#H-405 8/12/81

Memorandum 81-62

Subject: Study H-405 - Marketable Title (Reverter Act--staff draft)

Attached to this memorandum is a staff draft of a tentative recommendation dealing with rights of entry and possibilities of reverter as clogs on land titles. This memorandum briefly recapitulates the contents of the tentative recommendation draft. The draft contains citations and more detailed reasoning.

Rights of entry and possibilities of reverter are employed in land grants typically to enforce use restrictions on the land--e.g., to the grantee in fee so long as alcoholic beverages are not sold on the property and if alcoholic beverages are sold, the property reverts to the grantor and his heirs. The theoretical difference between a right of entry and a possibility of reverter is that the grantor must exercise a right of entry to make the reversion effective whereas a possibility of reverter operates automatically upon breach of the condition.

Because the law disfavors forfeitures, possibilities of reverter tend to be strictly construed as rights of entry, and the restrictions that both of these reversionary interests are designed to enforce tend to be construed as covenants rather than conditions. A covenant is enforceable by injunction or damages, as opposed to a condition which is enforceable by forfeiture of the property.

The possibility of reverter is not even recognized as an interest in some American jurisdictions and was not recognized in California until 1935. The staff draft abolishes possibilities of reverter and groups them together with rights of entry, which are called by the more technically accurate name of powers of termination. Kentucky has similar legislation, drafted by Professor Dukeminier.

Although some legal scholars have also called for abolition of the right of entry or power of termination, the staff draft does not go this far. Reversionary interests serve a number of different functions that would not be satisfied by an injunction or damages. A trust might be able to accomplish some of these functions, but a property owner should be able to make a conditional grant of real property.

The major problem with these reversionary interests is that they are not subject to the Rule Against Perpetuities and so cloud title

forever. A number of jurisdictions by statute have limited their duration either by making the Rule Against Perpetuities applicable or by specifying a maximum duration. Professor Dukeminier has written to the Commission suggesting a 21-year maximum duration consistent with the treatment of executory interests under the Rule Against Perpetuities.

The problem with a maximum duration (or with the Rule Against Perpetuities) is that it may be desirable to restrict land use for longer periods--say for public use or for environmental preservation. The staff draft resolves this difficulty in the same manner several other jurisdictions have--the power of termination is good for up to 30 years and can be renewed for periods of 30 years at a time by recording a notice of intent to preserve the power. This will get rid of powers automatically in which no one has an interest and will enable a person who has an interest in the power to make sure it remains effective. It will also keep record ownership of the power current in case the fee owner needs to find the holders of the power in order to assemble clear title. It will not, however, affect "conservation easements" that may be made perpetual pursuant to Civil Code Sections 815-816.

What about the obsolete power of termination that no longer serves a useful function and simply impairs marketability, but which has another 10 or 15 years to run before the 30-year period expires? Existing California case law refuses to enforce obsolete powers of termination on the basis of changed conditions or circumstances that render the land use restriction meaningless. The staff believes this is an important concept in effectively controlling obsolete powers and has codified this rule in the draft; a number of other jurisdictions also recognize by statute the doctrine of changed conditions.

There is some uncertainty in the law over the period within which a power of termination must be exercised after breach of a condition. Several California cases make reference to exercise of the power "within a reasonable time." This uncertainty is not satisfactory. The ordinary five-year statute applicable to real property actions seems appropriate in this case and the staff draft makes express provision for a five-year limitation period. Other jurisdictions have enacted similar legislation.

Respectfully submitted,

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#H-405 8/12/81

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER

Introduction

California recognizes three types of future interest in a grantor of property--the reversion following a grant of an estate less than fee and the possibility of reverter and the right of entry for condition broken following a grant of a fee estate.

The grantor has a reversion following the grant of an estate less than fee that commences in possession upon the termination of the estate granted.[1] Thus, for example, the grant of a life estate or a term of years creates a reversion in the grantor upon the termination of the estate or term.[2]

If an estate is granted in fee but the duration of the estate is subject to a special limitation, a fee simple determinable is created; the grantor retains a possibility of reverter. When the event that limits the duration of the estate occurs, the estate terminates and there is a reversion to the grantor. The reversionary interest is called a possibility of reverter because the event upon which the limitation depends may never occur.[3] No particular words are required to create this estate, but it is necessary that the language show that the grantor intended that the fee estate automatically expires on the occurrence of the event.[4]

If an estate is granted in fee subject to a condition subsequent, the grantor is said to retain a right of entry upon breach of the condition.

1. Civil Code § 768.

2. 3 B. Witkin, Summary of California Law, Real Property § 242 (8th ed. 1973).

3. Alamo School Dist. v. Jones, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

4. McDougall v. Palo Alto Unified School Dist., 212 Cal. App.2d 422, 28 Cal. Rptr. 37 (1963).

Exercise of the right of entry terminates the fee simple, hence the right of entry is sometimes classified as a power of termination rather than a reversionary interest.[5] It is distinguished from the possibility of reverter by the fact that it is not a limitation upon the estate granted--not a measure of its duration--but a condition upon the occurrence of which the granted estate could be cut off by entry of the grantor.[6]

Whether particular language in a grant creates a possibility of reverter or a right of entry is a fine point. A classic example is that a conveyance in fee simple "until St. Paul's falls" or "as long as St. Paul's stands" creates a fee simple determinable with possibility of reverter, whereas a conveyance in fee simple "upon condition that, if St. Paul's falls, the estate shall terminate" creates a fee simple on condition subsequent with right of entry for condition broken.[7] In doubtful cases the preferred construction, consistent with the general disfavor of forfeitures, is for a fee simple on condition subsequent (which requires an act by the grantor to terminate) rather than a fee simple determinable (which ends on the happening of the event without any act by the grantor).[8] The possibility of reverter is recognized only where there is no ambiguity and no doubt as to the intent of the creating instrument.[9]

Comparison of Right of Entry with Possibility of Reverter

The right of entry and the possibility of reverter are closely related reversionary interests distinguished primarily by technicalities in the wording of the creating instrument. The two interests are so

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5. Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 74 P.2d 738 (1937).

6. Alamo School Dist. v. Jones, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

7. Alamo School Dist. v. Jones, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

8. Civil Code § 1442; 3 B. Witkin, Summary of California Law, Real Property § 189 (8th ed. 1973).

9. 2 H. Miller & M. Starr, Current Law of California Real Estate §§ 15:6, 18 (rev. 1977).

similar in effect that there is no substantial difference between the two for most purposes.[1] In fact it was not certain until the end of the nineteenth century that American law included the possibility of reverter, and California recognized this interest only in the twentieth century.[2]

The critical difference between the right of entry and the possibility of reverter is that a right of entry requires an act of the holder of the right in order to terminate the preceding fee estate, whereas a possibility of reverter terminates the preceding fee estate automatically. The practical implications of this distinction between the effect of a right of entry and a possibility of reverter are not clear, however.

Although technically a right of entry permits the holder of the right to take possