however*, if the date when such possibility of reverter or right of entry was created was more than twenty-eight years prior to the effective date of this act, the notice may be recorded within two years after such effective date. A renewal notice may be recorded after the expiration of twenty-eight years and before the expiration of thirty years from the date of recording of such initial notice, and shall be effective for a period of thirty years from the recording of such renewal notice. In like manner, further renewal notices may be recorded after the expiration of twenty-eight years and before the expiration of thirty years from the date of recording of the last preceding renewal notice.

(d) Applications of Section 3 of This Act.—Section 3 of this act shall apply to all possibilities of reverter and rights of entry limited on estates of fee simple, existing at the effective date of this act.

Section 4. *Limitations of Period Within Which Actions May Be Brought and Land Recovered By Reason of Termination of Determinable Fee Simple Estates or Upon Happening of Condition Subsequent.*—No person shall commence an action for the recovery of lands, nor make an entry thereon, by reason of a breach of a condition subsequent or by reason of the termination of an estate of fee simple determinable, unless the action is commenced or entry is made within seven years after breach of the condition or within seven years from the time when the estate of fee simple determinable has been terminated. Possession of land after breach of a condition subsequent or after termination of an estate of fee simple determinable shall be deemed adverse and hostile from the first breach of a condition subsequent or from the occurrence of the event terminating an estate of fee simple determinable. *Provided, however*, that where there has been a breach of a condition subsequent or termination of an estate of fee simple determinable which occurred more than five years prior to the effective date of this act, an action may be commenced for the recovery of the lands, or an entry may be made thereon by the owner of a right of entry or possibility of reverter, within two years after the effective date of this act.

Section 5. *Possibilities of Reverter and Rights of Entry Not Enforceable; Changed Circumstances, Substantial Accomplishment or Where Enforcement Will Be of No Substantial Benefit.*—No restriction on the use of land created by a special limitation or condition subsequent shall be enforceable by re-entry or by any action instituted in the courts to effect a re-entry or forefeiture of a possessory fee simple estate subject to a special limitation or condition subsequent where it appears that the restriction is or shall become of no actual and substantial benefit to the person or persons seeking to have it enforced, or where the court shall find that the initial purpose of the restriction has been accomplished or that the restriction is no longer of actual or substantial benefit to the person or persons seeking to have it enforced by reason of changed conditions or circumstances.

Section 6. *Dissolution of Corporation; Possibility of Reverter and Right of Entry Ceases.*—When a corporation is dissolved or ceases to exist, any possibility of reverter and any right of entry or re-entry for breach of a condition subsequent heretofore or hereafter reserved by or to the corporation and affecting land in this state ceases and determines.

Section 7. *Severability of Sections of Statute.*—In the event any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act, which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Another sophisticated model is proposed for adoption in North Carolina and other states by Fratcher.[63] Although it applies to real property interests only, it is unusual in that it includes provisions as to good faith improvers, mining and natural resource extraction, tax burden, and other matters.

I. A person seised of a freehold estate in land shall not forfeit his estate or incur liability in damages for changes in the land made with the reasonable and good faith intent of improving its usefulness, value, or beauty, including the erection, alteration or demolition of buildings or other structures, conversion from meadow or pasture to cultivation or vice versa, conversion from rural to urban uses, and conversion from residential to commercial or industrial uses, or vice versa.

II. A person seised of a freehold estate in land shall not forfeit his estate or incur liability in damages for sale of timber, stone, gravel, earth, minerals, coal, oil or gas, if the sale price is reasonable and the proceeds are paid to a corporation authorized to act as trustee, which is not, and is not controlled by, the person seised, upon trust for the holders of present and future estates in the land as their interests may appear.

III. If a possibility of reverter conditioned upon an event which has not yet occurred has been in existence for more than thirty years, the person seised of the present freehold estate shall be entitled to have the possibility of reverter assessed for property taxation separately from the other interest or interests in the fee simple absolute. If the tax so assessed against the possibility of reverter is not paid by the last day upon which it may be paid without interest or penalty, the non-payment of the tax shall operate as a release of the possibility of reverter to the person seised of the present freehold estate, subject to the unpaid tax and interest and penalties due thereon, which release shall extinguish the possibility of reverter.

IV. If a right of entry on breach of condition subsequent on a fee simple has been in existence for more than thirty years and has not yet been exercised by entry or action, whether or not the event upon which it is conditioned has occurred, the person seised of the present freehold estate shall be entitled to have the right of entry assessed for property taxation separately from the other interest or interests in the fee simple absolute. If the tax so assessed against the right of entry is not paid by the last day upon which it may be paid without interest or penalty, the nonpayment of the tax shall operate as a release of the right of entry to the person seised of the present freehold estate, subject to the unpaid tax and interest and penalties due thereon, which release shall extinguish the right of entry.

V. In the absence of other persuasive evidence of value presented to the assessor, it shall be presumed, for the purposes of III and IV, that a possibility of reverter or a right of entry on breach of condition subsequent on a fee simple is worth one tenth of the value of the unencumbered fee simple absolute.

VI. A person seised of a freehold estate in land shall be entitled to have legal reversions, remainders and executory interests in the land assessed for property taxation separately from the other interest or interests in the fee simple absolute. If the tax so assessed against the reversions, remainders and executory interests is not paid by the last day upon which it may be paid without interest or penalty, the non-payment of the tax shall operate as a release of any and all legal reversions, remainders and executory interests in the land to the person seised of the present freehold estate, subject to the unpaid tax and penalties due thereon, upon trust for the benefit of all persons with present or future interests in the land.[106]

VII. In the absence of other persuasive evidence of value presented to the assessor it shall be presumed, for the purposes of VI, that any and all legal reversions, remainders and executory interests are worth, in the aggregate, forty percent of the value of the unencumbered fee simple absolute.

VIII. A person seised of a freehold estate in land who becomes trustee of the land by virtue of VI shall have power to sell, exchange, mortgage or lease all or any portion of or interest in the land, to grant options for purchase, exchange, mortgage or lease and to make all conveyances necessary to effectuate such transactions, which options, mortgages, leases and conveyances shall override the equitable reversions, remainders and executory interests therein, subject to the following provisions:

A. Any sale or exchange shall be for an adequate consideration in money or money's worth, and any portion of the purchase price not paid at or before the execution of the conveyance shall be secured by mortgage or other security upon the land.

B. Land received in exchange shall be held upon the same trusts as the land exchanged.

C. Money or securities constituting all or part of the consideration for a sale or exchange, including royalties paid under a mineral, gas or oil lease, shall be paid or transferred by the purchaser to a corporation authorized to act as trustee which is not, and is not controlled by, the person theretofore seised, upon trust for the holders of present and future interests in the land as their interests existed prior to the sale or exchange.

D. Money lent on any mortgage made by the person seised shall be paid by the mortgagee to a like corporation, upon trust as under C. The corporate trustee, if it deems it in the interest of the beneficiaries of the trust, may apply the proceeds of such a mortgage, at the request of the person seised, toward discharge of encumbrances on the mortgaged land, or to the cost of making improvements, including the erection or alteration of buildings, to the mortgaged land.

E. A lease, other than a mineral, oil or gas lease, shall be for a term not exceeding ninety-nine years. Every lease shall reserve a full and adequate rent or provide for payment of adequate royalties.

IX. If, after any legal reversion, remainder or executory interest has become a beneficial interest under a trust by the operation of VI, an event occurs which would have caused such legal reversion, remainder or executory interest to become a present freehold estate but for the operation of VI, the reversion, remainder or executory interest shall become a legal present freehold estate, subject to any sale, exchange, mortgage, lease, option or conveyance made under the powers conferred by VIII.

As discussed above, the particular effectiveness of reverter and reentry in clouding title in the United States is due to the fact that through an apparent misperception of English law, American courts have refused to apply the Rule Against Perpetuities to these interests as they have to executory interests. Yet the executory interest, being an interest created in a third person following the same limitation which could have been followed by reverter or reentry in the transferror, is made subject to the Rule. This has given rise to the "two paper problem" in the law of estates. X, wishing to create an interest in Y

which would have the same practical effect as an executory interest in Y and yet not be subject to the Rule, makes up an instrument of transfer conveying property to A and reserving to himself a reverter or reentry. He then makes up a second deed, transferring this reserved interest to Y, as he may do in most of the American states. Y, now holding the right of reentry or possibility of reverter as an assignee, holds a permanent interest subject to no termination by any policy of the law, and not subject to the Rule Against Perpetuities.

Early reverter statutes were sometimes adopted without due regard for constitutional issues. Minn. Laws 1943, ch. 529, An Act Relating to Limitations of Actions Affecting Title to Real Estate, provided that all persons owning reverter or reentry interests in real property, must sue on them within one year or be barred. Of course, most such persons had no present right of action since the covenants were not breached nor actionable. Hence, they could not sue and had to sit by and have their interests eliminated without the opportunity to do anything about it. The statute was pretty obviously unconstitutional.[64]

Iowa has pursued the simplification of land titles aggressively, as in its Ancient Mortgages statute, Ia. Code Ann. §614.21 (1940), Ancient Deeds statute, §614.22, and its Stale Uses and Reversions Statute of 1965, §614.24. The first two statutes went on the basis that an instrument recorded prior to Jan. 1, 1960 was presumed valid if not contested by action filed prior to Jan 1, 1971. The Stale Uses and Reversions statute cuts off

possibilities of reverter and powers of termination older than twenty-one years, and probably eliminates restrictive covenants and many easements. Basye, Clearing Land Titles, §§51-143 (2d Ed. 1970, Supp. 1977) is exhaustive as to such statutes in other states.

Statutes re Restrictive Covenants

The pattern of the common law in both Britain and the United States was hostile to clogs on title of any sort, including covenants and servitudes respecting the use of land. With increasing urbanization, industrialization and tract development, this attitude changed. In most common law jurisdictions, legal policies were developed to extend and preserve the effect of covenants and servitudes, commonly referred to at present at restrictive covenants. At the same time that increased and broader effect was given to restrictive covenants, attempts by tract developers to write restrictive covenants in the form of powers of termination and possibilities of reverter were by and large rebuffed.[65] Deeds containing a series of "conditions" were given effect, if apt, as containing restrictive covenants and not possibilities of reverter or rights of reentry.

This willingness of the courts to extend the effect of restrictive covenants in itself created a title clouding problem. Covenants at first salutary in their operation, later prevented the use of the land for its obvious best purpose after initial circumstances had changed.[66] While a clear title action might succeed in clearing restrictive covenants from the title on the

basis of the equitable doctrine of changed conditions or some other equitable principle, such an action was time-consuming and costly. Restrictive covenants came, in older urban areas especially, to be a factor in preventing the use and redevelopment of land. In response to a perceived need, Britain and various of the American states adopted statutes placing limits on the effect of covenants and servitudes, similar in form and intent to the reverter and marketable title acts. The large scale effect of these statutes is still not clear. Tract developments rarely lose their original character in the thirty or forty years allowed by the statutes for the original covenants, and the filing of notice to preserve is a difficult process when left to the various owners of the lots within the tract.

For this reason, some of the original proponents of marketable title and reverter acts have recommended that tract housing development restrictive covenants be excepted from the operation of these acts. It is clear that otherwise the covenants would not be continued at the end of the fixed term, in that it would be an impossible effort to get all or even a majority of the title owners for the time being in a tract development to make out and record the necessary notice to preserve the covenants.

California's law has not followed the trend toward broadening the coverage of restrictive covenants and softening or removing legal hindrances to their more inclusive application.

The leading cases on the subject, Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919) and Wing v. Forest Lawn Cem. Assn., 15 Cal.2d 472, 101 P.2d 1099, 130 A.L.R. 120 (1940), refuse to extend the reach of equitable servitudes imposed on the basis of actual or imputed notice, and this pattern has continued to the present in California statute and cases, Civil Code §1468 (1969), Riley v. Bear Creek Planning Comn., 71 Cal.3d 500, 131 Cal. Rptr. 381, 551 P.2d 1213 (1976). As in Werner v. Graham, tract covenants in California are frequently phrased as covenants, conditions, restrictions and servitudes, or in similar language. Such language refers to the restrictive covenants as being enforceable by reserved power of termination or possibility of reverter. Contrary to common practice elsewhere, however,these provisions can be and are enforced on rare occasion, causing what amounts to a forfeiture of the estate granted.[67] The cases appear to indicate that this willingness to enforce restrictive covenants via termination of the estate granted may be caused by the fact that California law does not permit a developer who no longer owns land in the area to enforce such provisions as restrictive covenants. However, there is no difficulty in the developer's enforcing such interests as powers of termination or possibilities of reverter, if in fact he is permitted to do so in the particular case.

In modern American law, a forfeiture is almost never permitted.[68] It would appear that the legislature might well look into this pattern. It seems that enforcement of restrictive covenants in tract developments should be limited to injunctive

relief and the award of damages. The right of developer or successor to enforce the tract covenants should be provided specially by statute, whether or not the developer continues to own land in the area. Forfeiture might be permitted in commercial developments and in one on one situations, but it appears that forfeiture is too harsh a penalty even in those areas. Perhaps a statute might provide that where a power of termination or possibility of reverter is used successfully to end an interest earlier transferred, there should be a careful settling of accounts, as in the case of foreclosure of a common law mortgage. That is, the transferror would have the right to cause the termination of the interest granted, but the forfeitee should be allowed relief in the way of repayment of part of the purchase price, considering the original amount paid, the rental value of the premises, improvments to the property, etc., all calculated so as to return to the original transferror what is equitably due him, but at the same time calculated so as to prevent him from realizing a windfall, and preventing the transferree from suffering a crippling loss.

Looking at the question of the duration of the effect of restrictive covenants, various states have moved to limit the continuation of these interests too far into the future.[69] Four types of statutes are common. The first is the "substantial benefit" type, which will not permit the enforcement of restrictive covenants unless such restriction will bring substantial benefit to the convenantee. So far, California case law is in general accord.[70] However, these statutes usually provide as well that covenants and servitudes end when they are no longer of substantia-

benefit to the covenantee, and the title may be cleared of them.[71] California appears to have no such development in its law.

The second type of statute provides a fixed period during which restrictive covenants are valid, and they end with no possibility of renewal at the end of that period.[72]

The third type of statute, a modern pattern, operates like the marketable title statutes. Covenants and servitudes are cleared from the title if not re-recorded at stated intervals, usually thirty or forty years. These statutes are commonly part of statutes dealing with certain future interests in land which are treated likewise.

The fourth type of statute provides that the benefit of the covenant ends when the title to the benefited parcel is transferred.

The adoption of marketable title and reverter statutes in recent years, which usually apply as well to restrictive covenants, has placed a desirable check on the too-long continued effect of narrowly restrictive covenants and servitudes. California has no statute dealing with the life or continued effect of restrictive covenants. It relies on notions such as release, merger, waiver, change of condition and the like to govern the life and continued effect of covenants. Since most modern marketable title statutes apply as well to covenant interests, it would appear that California would not need to consider a separate statute in this regard if it adopted a marketable title statute with limited exceptions.

Curative Acts

The subject matter covered by curative acts laps over into and includes the subject matter of reverter statutes and statutes concerning covenants and restrictions.[73] However, the description is usually used more restrictively, to apply to acts which clear up petty shortcomings as to corporate seals, incomplete acknowledgments, failure of a fiduciary to sign in the required form, irregularities in recording and the like. California is in little need of additional legislation of this kind, in that Civil Code §1207 and existing statutes take care of the really important problems raised by the Model Curative Act, Simes and Taylor, Improvement of Conveyancing by Legislation 17, 20-24 (1960), the Curative Provisions and Limitations provisions, Part 4, Uniform Simplification of Land Transfers Act, 13 ULA, 1979 Pamphlet, 253, §3-401 - 3-411, and Basye, Clearing Land Titles §§201-364 (1970 Supp. 1977).

Title Standards

Title standards, adopted by state or local bar associations, have provided a semi-official method of resolving title problems in many of the states. Standards resolving many of the problems encountered by conveyancers and abstractors have the advantage of being more flexible than similar state statutes. Many persistent but relatively minor problems may be resolved in this fashion. However, due to the special nature of California title and conveyancing practice, it appears that it is impractical to look to this method of resolving title problems.

Title standards, in number from fifty to a hundred in the usual pattern, are typically adopted by a state bar association, county or metropolitan bar association. Such standards are adopted in an attempt to deal with the overwhelming number of factors in a typical chain of title which may make such title unmarketable. The standards, when adopted, usually do not have the effect of statute. They rely upon their effect in setting a tort standard of conduct for the whole profession for their effect, and upon their setting a contract standard for reasonable performance under the terms of a contract to search or abstract title. They also serve to resolve certain factors which might otherwise lead a title searcher to declare a title unmarketable, toward assisting the searcher to find the title marketable.

The older curative statutes were of little help in this regard. Several authors have explored the area of title standards, and the almost incredible background of title complexities and irregularities against which the title standards were considered.[74] Title standards supply answers for the conveyancing bar to such problems as whether the title to real property awarded in an interlocutory decree of divorce is marketable, or whether a witnessed title deed of record for more than twenty years which refers in general terms to an unrecorded mortgage makes title unmarketable when a diligent inquiry turns up no information,[75] or whether a title to A and B jointly is marketable.[76]

Professor Payne has explored the nature and history of title standards and the title standards movement thoroughly. He states that the movement seems to have started with the adoption of such standards by the Bar of Livingston County, Illinois in 1923, and to have become a significant movement with the adoption of title standards by the Connecticut Bar Association in 1938. He says that about half the states have adopted such standards, and that the movement is centered in the midwest and mountain states. His analysis and comment indicates that he considers title standards timorous and merely a palliative, and that radical revision of property and recording statutes is required.[77]

A Survey of California Property Statutes

Several of the California statutes in the areas of titles, conveyancing and title transfer might well be considered with an eye toward possible change.

California's recording law is by and large conventional and consistent with that of other notice-race jurisdictions.[78] It is somewhat unusual in following the so-called look-forward or New York view. Under this concept, one who searches the land records is not freed from the burden of constructive notice when he traces an owner's title in the records to the point at which that person's conveyee records the transfer. California and approximately ten other states require the searcher to continue to search the record after such conveyance is recorded, for an

indefinite time thereafter. The difficulty and burdensome nature of the search and the fact that few searchers in practice do "look forward" in the record more than a few months or a year, if at all, is not relevant. The law in California is fixed in a pattern which seems contrary to general practice within the state, by the decisions in Mahoney v. Middleton, 41 Cal. 41 (1871) and County Bank v. Fox, 119 Cal. 61, 51 P. 11 (1897). Yet, those cases themselves are weak authority for the look-forward proposition. The court in Mahoney made its decision hurriedly and with little consideration, as it said itself, "The accumulation in this court of cases awaiting decision, forbids the discussion, at any considerable length, of this interesting question, or a review of the authorities bearing upon it." (at 50). In Mahoney, a bona fide purchaser who had taken relying on the record was involved, and this is a basic requirement for a person to take advantage of the recording act in most states. Fox does not seem to support Mahoney, since Fox sets out the familiar law that in a dispute among original parties, all of whom have knowledge of the transactions involved, the advantage of the recording law is not available to any of the parties. Fox refers to the California recording act, Civil Code § 1214.

There is little reason for California's law to continue in this pattern. A statute should be considered, preferably a modification of Civil Code §1214, which would place California with the majority of states, with the general American title search procedures, and with the "better view." Section 3-202 of

the Uniform Simplification of Land Transfers Act, 13 ULA, 1979 pamphlet, 239 might well be consulted for guidance in drafting. Civil Code §1107 should probably stay as is.

Civil Code §702 does not state the law of California, and is contrary to American law and practice, in which titles to real and personal property are assimilated insofar as logical and possible. It is not an important point, since the case law makes it clear that §702 does not mean what it appears to say. In its present form §702 states, "The names and classifications of interests in real property have only such application to interests in personal property as is in this division of the code expressly provided." It might well be changed, perhaps following the pattern of the English Law Of Property Act of 1925, to read something like the following: "The names and classifications of interests in real property have application to interests in personal property insofar as such names and classifications may be assimilated to such interests."

Civil Code §707 deals with conditions and events which may terminate a particular title in property. If the legislature should determine to do away with the determinable estate or the estate on special limitation, and treat all such interests as being on condition subsequent and subject to the right of reentry, or executory interest, this is probably the statute which should be redone to that effect. There is little purpose to be served in continuing the two very similar interests in property. They serve the same purpose, and any reversion which may take place under either concept is worthless in California practice until it

is confirmed in a proper legal action. Allison Dunham pointed out twenty-six years ago[79] that there was no practical difference between the right of reentry, properly called a power of termination, and the possibility of reverter, and that the existence of the two concepts, with their different patterns of law, merely added needless complexity and confusion to the law. A single interest of this type will serve all purposes of a transferror. The Kentucky statute, Ky. Rev. St. Ann. §381.218 (Baldwin 1969) would provide a good drafting model for the purpose. Civil Code §§703, 768-9, 778 and 790-3 should be reviewed to avoid conflict.

> **381.218 Abolition of fee simple determinable and possibility of reverter.**
>
> The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry. (1960 c 167, § 4. Eff. 6-16-60.)
>
> "Kentucky Perpetuities Law Restated and Reformed" by Jesse Dukeminier, Jr. 49 Ky LJ 3 (1960).
> "Perpetuity Legislation Handbook," ABA Section on Real Property, etc, 2 Real Property, Probate and Trust, Jour 176, 188-189 (1967).

Civil Code §793 appears to permit a grantor or lessor to commence an action to evict a possessor without giving notice. Case law limits its application to an ejectment proceeding. Ejectment is no longer in use in California practice. Unlawful detainer proceedings have replaced it, Code of Civil Procedure §§1161-2. The statute does not mean what it appears to say, and should probably be eliminated entirely.

Civil Code §826 allows to a reversioner or remainderman an immediate right of action for injury done to the inheritance, despite an intervening life estate or estate for years in possession. The statute is meant to allow waste type actions and suits for injunction in a situation in which the common law and usual American law did not allow a present right of action. At the same time, the California case law makes it clear that the possession of an adverse possessor does not run against the reversioner or remainder person until those rights become possessory.[80] A number of states, seeking to clear and stabilize titles as early as possible, have provided that the adverse possession of a trespasser runs as well against future as against present title owners. California's five year adverse possession statute, Code of Civil Procedure §325, etc., is quite short, but if the desire to clear titles early is strong, a provision applying the five year period to future as well as present interests in land might be considered, probably as a modification of §826.

Civil Code §1096 provides[81] that where a grantee under a deed later changes his or her name, a later deed from the grantee must set out the name by which the property was acquired. This provision might well be expanded to require further information meant to make the records more informative and useful, or the presently blank §1098 might be used. A provision requiring the full name and street address of all parties whose names appear on the face of the deed and the name and address of the drafter

would be helpful. Such information should be printed or typed. The statute should permit this information to be added before recording, if necessary, by writing, rubber stamp, or attachment. A requirement that the street address be provided as well as the legal description of the property would be informative, and the statute should allow incorporation by reference to a full legal description appearing earlier in the public record. A deed, if recorded without any of this information, should be valid. Such provisions might be added to the civil code at this point, but a more likely place for them would be at those points in the Government Code at which the duties of county clerks in reference to instruments presented for recording in the land records are set out, Government Code §§27200 et seq., probably at §27321.5.

California's grantor-grantee method of indexing is obsolete. Data retrieval systems had progressed by World War I to such an extent that the grantor-grantee system was antiquated. While there remains much discussion as to the exact form the new indexing should take,[82] it is only a matter of time until a computerized or tract indexing system will become inevitable. Title company practice in California has taken much of the burden off the public land records. In California, title companies have universally adopted an arbitrary tract indexing system and have programmed their computers with the system. It appears that smaller title companies make use of the computer lines from larger companies, to supplement their own computer systems as necessary. Since attorneys and members of the public usually use

title companies as a source of information concerning land titles, the form in which the public records are kept is of no great practical consequence. Yet, the form in which a title search is done by a title company at the present time may not be thorough enough to suit the sense of professional excellence of a conveyancer. A title company is not required to keep records to suit the professional sense of a title lawyer, since a title company is a business concern which may choose to make certain shortcuts by eliminating search into title problems which rarely or never occur. The practical excellence of title company title search and insurance procedures, to a person who knows how to use them, removes much of the incentive for improvement of the public records.

The Uniform Simplification of Land Transfers Act, 13 ULA, 1979 Pamphlet §§2-301 - 2-312, and the entire Article 6, make specification for improvement of current recording practice, and for the establishment of a tract indexing system to replace entirely the antiquated grantor-grantee indexing system. Yet, there seems to be a mood of waiting among commentators and persons active in conveyancing. They seem to be awaiting a uniform, simple and generally available computerized system to come into use; or perhaps for a tract index or other speedy date retrieval system to be proposed by some governmental agency -- perhaps the Secretary of Housing and Urban Development, acting under the Real Estate Settlement Procedures Act.[83]

If the California legislature chooses to act in this respect, a system of tract records, based on tract identifier and

parcel numbers and centered in some central city such as Sacramento, with computer access points kept in each county recorder's office appears to make the most sense.[84] Such a system would have much in common with the system presently maintained by the Title Insurance and Trust Company of Los Angeles. Recent improvements, making the transmission of documents by ordinary telephone lines speedy and cheap, make such a computerized tract indexing system eminently practical.

The usual fears as to the cost of such a system would be minimized by setting a cut-off point a few years into the future, at which point physical records would no longer be kept in each county, but would be transferred as received for filing, to the central computer records. Hence, a searcher would search up to a certain date in the county records, and thereafter in the centralized computer records in Sacramento. It appears certain that the centralized system could be maintained at a fraction of the cost of the present manually-maintained county recorder records.

California appears to have no statute barring ancient mortgages or powers of sale under mortgages and deeds of trust. A marketable title act would resolve this lack, or perhaps a statute similar to Ala. Code Ann. T. 47 §§174-5 might be considered. Basye, Clearing Land Titles §§71-128 (1970 Supp. 1977) has an extensive discussion of this subject.

Civil Code §1106 deals with the concept of after-acquired title or estoppel by deed.[85] In the real property area, the universal pattern of recording does much to minimize the importance of this legal concept. In brief, the concept is that one who purports to convey real property to another, while not owning the property, and who later acquires that property, does not own it, but rather his or her transferree owns the property. In other words, if I sell you property I don't own and later acquire it, it is yours.

In its original form, common requirements were that the property be real property, that it be transferred by warranty deed, and that interests less than fee simple were not affected by the concept. The concept has become more general in recent years, tending toward a state in which a transfer of any sort of property by any sort of instrument binds the transferror, so that if he or she later acquires the property or any part of it, the title goes immediately to the original transferree.

California's statute in this regard, Civil Code §1106 is obsolete on its face, and prevents the case law from developing in such a way as to advance the interests of justice and fair dealing. It should be redrafted in the form which the doctrine has taken in recent years. Because of questions raised by the use of the quitclaim the statute should make clear that the form of the transfer instrument is irrelevant. A statute somewhat like the following might be considered:

§1106. Where a person purports by any instrument of transfer to grant any interest in property, and subsequently acquires any title or claim to such property, the same passes by operation of law to the transferree or his successors.

Civil Code §1213.5 is intended to clear the record of unexercised options one year after their expiration. Such options, as well as contracts for the sale of land, have been a prime source of title clogging. This is true especially since many recorded documents of this type are of dubious legal effect and are sometimes recorded for nuisance settlement value. Section 3-206 of the Uniform Simplification of Land Transfers Act, 13 ULA, 1979 pamphlet, 243 is much like Civil Code 1213.5 but applies to both options and simple contracts of sale not used as credit instruments. It provides for the record to be cleared in favor of a purchaser for value. Extra record notice to the buyer is irrelevant Section 1213.5 might be rewritten accordingly.

Section 3-206. **[Lapse of Effect of Recording Option or Contract for Conveyance]**

If 6 months have elapsed after the recorded expiration date (or, if there is no recorded expiration date, the date of recording) of a recorded option or after the date for performance of a recorded contract to convey (or, if there is no recorded date for performance, the date of recording), or of any recorded agreement extending such expiration of performance date, a purchaser for value who has recorded his conveyance takes free of any claim based upon the recorded option or contract, except as preserved by the recording of a notice of pending proceedings (Section 4-301).

Civil Code §1464 sets out the common law first Rule in Spencer's Case, 5 Co.Rep. 16A, 77 Eng. Rep. 72 (K.B. 1583). The first resolution has been rejected in almost every other American jurisdiction. Section 1464 might as well be eliminated. Only the second Rule in Spencer's Case, that a covenant must touch and concern the land if it is to run with the title to subsequent takers, has any present day relevance. The leading American case is probably Purvis v. Shuman, 273 Ill. 286, 112 N.E., 679 (1916), noted in 1 Ill. Law Bull. 60 (1917) and 15 Mich. L. Rev. 79 (1916).[86] It sets out that the use of the word assigns is irrelevant, and the intention of the parties as to whether a covenant is meant to run with the title is to be gathered from an inspection of the entire instrument.

Code of Civil Procedure §872.210 sets out the requirements as to standing to commence an action for partition of real or personal property. The remaining sections of the Partition Act, as well as its title, make it clear that the law of California permits partition of personal as well as real property. One makes suggestions as to such an elegantly-drafted statute with hesitation. It is difficult to see why the distinction is made in §872.210 between real and personal property. Unless some good reason exists, §872.210 should be rewritten to eliminate subparagraph (1) and to eliminate the word "real" in line two of subparagraph (2). Despite the law revision comments on this section, it is unclear that a coowner of personal property may be an owner of property subject to successive estates, as well as a co-tenant. If "coowner" were

intended to include owners of successive estates, the word should have been defined accordingly in §872.010.

In 1932, Professor Turrentine undertook to make "Suggestions For Revision of Provisions of the California Civil Code Regarding Future Interests," 21 Cal. L. Rev. 1 (1932). He made certain suggestions which remain current. He recommended that the Rule Against Perpetuities be applied to the reverter and reentry, or that a reasonable time limit be set after which these rights would be barred (at 7).

He likes the development in California law which permits judges to apply equitable concepts in cases involving the attempt to enforce possibilities of reverter and rights of reentry (at 8). This development is discussed elsewhere in this paper. He suggests that the Rule in Jee v. Audley, 1 Cox 324 (1787) be abolished, and suggests that the decision in Fletcher v. Los Angeles Trust and Savings Bank, 182 Cal. 177, 187 P. 425 (1920) be modified or abolished by statute. This rule is to the effect that every natural person is conclusively presumed capable of having children until death. The English law is now contrary, Turrentine says, and amendment of the California Code is required.

He states that despite cases and statutes on the subject, the Civil Code should set out at some one definite point that future interests in personal property similar to those in real property are recognized. His other comments have been made unimportant or irrelevant by the lapse of time.

The Rule in Wild's Case

It is not quite clear whether the Rule in Wild's Case[87] exists in California. The paucity of reported appellate cases is a good indication that the Rule has not provided significant difficulties in California practice. However, it is one of the ancient legal rules which deserve putting away along with its close associates, the Rule in Shelley's Case and Worthier Title.

A great deal appears in the legal periodical literature about Wild's Case. The Uniform Property Act, now withdrawn and no longer recommended for adoption, contained a section meant to abolish the act. Kansas and Nebraska have statutes concerning Wild's Case, modeled on the Uniform Property Act section.

The Rule contained three resolutions, the first two of which are usually set forth as constituting the Rule in Wild's Case. The original rules applied only to devises of real property, where the words of transfer were to a named person and that person's children, without further description or qualification, in form "to A and his (her) children." The British judges distinguished two situations, in the first of which A was alive but had not had children or had had children who had died,[88] and in the second of which A had living children. In the first instance, A was said to take the land in fee tail and in the second to take it in fee simple absolute as joint tenant in equal shares with his or her children.[89] The problem set out by Wild's Case caused endless difficulty in the American courts. Some rejected the distinction between living and dead children and held that A always took a

life estate and the children always took a remainder, and this view came to be the so-called "better view" set out by the Restatement of Property and adopted by the Uniform Property Act.[90] Others followed the English precedent, usually holding that the fee tail in the first resolution was converted immediately into a fee simple absolute in A, or was converted into a life estate in A and a remainder in fee in the children. Most followed the second resolution by interpreting the gift as one in co-tenancy, either joint or in common, to A and the children in equal undivided shares. Along the line, the fact that the Rule applied to devises and not to inter vivos grants by deed was often lost sight of. Also lost sight of was the fact that the rule applied only to real property. A mishmash resulted, with inconsistencies even within states.

California was spared most of this. The only case said to apply Wild's Case in California is Estate of Utz, 43 Cal. 200 (1872). In that case, a testator directed property "to my youngest daughter, Margaret Utz, and to her children I will and bequeath... all my property, money, land, furniture, etc..."(at 203). Margaret had living children and was adjudicated to take equal undivided shares with them. Note that the gift was testamentary, but that the property included personal property.

The case is said to indicate that California adopted thereby the Rule in Wild's Case. However, a careful reading of the case shows no mention of or reference to Wild's Case. Counsel argued that the Rule in Shelley's Case should be applied, but the court discussed and rejected this possibility. The court based

judgment on Oates v. Jackson, 2 Strange 1171, 93 Eng. Rep. 1107 (King's Bench 1795). That case does not mention Wild's Case, referring only to the text in Co. Litt. 9. The case and text refer to grants to a named person and a class, as being in joint tenancy and equal undivided shares. No other case has been found which indicates that California has adopted the Rule in Wild's Case. It appears that the matter should be laid to rest, and the precedent of Estate of Utz preserved by adopting a statute providing that in the case of a transfer of real or personal property to a named person and his or her children, where the person has living children, he or she takes equal undivided shares in tenancy in common with the children.[91] Where no children of the named person are alive, the named person should take a life estate and the children a contingent remainder in fee simple absolute. If on the other hand the solution of the Model Property Act appeals, that act or the form it takes in the Kansas or Nebraska Statutes might be adopted.

A statute similar to the following is suggested to be inserted, perhaps as Civil Code §1074:

> The Rule in Wild's Case and the Resolutions therein are no part of the law of this state. A transfer of real or personal property to a named person and his or her children shall be construed in the absence of intent to the contrary as a transfer in tenancy in common in equal shares if there are children alive at the time of the transfer or as a transfer of a life interest to the named person and of a contingent remainder interest to the children if there are no children alive at the time of transfer.

The Uniform Property Act, §13 provides:

> § 13. Effect of Conveyance to One and His Children—The Doctrine Known as Rule in Wild's Case Abolished.—When an otherwise effective conveyance of property is made in favor of a person and his "children," or in favor of a person and his "issue," or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested.

This section was drafted by Professor Casner, and is similar to the text of the Restatement of the Law of Property §283 (1936). Kansas Stat. Ann. §58.505 (1976) is similar in effect, though not in words, likewise providing that a transfer to A and his children results in a life interest in A and a remainder interest in fee in the children.

> **58-503.** Same (rule in Wild's case). In the case of instruments disposing of property of which the following is a type: "A to B and his or her children," the doctrine of the common law known as the rule in Wild's case shall not hereafter apply, and the instrument shall create a life interest in B and a remainder in his or her children. The rule here prescribed applies when the expression is "children," or "issue," or words of similar import. [L. 1939, ch. 181, § 5; July 1.]

Professor Link, in exploring the desirability of a statute re Wild's Case for North Carolina, indicated that neither the Uniform nor the Kansas Provisions covered the ground really adequately and suggested the following statute for possible consideration and adoption by the North Carolina legislature.[92]

An Act to Abolish the Rule in Wild's Case

Section 1. Chapter 41, entitled "Estates" of the North Carolina General Statutes, is hereby amended by adding the following section at the end thereof:

§41 - ——. **Rule in Wild's Case abolished; effect of estate to one and his children.**—(a) The rule known as the Rule in Wild's Case, both the First and Second Resolutions thereof, is abolished.

(b) When an estate or interest in real or personal property is transferred to or for the benefit of a person and his "children" or other words of similar import, whether the conveyance is immediate or postponed, the transfer is presumed to have the following attributes:

(1) The transfer creates a life estate in the person designated.

(2) Upon the death of the person designated, or upon the effective date of the transfer if the person designated does not survive the effective date of the transfer, the estate or interest in property shall be divided into separate shares of equal value, creating one share for each child of the person designated then living and one share for the then living descendants, collectively, of each deceased child of the person designated. Each share created for a child of the person designated shall go to the child, and each share created for the descendants of a deceased child of the person designated shall go per stirpes to such descendants.

(3) Upon the death of the person designated, or upon the effective date of the transfer if the person designated does not survive the effective date of the transfer, if no child or other descendant of the person designated is then living, the estate or interest in property shall go to those persons who would have taken the transferor's property (real or personal, as the case may be) if he had then died, intestate and domiciled in North Carolina, and the proportions of taking shall be determined by those laws.

(4) Except in cases governed by subsection (1), estates or interests shall be held in fee simple or absolutely.

(5) Estates or interests shall be held between two or more persons as tenants in common and not as joint tenants.

(6) The words "child," "children," "descendant," and "descendants" or other words of similar import include adopted persons, illegitimate persons, and persons born within ten lunar months after the time of distribution.

(7) If a life estate in the person designated is disclaimed, renounced or otherwise terminated before the death of the person designated, the income from the estate or interest in property shall go quarterly to the children and descendants from time to time living in accordance with the formula in subsection (2). If at any time there is no child or descendant living, the income shall be accumulated and added to principal. Upon the death of the person designated, the property shall go according to subsection (2) or (3).

(8) The words "transfer" or "transferred" include conveyances, gifts, devises and bequests.

(9) Where the transfer is made to two or more persons and their "children," upon the effective date of the transfer the estate or interest in property shall be divided into separate shares of equal value, creating one share for each person designated then living and one share for the then living descendants, collectively, of each person designated who is then deceased. Each share created for a person designated shall go according to the principles of subsections (1) through (9). Each share created for the then living descendants, collectively, of each person designated who is then deceased shall go per stirpes to such descendants. If upon the effective date of the transfer no person designated or descendant of a person designated is living, the estate or interest shall go according to subsection (3).

(10) Where the transfer is postponed, the attributes of the transfer shall be determined in accordance with the principles of subsections (1) through (9). For example, the time for determining the shares of children and descendants under subsection (2) will be the last to occur of: the death of the person designated; the termination of the postponing interest; and the effective date of the transfer.

(11) Any one or more or all of the preceding presumptions of this subsection may be rebutted by clear, strong and convincing evidence of intention to the contrary. In examining evidence of contrary intention the court shall consider, but is not limited to, the following questions: Whether the words "and his children" were intended as words of purchase or words of limitation; whether any gift to children was intended to be substitutional, concurrent or successive; whether the gift to the person designated was individual or class; and whether shares of any individuals or class members were intended to be equal.

(c) The provisions of this section shall apply only to wills of decedents dying after [effective date of statute] and to deeds, agreements, and other written instruments executed and delivered after [effective date of statute].

Section 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 3. This Act shall become effective on [effective date of statute].

Self-indexing Records

Regardless of whether action is taken to simplify the manner in which land records are kept, provision for "self-indexing" should be made by statute. This system, in present effect in several states, has attracted little attention as a simple and effective means of title search reform.[93]

The heart of the reform lies in a set of statutes which require the county clerk or recorder to refuse to accept title instruments unless the proferred instrument contains required information. Such required information always includes the full name and address of the person who preceeded the present transferror in title. Usually, the one filing for record must also provide a reference to the place in the land records in which the previous instrument is to be found. The information may be contained in the instrument proferred for recording in some such form as this:

> being the same property which I took by grant deed from Robert R. Quimby and Catherine Grimes Quimby on January 29, 1978, recorded in the official records of Lake County, book 128, page 67, recorder's number 567834.

or it may be written on the face of the instrument before or at the time the instrument is presented for recording. Provision is to be made by the recorder for a rubber stamp with blank spaces to be filled in, for a paper attachment to be glued to a blank part of the face of the instrument to be recorded, or as an attached page with a printed form to be filled in. The procedures which result in the information being set out on the face of the

instrument where possible are favored, since they minimize the bulk of the record and cut recording costs. If somehow an instrument gets to be recorded without containing the required information, it is nevertheless valid.

Such self-indexing records have been a great success in the states where they are maintained. Most transactions in land are handled by professionals who immediately adapt to the new form. Little extra effort is required because such professionals always have an abstract of title, a preliminary title report, or other title search information which already contains the required information. The occasional nonexpert person who appears to record an instrument is met at the desk in the recorder's office by a clerk armed with a rubber stamp or printed stickon paper strip or extra page. The required information can usually be supplied directly, or with a bit of trouble. Experience seems to indicate that when such a system is adopted, ordinary people bring their title deeds with them to the recorder's office.

The self-indexing statutes are often supplemented by other statutes which have the same purpose -- making the land record as fully informative and complete as possible. Typewritten or printed full names of all persons whose names appear on the instrument are often required, with street addresses.[94] The same is sometimes required of the notary public, and the person who drafted the instrument. If the name by which the grantor took title originally is different from the present form of the grantor's name, both names must be stated on the face of the instrument or

by attachment. Property may be required to be identified by surveyor's description and by street address as well. Provision is often made to include earlier land descriptions by reference, using recorder's number, book and page or similar information, and entire earlier instruments may be incorporated by such reference. No instruments, even probate decrees, are accepted unless the required information appears in the instrument or is added at the time of recording. Other information may be required such as the marital status of male persons, or of any person, party to any instrument to be recorded. Such statutes commonly give the recorder ample power to refuse instruments unless they are fit for recording, with all required information on the face of the instrument or attached.

Experience with various of these elements has demonstrated that a system which would incorporate most or all of these requirements, enforced only through administrative procedures in the recorder's office, is almost totally effective in eliminating wild deeds, perfecting chains of title, giving information via the names and addresses of the parties of record which can be used to perfect the record, allowing easy reference to the property because it is identified both by legal description and streetaddress and in general making a grantor grantee system work as it is supposed to rather than in the usual way, in which virtually every title is affected by wild, ambivalent and uncertain deeds and interests.

California statutes can and should be expanded to make the land records self-indexing. Government Code §27321.5 requires every

instrument used to convey fee title to real property to have at the bottom of the first page a name and address to which tax statements are to be mailed, and has a similar provision as to mortgages and deeds of trust. It could be expanded to add some or all of the above-discussed features.

Statutes are in effect in Alabama, Kentucky, Tennessee, Wyoming, Michigan, Montana, New York and North Dakota, containing some of the provisions discussed. The Kentucky statute, Ky. Rev. St. §§382.090 and 382.110 (1970) requires that the deed recite the immediate source from which the grantor acquired title, or the clerk may not admit it to record.

> 382.110. Recording of deeds and mortgages—Place of recording—Contents of deed.—(1) All deeds, mortgages and other instruments required by law to be recorded to be effectual against purchasers without notice, or creditors, shall be recorded in the county clerk's office of the county in which the property conveyed, or the greater part thereof, is located.
>
> (2) No county clerk or deputy county clerk shall admit to record any deed of conveyance of any interest in real property equal to or greater than a life estate, unless the deed plainly specifies and refers to the next immediate source from which the grantor derived title to the property or the interest conveyed therein.
>
> (3) If the source of title is a deed or other recorded writing, the deed offered for record shall refer to the former deed or writing, and give the office, book and page where recorded, and the date thereof. If the property or interest therein is obtained by inheritance or in any other way than by recorded instrument of writing, the deed offered for record shall state clearly and accurately how and from whom the title thereto was obtained by the grantor.
>
> (4) If the title to the property or interest conveyed is obtained from two (2) or more sources, the deed offered for record shall plainly specify and refer to each of the sources in the manner provided in subsections (2) and (3), and shall show which part of the property, or interest therein, was obtained from each of the sources.
>
> (5) No grantor shall lodge for record, and no county clerk or deputy shall receive and permit to be lodged for record, any deed that does not comply with the provisions of this section.
>
> (6) No clerk or deputy clerk shall be liable to the fine imposed by subsection (1) of KRS 382.990 because of any erroneous or false references in any such deed, nor because of the omission of a reference required by law where it does not appear on the face of such deed that the title to the property or interest conveyed was obtained from more than one source.
>
> (7) This section does not apply to deeds made by any court commissioner, sheriff or by any officer of court in pursuance of his duty as such officer, nor to any deed or instrument made and acknowledged before March 20, 1928. No deed shall be invalid because it is lodged contrary to the provisions of this section. (495.)

382.120. Real property acquired by descent—Requirements for conveyance of—Indexing—Clerk's fees.—(1) Before any deed to real property, the title to which has passed to the grantor under the laws of descent, is filed for record the grantor or grantee, or the agent or attorney of either, shall present to the county clerk the affidavit of the grantor or any one of the heirs at law or next of kin of the ancestor of the grantor, or of two (2) residents of this state, each of whom has personal knowledge of the facts, which affidavit shall set forth:

(a) The name of the ancestor;

(b) The date of the ancestor's death;

(c) Whether the ancestor was married or single, and if married, the name of the surviving husband or wife;

(d) The place of residence at the time of the ancestor's death, if known to the affiant or affiants;

(e) The fact that the ancestor died intestate; and

(f) The names, ages and addresses, so far as known or ascertainable, of each of such ancestor's heirs at law and next of kin, who by his death inherited such real property, and the relationship of each to the ancestor, and the interest in such real property inherited by each.

The Tennessee statute is similar in its provisions.

64-2410. Recital as to last previous registered instrument. — Before any instrument of writing, required by the registration laws to be registered, shall be registered, it shall contain a recital designating, by appropriate name, the character of the preceding last registered instrument relating to the property or subject matter embraced in the instrument to be registered, and shall set forth the book and page where appears the last registered instrument. [Acts 1915, ch. 25, § 1; Shan., § 3704a5; mod. Code 1932, § 8085.]

64-2411. Indorsement as to last previous instrument. — When any instruments referred to in § 64-2410 shall not contain such recital or reference as is so required, and the same shall be delivered to the register for registration, it shall be the duty of the register, before registering said instrument, to enter or indorse upon the same the recital and reference to the preceding and last registered instrument so required, and shall date and sign the same officially; and he shall, upon registering said instrument, transcribe his said entry or indorsement to the record, immediately following the instrument registered and in connection with the usual entry thereon, showing when the instrument was received and noted for registration; provided, he shall be entitled to receive for every such entry twenty-five cents (25¢) in addition to the compensation now allowed by law for registering instruments of writing. The said entry shall be substantially as follows: "The previous and last instrument (a deed or other instrument) is registered in this office in book (designating it), page ——, (designating it). This ——— day of ————————, 19—, ———————— Register." [Acts 1915, ch. 25, § 2; Shan., § 3704a6; mod. Code 1932, § 8086; modified.]

64-2112. No previous instrument — Validity of registration unaffected by noncompliance. — Nothing in §§ 64-2410 and 64-2411 shall be construed to prohibit the registration of instruments otherwise required by law to be registered, in the absence of a previously registered instrument respecting the property or subject matter embraced in the instrument delivered for registration; provided, further, that a failure of the record to show a compliance with the requirements of §§ 64-2410 and 64-2411, shall in no wise affect the validity of the registration of any registered instrument. [Acts 1915, ch. 25, § 3; Shan., § 3704a7; mod. Code 1932, § 8087.]

Michigan requires the name and address of the grantee and of every signer of an instrument, to appear thereon; this includes the grantor, witnesses and notary, Mich. C.L.A. §§ 565.201-203 (1967) and requires that instruments state the marital status of male grantors and authors of other instruments Mich. C.L.A. §565-221. Montana requires that grantees, mortgagees, or assignees of mortgagees place their addresses on the face of instruments before recording. Rev. C. Mont. §16-2911. New York requires street addresses of grantors and grantees in cities over 200,000 population and North Dakota controls the clogging effects of mortgages by requiring the address of the mortgagee and a complete description of the indebtedness secured as to amount, interest rate, and place and date due. Assignees must also record their addresses, N.D. Cent. C. §35-0304

Fundamental Change in the Law of Titles

Recommendations for adoption of statutes doing away with the possibility of reverter and treating limitations which formerly would have created such an interest as creating instead a right of reentry have already been discussed herein, as have the fairly radical changes made by the English Law of Property Act of

1925. This section will discuss much more fundamental notions for treatment of interests in property in a simplified and modern fashion.[95]

Our present law of titles, to put it simply and perhaps simple-mindedly, consists of present interests which may be entirely owned, owned for life or which give the right to possession which may be guaranteed for a period of time. Conditions may be attached to these interests, so that an interest may be owned without conditions; or it may come into ownership only after certain conditions have occurred, failed to occur, stopped occuring, or been complied with; or it may be owned until some condition occurs, etc., just as in the first case. The people who have the property before the conditions are satisfied, or have the right to the property after the condition, are regarded as owning part of the property involved. The common law has given names to all of these interests, and has evolved an almost unbelieveably complex body of law in relation to them. These legal principles were evolved largely in the period from the 13th to the 16th centuries, and remained largely unchanged until the late 19th and 20th centuries. Even in the latest period, relatively little change has taken place.

Little change has taken place and little is likely to take place simply because so large a part of present-day economic wealth is tied up in fixed relation to these concepts. The concepts are also so basic that change would involve the rewriting of dozens of complex, far-reaching statutes.

However, the existing system is in fact a very expensive and somewhat unpredictable one as to its effects and results. Sooner or later, fundamental change will be made, and this section will explore some possible bases for change.

Professor Waggoner, in a 1972 article,[96] sets out the law of titles and future interests in all its complexity, and criticizes it harshly. He refers to the Uniform Estates Act of 1938, shortly withdrawn and not adopted anywhere, as merely a setting out of the estate principles of the Restatement of the Law of Property of 1936. He discusses the New York Estates, Powers and Trusts Law §§6-3.2, 6-4.3 (McKinney 1967) and the Wisconsin statute, Wis. St. Ann. §700.04(a)(Supp. 1970). These statutes denominate both remainders and executory interests as remainders and the former executory interest in those states is given the characteristics of a remainder. The Kentucky statute, Ky. Rev. St. §381.218 (1962), which eliminates the fee simple determinable and the possibility of reverter, and turns apt language instead into a fee simple on condition subsequent and a right of entry, is praised. Waggoner suggests that the statute also turns an executory interest following such a fee simple on condition subsequent into a right of entry in a third party He suggests that California Civil Code §§769 and 778 could be modified to the same end.

Having thus made a survey of the state of the law of titles and future interests, and remedial concepts, he sets out his "proposed reformulation" of the law of such interests

(at 752-756). To state his suggestions most simply, present estates would consist only of fees simple absolute and defeasible, similar life estates, and similar leasehold estates. All present day future interests are eliminated in favor of the contingent future interest, the alternative contingent future interest, the future interest subject to open and the indefeasibly vested future interest. The Rule Against Perpetuities would apply to all contingent future interests. He suggests further that the present reverter and right of reentry might be classified instead as powers of revocation or appointment, and given effect as powers exercisable according to the terms of the transfer, instead of as conventional future interests (at 759).

Section —. *Classification of Interests in Property as to Time of Enjoyment.* — Legal and equitable interests in real and personal property are classified as to time of enjoyment as:

(A) Possessory interests, which entitle the owner to the present possession or enjoyment of the benefits of the property; or

(B) Future interests, which do not entitle the owner to possession or enjoyment of the benefits of the property until a future time.

Section —. *Classification of Possessory Interests.* — Possessory interests are classified as:

(A) Interests in fee simple absolute;

(B) Defeasible interests, which are interests which terminate upon the happening of an uncertain event, regardless of the language used to describe the uncertain event;

(C) Life interests;

(D) Interests for years, which are interests the duration of which is described in units of a year or multiples or divisions thereof;

(E) Periodic interests, which will continue for successive periods of a year, or successive periods of a fraction of a year, unless terminated;

(F) Interests at will, which are terminable at the will of either the transferor or the transferee and have no designated period of duration.

Section —. *Classification of Future Interests.* — All future interests, whether left in or created in the transferor or created in a transferee, including those interests known at common law as "reversions," "resulting trusts," "possibilities of reverter," "rights of entry" ("powers of termination"), "executory interests," and "remainders," are assimilated under the title "future interest."

(A) "Future interests" are classified as:

(1) "Contingent," if the interest is in favor of one or more unascertained or unborn persons, or is for any reason uncertain to become possessory at some future time; or

(2) "Vested subject to open," if the interest is in favor of a class of persons, one or more of whom are ascertained and in being, and if the interest is certain to become a possessory interest at some future time, and the share of the ascertained persons is subject to diminution by reason of other persons' becoming entitled to share as members of the class; or

(1) "indefeasibly vested," if the interest is not vested subject to open or contingent.

(B) The classification known at common law as "vested subject to complete defeasance" is abolished. Future interests which would at common law have been so classified are either "indefeasibly vested" or "contingent."

(C) Language which expressly confers on the transferor the right to reenter and take possession of the premises or words of similar import may be construed as a power of revocation or a power of appointment rather than a future interest.

Section —. *Application of the Rule Against Perpetuities.* — The Rule Against Perpetuities shall apply to all contingent future interests [except as specified in Section —].

Section —. *No Violation of the Rule Against Perpetuities in Certain Cases.* — Subject to the doctrine of infectious invalidity, no future interest shall violate the Rule Against Perpetuities if it is contingent only because another future interest which has priority may take effect in possession instead, or because a power might be exercised creating in the appointee an interest which takes effect in possession instead, and the other future interest or the power violates the Rule Against Perpetuities.

There is a good deal of comment in the periodical literature on the need for total reform of the law of titles, but little in the way of practical proposals.

The author of this study will observe that there is little difference in concept between the reversion and the remainder interests, and these should be subsumed under one head, and the law modified accordingly. Again, there is little difference in concept or practical effect between the executory interest, the possibility of reverter and the right of reentry, or to give it its proper name, the power of termination. All these interests should be grouped together, made subject to the Rule Against Perpetuities and made enforceable only after notice, demand and suit, just as the power of termination is presently given effect.

At the very least, the possibility of reverter should be abolished, leaving only the power of termination as a contingent interest in the transferror.

If a total change in estate law were desired, to make it as simple as possible without losing much of its flexibility and effectiveness, a simple system of estates could be set out. The only present estates would be permanent ownership and nonpermanent ownership. All interests beyond these present interests would be referred to as powers of termination, or powers of revocation and the law of powers of appointment subsumed. These powers would be subject to the Rule Against Perpetuities and to the jurisdiction's marketable title or reverter statute. The permanent estate, similar to the fee simple absolute estate, would be created by a transfer which would be effective in present law to create a fee simple interest. If a transfer were made to a person for life, or for another person's life, or for life subject to a further condition, the estate created would be a nonpermanent interest, for life, with a power to terminate at the proper time by notice, demand and suit by the owner of the power. Similarly with an estate created for five years, the transferree taking a nonpermanent title for five years, and the transferror retaining a power of termination exercisable at the end of five years, or on the breach of any other condition before then. Alternative contingent powers of termination or revocation could be created, as well as such powers in a closed or open class. If the owner of a power failed to exercise it, or lost the right to exercise the power, the nonpermanent interest would become permanent. Since the law of powers of appointment, revocation and termination is pretty definite and well thought-out in California, little would be left in the way of uncertain points causative of litigation.

All such schemes, however, have little practical chance of being enacted, and must be left for the future.

FOOTNOTES

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1. There is an extensive periodical literature setting out the law of titles and estates. See, e.g., McDougal, "Future Interests Restated: Tradition versus Clarification and Reform," 55 Harv. L. Rev. 1077 (1942); Wright, "Medieval Law in the Age of Space: Some 'Rules of Property' in Arkansas," 22 Ark. L. Rev. 248 (1968); Bordwell, "To Have and To Give, 37 Iowa L. Rev. 1 (1951) and 481 (1952); Boardwell, "The Common Law Scheme of Estates," 18 Iowa L. Rev. 425 (1933) and 33 Iowa L.Rev. 449 (1947); Niles, "Future Interests," 1947 Ann. Survey Am. Law 871; Aigler, "Title Problems in Land Transfers," 24 Mich, St. B.J. 202 (1945); Patton, "Evolution of Legislation on Proof of Title to Land," 30 Wash. L.Rev. 224 (1955); Cribbet, "Property in the Twenty-First Century," 39 Ohio St. L.J. 671 (1978) disucsses trends in property law.

2. Fiflis, "Land Transfer Improvement," 38 U. Colo. L.Rev. 431 (1966).

3. Patton, "The Torrens System of Land Title Registration," 19 Minn. L.Rev. 519 (1935). Prof. Aigler states that title registration received its fatal blow when Prof. Powell, employed to consider formulating such a system for use in New York State, recommended against it, though favoring such a system himself, apparently considering the system impractical for use in New York State. Aigler, "Title Problems in Land Transfers," 24 Mich. St. B.J. 202 (1945); Powell, The Registration of the Title to Land in the State of New York (1938).

4. But see Simes, "Future Interests in Chattels Personal," 39 Yale L.J. 771 (1930).

5. Mandsley, "Escaping the Tyranny of Common Law Estates," 42 Mo. L.Rev. 355 (1977); Crane, "The Law of Property in England and the United States", 36 Ind. L.J. 282 (1961); Johnson, "The Reform of Real Property Law in England," 25 Col. L.Rev. 609 (1925); Payne, "In Search of Title," 14 Ala. L.Rev. 11 (1961). The history of land law and conveyancing

in England, with a discussion of the Law of Property Act of 1925, and of European and American property title systems is set out by Cretney, "Land Law and Conveyancing Reforms," 32 Mod. L.Rev. 477 (1969). Bordwell, "English Property Reform and Its American Aspects," 37 Yale L.J. 179 (1927).

6. 15 & 16 Geo. V, c.20 (1925).

7. "Summary of the Uniform Land Transactions Act," 13 Real Prop., Prob. & Tr. L.J. 672 (1978).

8. Comment, "The Uniform Simplification of Land Transfer Act: Areas of Departure from State Law," 73 N.W.U.L.Rev. 359 (1978).

9. California Gov. Code § 27287 requires acknowledgment as a prerequisite to recording any instrument. This section might be modified if USLTA § 2-301 were to be adopted by the legislature.

10. Rubens v. Texam Oil Corp., 239 Cal.App.2d 78, 48 Cal. Rptr. 411 (1965); Holman v. Toten, 54 Cal. App.2d 309, 128 P.2d 808 (1944); Promis v. Duke, 208 Cal. 420, 281 P.613 (1929).

11. Grand Grove of the United Ancient Order of Druids v. Garibaldi Grove No. 71, 130 Cal. 116, P. 486 (1900). California Corp. Code § 20001 appears to make grants to organizations or offices valid.

12. Note, "Clearing Land Titles -- Two Important New Statutes," 44 Mass. L.Q. 22 (1959).

13. Sparks, "Marketability Problems of Land Use Restrictions," 33 Fla. B.J. 76 (1959); Comment, "Rights of Entry and Possibilities of Reverter -- The Perpetual Title Cloud -- A Need for Legislative Limitation," 71 Dick. L.Rev. 349 (1967); White, "Reversionary Restrictions," 14 U. Cin. L.Rev. 524 (1940); Browder, "Future Interest Reform," 35 N.Y.U. L.Rev. 1255 (1960); Fratcher, "Defeasance as a Restrictive Device in Michigan," 52 Mich. L. Rev. 505 (1954); Browder, Defeasible

Oklahoma," 4 Okla. L.Rev. 141, 163-166 (1951). For a sample of California cases on the subject, see Johnston v. Los Angeles, 176 Cal. 479, 168 P. 1047 (1917); Strong v. Shatto, 45 Cal.App. 29, 187 P.159 (1919); McDougall v. Palo Alto Unified School Dist., 212 Cal.App.2d 422, 28 Cal.Rptr. 37 (1963); Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849 (1937); Comment, "Universality of a Curse: 'Future Interests' in French Law," 3 La. L.Rev. 795 (1941); Brown v. Wrightman, 5 Cal.App. 391, 90 P. 467 (1907); Note, "Right of Re-Entry for Condition Broken: Enforceability," 42 Cal. L.Rev. 194 (1954). For developments in other states along these lines, see Brake, "Fees Simple Determinable -- the Purpose they Serve With an Appraisal of Their Utility," 28 Ky. L.J. 424 (1940); Note, 51 Harv. L.Rev. 1113 (1938); Thompson, Real Property §§ 1865, 1976 (1961); 28 Am. Jur.2d, Estates § 165-170. For a discussion of the general issue, see Rogers, "Removal of Future Interest Encumbrances -- Sale of the Fee Simple Estate," 17 Vand. L.Rev. 1437 (1964); Bofil v. Fisher, 3 Rich. Eq. 1,

55 Am. Dec. 627 (A.C., 1850); Schnebly, "Power of Life Tenant or Remainderman to Extinguish Other Interests by Judicial Process," 42 Harv. L.Rev. 30 (1928); Simes, "Fifty Years of Future Interests," 50 Harv. L.Rev. 749, 760 (1937); 31 C.J.S. Estates § 89.

14. As to the power of termination and the possibility of reverter in general, with historical information, see 3 Walsh, Commentaries on the Law of Real Property § 274 (1947). Such interests have been under prolonged attack. See Proc., A.B.A. Section on Real Prop., Prob. & Trust Law, "Report of the Committee on the Improvement of Conveyancing and Recording Practices," 73 (Pt. II, 1957); and see Note, "Future Interests in Chattels Personal," 11 Baylor L.Rev. 222 (1959); Sparks, "A Decade of Transition in Future Interests," 45 Va. L.Rev. 339 (1959). As to abolishing the distinction between remainders and executory interests, see Dukeminier, "Contingent Remainders and Executory Interests: A Requiem for the Distinction," 43 Minn. L.Rev. 13 (1958). For a discussion of future interests in personalty in California, see 30 Cal. Jur. 2d Estates, §§ 15, 24.

15. Bordwell, "The Common Law Scheme of Estates," 18 Iowa L.Rev. 425 (1933), 88 Iowa L.Rev. 449 (1947); Niles, "Future Interests," 1947 Ann. Surv. Am. Law 871; Walsh, "Conditional Estates and Covenants Running With The Land," 14 N.Y.U.L.Q. Rev. 162, 191 (1937); for California development, see Ferrier, "Determinable Fees and Fees upon Condition Subsequent in California," 24 Cal. L.Rev. 512, 516 (1933); Pabst v. Hamilton, 133 Cal. 631 66 P. 10 (1901); O'Connell, "Estates on Condition Subsequent and Estates on Special Limitation in Oregon," 18 Ore. L.Rev. 63 (1939).

16. The Law of Property Act of 1925, 15&16 Geo. V, c. 20. enacts as statute law the traditional English rule that the Rule Against Perpetuities applies to the possibility of reverter and the power of termination. In re Trustees of Hollis' Hospital (1899) 2 Ch. 540; In re Da Costa (1912) 1 Ch. 337. Note, "Application of the Rule Against Perpetuities to Rights of Entry and Possibilities of Reverter," 28 Mich. L.Rev. 1015 (1930). The author states, "It seems

inevitable that statutes will be enacted to prevent the abuses inherent in the creation of these interests." (at 1023).

17. Ferrier, "Determinable Fees and Fees Upon Conditions in California," 24 Cal. L.Rev. 512 (1936). The author states, "The determinable fee has recently been accorded judicial recognition in California, Dabney v. Edwards, 91 Cal. Dec. 41, 53 P.2d 962 (1935)," and says that the fee simple determinable was recognized in 18 states at that time. See also Behlow v. So. Pac. R. Co., 130 Cal. 16, 62 P. 295 (1900), Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047 (1917), and Victoria Hosp. Assn. v. All Persons, 169 Cal. 455, 147 P. 124 (1915); Firth v. Los Angeles Pac. Land Co., 28 Cal.App. 399, 152 P. 935 (1915); Reclamation Dist. v. Van Loben Sels, 145 Cal. 181, 78 P. 638 (1904). The distinction between remainder and reversion was not preserved in some early cases, Hughes v. Scott, 47 Cal.App. 264, 190 P. 643 (1920); Skellenger v. England, 81 Cal.App. 176, 253 P. 191 (1927); Lowe v. Ruhlman, 67 Cal.App.2d 828, 155 P.2d 671 (1945), which

leave the distinction unclear. See also Powell, "Determinable Fees," 23 Col. L.Rev. 207, 231 (1923); Agnor, "Creation of Defeasible Fees," 15 Ga. B.J. 20 (1952); Restatement of the Law of Property (1936) §§ 44, 45; Powell, "Law of Property," ¶¶ 187-8; Annot.131 A.L.R. 712; 30 Cal. Jur. 3d Estates s. 12 et. seq.

18. Civil Code § 789 requires written notice to every tenant at will, however the tenancy is created, and denies an actual right to enter and exclude the present possessor. Note, "Estates at Law and in Equity," 6 Cal. L.Rev. 382 (1918).

19. Dunham, "Possibilities of Reverter and Powers of Termination -- Fraternal or Identical Twins?" 20 U. Chi. L.Rev. 215 (1953); Comment, "Equivalence of the Right of Reentry and the Right of Reverter," 18 Ohio St. L.J. 120 (1957), Comment, "Proposed Restrictions on the Possibility of Reverter and the Right of Entry," 34 Miss. L.J. 176 (1963); the Virginia Supreme Court refused to recognize any distinction between the possibility of reverter and the power of termination in Sanford v. Sims, 192 Va. 644, 66 S.E.2d 495 (1951).

20. Payne, "The Alabama Law Institute's Land Title Acts Project, Part I," 24 Ala L.Rev. 175 (1971). The Alabama Law Institute was founded in 1967 and given as its first major project the reformation of Alabama titles law.

21. McMurray, "A Review of Recent California Decisions in the Law of Property," 9 Cal. L.Rev. 447, 456 (1921) and Turrentine, "Suggestions for Revision of the California Civil Code Regarding Future Interests," 21 Cal. L.Rev. 1, 9-14 (1932) both advocate this. Strong v. Shatto, 45 Cal.App. 29, 187 P. 159 (1919) made it clear that the Rule did not apply to reverters and reentries in California.

22. See the discussion of the Kentucky statute in the following section.

23. E.g., Conn. Gen. St. § 45-97 (1979); Ill. S-H Ann. Ch. 30 §§ 37b-h (1969) discussed in 43 Ill. L.Rev. 90 (1949) and 36 Ill. B.J. 263 (1948); Me. Rev. St. Att. T.33 § 103, 104 (1964); Minn. St. Ann. § 500.20 (1947); R.I. G.L. 34-4-19 (1969);

Fla. St. Ann. § 689.18 (1969) turns reverter and forfeiture provisions of unlimited duration in any plat or deed into covenants after 21 years. See discussion at 6 Miami L.Q. 162 (1952). Iowa Code Ann. § 614.24 (1949) provides that reversions, reverter interests and restrictions expire after 21 years unless a proper claim is recorded within the 21 years or prior to July 4, 1966. The statute was discussed and upheld, Presbytery v. Harris, 226 N.W.2d 232 (Iowa 1975), cert. den. 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed. 48 (1975). For a decision as to constitutionality of such statutes, see Hiddleston v. Nebraska Jewish Educational Society, 186 Neb. 786, 186 N.W.2d 904 (1971).

24. Aigler, "Clearance of Land Titles -- A Statutory Step," 44 Mich L.Rev. 45 (1945); Basye, Clearing Land Titles 261 (1970, Supp. 1977); Barnett, "Marketable Title Acts -- Panacea or Pandemonium," 53 Cornell L.Rev. 45 (1967); Payne, "In Search of Title," 14 Ala. L.Rev. 11 (1961), 14 Ala. L.Rev. 278 (1962); Aigler, "Marketable Title Acts," 13 Miami L.Q.

47 (1958); Am. L. Pr[illegible]. § 4.115 (1954). For a [illegible]st of state statutes, see Simes & S., Future Interests, § 1963 (2d ed. 1956). See also Basye, "Streamlining Conveyancing Procedure," 47 Mich. L. Rev. 1097 (1949); Aigler, "Title Problems in Land Transfer," 24 Mich. S.B.J. 202 (1945).

25. Aigler, "Marketable Title Acts," 13 Miami L.Q. 47 (1958); _____, Amendments of the Forty Year Marketable Title Act," 26 Mich. S.B.J. 23 (1947).

26. Barnett, "Marketable Title Acts-- Panacea or Pandemonium?" 53 Cornell L. Rev. 45 (1967).

27. The older marketable title acts, particularly those pre-Model MTA, were often phrased in terms like those of statutes of limitations. Modern acts clearly cut off titles of interests not preserved by filing before the statutory period runs. Note, "The Minnesota Marketable Title Act: Analysis and Argument for Revision," 53 Minn. L. Rev. 1004 (1969), in which the author gives Ill S-H Ann. St. Ch. 83 §§ 12.1 - .4 (1969) and Wis. St. Ann. § 893.15 (1966) as examples of the statutes of limitation type acts. The Iowa statute mentioned, Iowa Code Ann. §§ 614.17 - .20 (1949), has since been changed by that state's adoption of the Model Marketable Title Act in 1969.

28. But the Kansas, Iowa and Nebraska MTAs except future interests from the operation of the acts, thus minimizing a good deal of the intended effect of such acts. Note, "Kansas' Marketable Record Title Act," 13 Washburn L.J. 33 (1974).

29. Aigler, "Constitutionality of Marketable Title Acts," 50 Mich. L.Rev. 185 (1951) and "A Supplement to 'The Constitutionality of Marketable Title Acts' -- 1951-1957," 50 Mich. L.Rev. 185 (1951); and see Chicago & Northwestern Ry. Co. v. City of Osage, 176 N.W. 2d 788 (Iowa 1970); Hiddleston v. Neb. Jewish Education Society, 186 Neb. 786, 186 N.W.2d 904 (1971), noted 38 Mo. L.Rev. 140 (1973), 5 Creighton L.Rev. 140 (1972). It is worth noting that statutes drafted in the form of the uniform or model acts have never been found unconstitutional. For examples of what happens to a statute drafted without much attention to constitutional questions, see Biltmore Village, Inc. v. Royal, 71 So.2d 727, 41 A.L.R.2d 1380 (Fla. 1954); Bd. of Education v. Miles, 259 N.Y.2d 129, 259 N.Y.S.2d 129, 207 N.E.2d 181 (1965). Cf. Trustees v. Batdorf, 6 Ill.2d 111 (1955). Note, "Possibilities of Reverter: Constitution-

ality of Retroactive Limitation," 54 Mich. L. Rev. 863 (1956).

30. Wunderlich, "Land Ownership: A Status of Facts," 19 Nat. Res. J. 97 (1979) states that the American real estate industry at that time spent over eight billion dollars a year in transactions costs, "much of which is spent to determine who owns the land." (at 113). Report of the A.B.A. Comm. for Improvement of Land Data (CULDATA), 11 Real Prop., Prob. & Tr. L. J. 343 (1976)

31. Hicks, "The Oklahoma Marketable Record Title Act," 9 Tulsa L.J. 68 (1973).

32. Barnett, "Marketable Title Acts -- Panacea or Pandemonium?" 53 Cornell L.Rev. 45 (1967). All authors cited in this section favor the acts.

33. Cribbet, "Conveyancing Reform," 35 N.Y.U.L.Rev. 1291 (1960).

34. The Florida Supreme Court, Wilson v. Kelley, 226 So.2d 123 (2d D.C.A. Fla. 1969) held that the owner under a quitclaim deed was not entitled to claim clear title under Florida's Marketable Title Act, and the same appears to be true in most Model MTA states. Illinois is contra, Exchange Nat'l Bank v. Lawndale Nat'l Bank, 41 Ill.2d 316, 243 N.E.2d 193 (1969). These developments led the drafters of the Uniform Simplification of Land Transfers Act to write in provisions making the form of deed used in conveyancing irrelevant to the operation of the marketable title sections of the uniform act. This element is discussed in the analysis of the Uniform Act, below. As to possible California problems with the quitclaim deed, see Note, "Recording and Registry Acts: Sufficiency of the Quitclaim Deed in the Chain of Title," 18 Cal. L.Rev. 202 (1930); California Civil Code §§ 1213, 1214 make a quitclaim deed a valid conveyance under the recording acts.

35. Aiken, "Proposed Title Legislation," 50 Marq. L.Rev. 16 (1966).

36. Aigler, notes 1, 2, 4 supra.

37. Barnett, note 32 supra.

38. Comment, "The Ohio Marketable Title Act," 23 Clev. St. L.Rev. 337 (1974), an extensive discussion of the Ohio Act and the Model MTA on which it is based.

39. Payne, "In Search of Title," 14 Ala. L.Rev. 11 (1961), 14 Ala. L.Rev. 278 (1962) says that marketable title act periods from 17 to 75 years were considered by the drafters of the Model MTA.

40. Comment, "Marketable Record Title Acts: Wild, Forged and Void Deeds as Roots of Title," 22 U. Fla. L.Rev. 669 (1970). Cf. Readquarth v. State, 38 Ohio St. 2d 77, 310 N.E.2d 581 (1974); Allen v. Farmer's Union, 538 P.2d 204 (Okla. 1975); Illinois and Wisconsin appear to have indigenous MTAs.

41. Crane, "The Law of Property in England and the United States," 36 Ind. L.J. 282 (1961).

42. Payne, "In Search of Title," 14 Ala. L.Rev. 11 (1961), 14 Ala. L.Rev. 278 (1962).

43. The following statutes appear to require that the grantee be in possession to have the advantage of the statute: Neb. Rev. St. § 76-288 (1943 Supp. 1978); N.D. Cent. C. § 47-19A-01 (1943 Supp. 1979); S.C. Code L. § 51.16B01 (1976).

44. Comment, "Soldiers and Sailors Civil Relief Act of 1940-- Effect on Certainty of Land Titles," 24 Mo. L. Rev. 101 (1959). The article discusses among other cases Margraf v. County of Los Angeles, 144 Cal. App.2d 647, 301 P.2d 490 (1956).

45. Note, "Marketability of Title: Violation of Building Code As Encumbrance," 33 Wis. L. Rev. 641 (1958).

46. Mich. C.L.A. 565.104 (West 1967); Neb. Rev. St. § 76-298(1c) (1943 Supp. 1978); N.D. Cent. C. § 47-19A-11(1c)(1943 Supp. 1960); Ohio R.C.A. § 5301.53(f)(Page 1953 Supp. 1970); S.D. Comp. Laws § 51.16B10 (1967); several other marketable title states have interpreted the exception for the mortgagee's claim as extending to the claim of any land secured creditor.

47. Barnett, note 32 supra.

48. Comment, "Remedial Title Legislation for Wyoming," 7 Land and Water L. Rev. 561 (1972); Smith, "Developments of Oil and Gas Lands," 43 Tex. L. Rev. 129, 147 (1964); Bienenfeld, "Dormant Oil and Gas In-

terests in Land,' 10 Wayne L. Rev. 219, 233 (1963).

49. Northern Pac. Ry. Co. v. Advance Realty Co., 78 N.W. 2d 705 (N.D. 1956); Davis, "Some Practical Aspects of Oil and Gas Title Examinations in Nebraska," 34 Neb. L.Rev. 1, 18-20 (1955). As to passage of title in probate, see McGovern, "Facts and Rules in the Construction of Wills, 26 U.C.L.A. L.Rev. 285 (1978); Comment, "Effect of Probate Decrees of Distribution on Future Interests," 18 Wash. & Lee L.Rev. 305 (1961); Hazen, "Probate Title Problems and Code Provisions," 13 Cal. St. B.J. No. 9, 45 (1938), which discusses Code of Civil Procedure § 1723; Hansen v. Union Savings Bank, 148 Cal. 157 (1905) and King v. Pauly, 159 Cal. 549 (1911). And see 3 Am. Law Prop. § 14.43 (1954); Annot. 48 A.L.R. 1035 (1927) and 86 A.L.R. 400 (1933).

50. Simes, "Restricting Land Use in California by Rights of Entry and Possibilities of Reverter," 13 Hastings L.J. 293 (1962). Prof. Simes refers the reader to 7 Hastings L.J. 101 (1955) for a discussion of the California cases. Simes' treatment is definitive, covering every aspect of the treatment of reverter and reentry under California law.

51. Mitchell v. Cheney Slough Irr. Co., 57 Cal.App.2d 138, 134 P.2d 34 (1943)

52. Young v. Cramer, 38 Cal.App.2d 64, 100 P.2d 523 (1940).

53. Garvey, "Revocable Gifts of Legal Interests in Land," 54 Ky. L.J. 19 (1965), citing Lowe v. Ruhlman, 67 Cal. App.2d 828, 155 P.2d 671 (1945); Tennant v. John Tennant Mem. Home, 167 Cal. 570, 140 P. 242 (1914). See also note 67 infra.

54. Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931); Hirsch v. Hancock, 173 Cal.App.2d 745, 343 P.2d 949 (1959); Atkins v. Anderson, 139 Cal.App.2d 918, 249 P.2d 727 (1956); Townsend v. Allen, 114 Cal.App. 291, 250 P.2d 292 39 ALR 2d 1108 (1952), noted in 42 Cal. L.Rev. 194 (1954); Wedum-Aldahl Co. v. Miller, 18 Cal.App. 745, 64 P.2d 762 (1937); Forman v. Hancock, 3 Cal.App.2d 291, 39 P.2d 249 (1934); Letteau v. Ellis, 122 Cal.App.584, 10 P.2d 496 (1932); Wilshire Oil Co., v. Star Petroleum Co., 93 Cal.App. 437, 269 P. 722 (1938), are cases cited by Simes, note 1 supra, at 308, as cases in which the defense was effective. Simes also points out

other cases in which the principle was recognized, but held inapplicable under the circumstances of each case.

55. Turrentine, "Suggestions For Revision of Provisions of the California Civil Code Regarding Future Interests," 21 Cal. L.Rev. 1, 8 (1932).

56. E.g., Conn. Gen. St. Ann. §§ 45-97 and -98 (West 1978), Md. Real Prop. Code Ann. §§ 6-101 to -105 (Michie 1974); Fla, St. Ann. § 689.18 (West 1969) and see Webster, "The Quest for Clear Land Titles -- Whither Possibilities of Reverter and Rights of Entry," 42 N.C. L.Rev. 817 (1964); Simes & S., Future Interests § 1994 (2d ed. 1956); Annot. "Statutes re Limiting Future Interests," 41 A.L.R.2d 1384.

57. See discussion above on judicial treatment of reverter and reentry.

58. E.g., Ryman, "The Iowa 'Stale Uses and Reversions' Statute: Parameters and Constitutional Limitations," 18 Iowa L. Rev. 59 (1969).

59. Similar statutes relating to "merely nominal" conditions are Ariz. Rev. St. Ann. §33-436 (1956); Mich. C. L. Ann. §554.46 (West 1948 Supp 1967); Wis. St. Ann. §230.46 (West 1957).

60. Dukeminier, "Kentucky Perpetuities Law Restated and Reformed," 49 Ky. L.J. 2 (1960).

61. Guenther, "Legislating Limitation of Reverter and Forfeiture Provisions in Conveyances and devises of Land-- A Proposed Statute for Kansas," 15 Kan. L. Rev. 346 (1967).

62. Webster, "The Quest for Clear Land Titles-- Whither Possibilities of Reverter and Rights of Entry," 42 N.C. L. Rev. 819 (1964).

63. Fratcher, "A Modest Proposal for Trimming the Claws of Legal Future Interests," 1972 Duke L.J. 517.

64. Maloney, "Comments on Minnesota Laws, 1943, Chapter 529," 30 Minn. L. Rev. 32 (1945) details the entire sequence and discusses the legislation. He tells of a woman, sole "heir" under her father's will, which father had granted away a good part of

southern Minneapolis in fee simple on condition subsequent; she sold quitclaims to clear title at $25 each every time the land changed hands.

65. Goldstein, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land," 54 Harv. L. Rev. 248 (1940); Note, "Right of Re-Entry for Condition Broken: Enforceability," 42 Cal. L. Rev. 194 (1954).

66. Brown, "Marketability of Land Titles as Affected by Restrictive Covenants," 13 Baylor L. Rev. 323 (1961); Clark, "Limiting Land Restrictions," 27 A.B.A.J. 737 (1941). Judge Clark, pre-MTA, suggests limiting restrictive covenants to thirty years or during the time they remain of substantial utility and benefit to the owners. He excludes tract covenants, but includes reverter and reentry conditions.

67. Shields v. Bank of America, 225 Cal.App.2d 330 (1964); Arrowhead Mutual Service Co. v. Faust, 260 Cal.App.2d 567 (1968); 2 Ogden's Revised Cal. Real Prop. Law 1146 (1975). Yet, an early case flatly refused to enforce "covenants phrased as

conditions," Wiseman v. McNulty, 25 Cal. 230, 239 (1864). This case sets forth the general American view. W.F. White Land Co. v. Christenson, 14 S.W.2d 369 (Tex. Civ. App. 1928); Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889) and see Kent v. Koch, 166 Cal.App.2d 579, 333 P.2d 411 (1958) but cf. Finchum v. Vogel, 194 So.2d 49 (Fla. D.C.A. 1967). Comment, Removing Old Restrictive Covenants," 15 Kan. L. Rev. 582 (1967) and Goldstein, op. cit.

68. 30 Cal.Jur.3d Estates §39 states that California courts construe deed language as creating a covenant rather than a condition, if ambiguity exists, citing Savanna School District v. McLeod, 137 Cal.App.2d 491, 290 P.2d 593 (1955); Anderson v. Palladine, 39 Cal.App. 256, 178 P. 553(1918); and state further that the courts have distinguished a condition for an initial or short term use from a condition meant to be permanent, citing Booth v. Los Angeles County, 124 Cal.App. 259, 12 P.2d 72 (1932), and the Savanna case. For a recent summary, see Note, "Covenants and Equitable Servitudes in California," 29 Hastings L.J. 545 (1978).

69. Guenther, "Legislative Limitation of Reverter and Forfeiture Provisions in Conveyances and Devises of Land--A Proposed Statute for Kansas," 15 Kan. L. Rev. 346 (1967) is an extensive review of statutes re restrictive covenants in the various states.

70. A California court in deciding on a remedy for breach of a real covenant may withhold injunctive relief where trivial or inconsequential damages have resulted from the violation. Biagini v. Hyde, 3 Cal.App.3d 877, 83 Cal. Rptr. 875 (1970); 3 Witkin, Summary of California Law, Real Property §§ 2076, 2084 (1973 Supp. 1978). California's real covenant statutes, Civil Code §§1460-1468 still leave much to be desired, 9 S. Clara L. Rev. 285 (1969) despite the 1968-69, 1973 revisions.

71. See e.g. N.Y. Real Prop. Actions Law §1951 (McKinney 1939 Supp. 1963).

72. A complicating factor is that most statutes setting a fixed term of years for the duration of restrictive covenants

do not distinguish between covenants applicable to commercial tracts and parcels of land transferred in occasional sale on the one hand, and tract housing developments on the other. Many professional writers recommend an exception from such statutes and marketable title acts for housing tract restrictive covenants. Deed provision for such covenants to last a certain number of years and then automatically renew themselves over and over again is required by the V.A. and F.H.A. authorities as to tracts accepted for mortgage insurance or loan guarantee. Siegan, "Non-Zoning in Houston," 13 J. Law & Econ. 71, 81 (1970).

73. Healey, "Frequently Recurring Title Problems," 30 L.A. Bar Bull. 105, 135, 345 (1955). James F. Healey was Assoc. Counsel of Title Insurance and Trust Co. of Los Angeles at the time his article was prepared. It is extensive and carefully written, and should be reviewed if curative legislation is being considered, or title standards under consideration; Morris, "Curative Statutes of Colorado Respecting Titles to Real Estate," 26 Dicta 281, 321 (1949), wherein Morris brings his 1939 Dicta

article on the subject up to date in an extensive and expert analysis; Day, "Curative Acts and Limitations Acts Designed to Remedy Defects in Florida Land Titles I-IV," 8 U. Fla. L. Rev. 365 (1955) wherein Day examines the thirteen Florida curative statutes adopted 1873-1949; Helliwell, "Suggested Statutory Change for the Improvement of Title to Land in Florida," 12 Fla. L.J. 245 (1938); Rogers, "Florida Curative Statutes," 22 Fla. L.J. 153 (1948).

74. Comment, "Enhancing the Marketability of Land: The Suit to Quiet Title," 68 Yale L.J. 1245 (1959); Herbert, "What Every Lawyer Should Know About Suits to Quiet Title," 43 Ill. B.J. 344 (1955); Weil, "Some 'Bewares' in Title Examination," 21 Ala. Lawyer 341 (1960); Mosburg, "Statutes of Limitations and Title Examination," 13 Okla. L. Rev. 125 (1960). This article is noteworthy for its examination of title problems confronting the oil, gas and mineral lawyer; Note, "Survey of the Doctrine of Marketable Title in New England," 36 Boston U.L. Rev. 100 (1956); Martz, "Survey of Title Irregularities,"

35 U. Colo. L. Rev. 21 (1962); Comment, "Concerning Examination and Evaluation of Titles to Real Property in Virginia," 1 Wm.&M. L. Rev. 139 (1957).

75. See Iowa Title Stds. §4.1 in Comment, "The Iowa Title Standards," 2 Drake L. Rev. 82 (1953); see also Woodcock, "He Died Intestate And," 56 Dick. L. Rev. 402 (1952).

76. Editorial, 24 Mich. S. B.J. 365, 369-70 (1953).

77. Payne, "The Why, What and How of Uniform Title Standards, 7 Ala. L. Rev. 25 (1954); Payne, "Increasing Land Marketability Through Uniform Title Standards," 39 Va. L. Rev. 1 (1953); "Title Standards," 12 Conn. B.J. 100 (1938) sets out the entire set of Connecticut standards; A.B.A. Section of Real Prop., Prob. & Tr. Law, "Report of the Committee on Standards for Title Opinions," 130 (1939). The A.B.A. recommendations were adopted by Nebraska in 1939 and amended in 1947, Neb. Rev. St. §§76-601, 76-644 (1943 Supp. 1976). Experience in particular states is discussed in "Title Standards for Florida-- Uniform Title Standards," 33 Fla. B.J. 218 (1959), setting out the

Florida Title Standards verbatim; Hayes and Teske, "The Iowa Title Standards," 2 Drake L. Rev. 76 (1953) and 3 Drake L. Rev. 36 (1954), with sequel, "Iowa Title Standards III," 3 Drake L. Rev. 87 (1954). For text discussion, see Patton, Land Titles §501 (1957).

78. California statutes relating to recording will be found at Civil Code §§ 1107, 1213-18 and Gov. Code §§ 27201-06, 27230-40, 27243-44, 27247-51, 27264-65, 27280-90, 27292-96, 27320-21.5, 27322-30, 27333-35, 27257, 27288.1, 27297; and see Marshall, "An Historical Sketch of the American Recording Acts," 4 Clev.-Mar. L. Rev. 56 (1955).

79. Note 19, supra.

80. Mann v. Mann, 141 Cal. 326, 74 P. 995 (1903); Pryor v. Winter, 147 Cal. 554, 82 P. 202 (1905); Akley v. Bassett, 189 Cal. 625, 209 P. 576 (1922); Newport v. Hatton, 195 Cal. 132, 231 P. 987 (1924); Thompson v. Pa. Elec. R. Co., 203 Cal. 578, 265 P. 220 (1928); see also Green v. Brown, 37 Cal.2d 391, 232 P.2d 487 (1951). Note, "Remedy of Remainderman When Life

Tenant Has Deeded Property Without Mention of the Life Estate," 16 Cal. L. Rev. 348 (1928). The author analyses the California cases, e.g. Newport v. Hatton, 195 Cal. 132, 231 P. 987 (1924).

81. Puccetti v. Girola, 20 Cal.2d 574, 128 P.2d 13 (1942); Note, 41 Mich. L. Rev. 980 (1943). Gov. Code §27321.5 provides that the address to which tax and other notices are to be sent is to be noted across the bottom of the first page of deeds, instruments of conveyance, deeds of trust and mortgages.

82. Payne, "The Mobile Strip Index,: 15 Ala. L. Rev. 19 (1962) describes a form of tract indexing and discusses other forms of tract indexing; Cribbet, "Conveyancing Reform," 35 N.Y.U.L. Rev. 1291, 1314 (1960), states that only a single tract index will do. Cross, "Weaknesses of the Present Recording System," 47 Iowa L. Rev. 245 (1962); Johnson, "Purpose and Scope of Recording Statutes," 47 Iowa L. Rev. 231 (1962); Fiflis, Land Transfer Improvement," 38 U. Colo. L. Rev. 431 (1966); the entire issue, 47 Iowa L. Rev. 221 (1962), is devoted to a symposium on recording and American recording statutes. California

statutes are discussed at 228, 233; Cross, "The Record 'Chain of Title' Hypocrisy," 57 Colum. L. Rev. 787 (1957).

83. Burke, "Governmental Intervention in the Conveyancing Process," 22 Am. U. L. Rev. 239 (1973), says that Congress is about to simplify recording through the use of computers, self-indexing provisions, etc. Basye, "A Uniform Land Parcel Identifier," 22 Am. U. L. Rev. 251 (1973), is a discussion of various methods of tract indexing. There is a good deal of discussion of a thoroughly modern computerized tract indexing system in this symposium issue. See e.g. Leary & Blake, "Twentieth Century Real Estate Business and Eighteenth Century Recording," 22 Am. U. L. Rev. 275 (1973); Wunderlich, "Public Costs of Land Records," 22 Am. U. L. Rev. 369 (1973); Maggs, "Automation of the Land Title System," 22 Am. U. L. Rev. 369 (1973); Jensen, Computerization of Land Records by the Title Industry," 22 Am. U. L. Rev. 393 (1973) discusses techniques used by private title companies and abstractors; Comment, "A Facelifting for the Recorder of Deeds," 22 Am. U. L. Rev. 639 (1973).

84. Cook, "Land Law Reform: A Modern Computerized System of Land Records," 38 Cin. L. Rev. 385 (1969).

85. Note, "Estoppel by Deed: Effect of a Discharge on After-Acquired Title," 25 Cal. L. Rev. 360 (1937); Comment, "The Doctrine of After-Acquired Title," 11 S.W. L.J. 217 (1957).

86. See also Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907); Williams, "Restrictions on the Use of Land," 27 Tex. L. Rev. 419, 423 (1949); Galen, "Spencer's Case - Covenants Running With the Land -- The Requirement That The Word 'Assigns' Be Used," 28 Ore. St. L. J. 120 (1957).

87. 6 Co. Rep. 16B (K.B. 1599). See Am. L. Prop. §§22.12, 22.15-22.28 (1954); Powell, Real Property para. 355 (1968); Simes & S., Future Interests §§691-702 (2d ed 1956).

88. For an excellent discussion of the First Resolution, see 5 Am. L. Prop. 284-313 (1954).

89. Casner, "Construction of Gifts 'To A and His Children' (Herein The Rule in Wild's Case)" 7 U. Chi. L. Rev. 438 (1940); Note, "Judicial Construction of 'To A and His Children', "75 W.

Va. L. Rev. 296 (1973); Link, "The Rule in Wild's Case in North Carolina," 55 N.C.L. Rev. 751 (1977); Annot."Grant or Gift to One and His Children," 161 A.L.R. 647 (1946); Restatement of the Law of Property (1940) §283; Simes & S., Future Interests §696 (2d ed. 1956).

90. Uniform Property Act §13, 9 ULA 254 (1942), withdrawn 1966; Restatement of the Law of Property §283 (1940); 3 Calif. Annot. 44 (1950).

91. This is stated to be the usual law in respect to any transfer to A and his children, the transfer making them co-tenants. 28 Am. Jur. 2d, Estates §§ 13, 69-71.

92. Link, "The Rule in Wild's Case in North Carolina," 55 N.C.L. Rev. 751, 830 (1977).

93. Payne, "Continuity and Identity in Land Title Searches -- A Perpetual Self-Indexing System," 16 Ala. L. Rev. 9 (1963).

94. Note, "Grantee's Address Requirements for Deeds," 30 Mo. L. Rev. 164 (1965); Basye, Clearing Land Titles §235

(2d ed. 1970 Supp. 1977).

95. For suggestions for change, see Simes, "Fifty Years of Future Interests," 50 Harv. L. Rev. 749 (1937), Turrentine, "Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests," 21 Cal. L. Rev. 1 (1932); Youngs, "Future Interests -- The Problem of the Life Tenant Who Lives 'Forever'," 5 N. Ky. L. Rev. 3 (1978); Fratcher, "A Modest Proposal For Trimming The Claws of Legal Future Interests," 1972 Duke L.J. 517; Simes, "Future Interests in Chattels Personal," 39 Yale L.J. 771 (1930).

96. Waggoner, "Reformulating the Structure of Estates, A Proposal for Legislative Action," 85 Harv. L. Rev. 729 (1972).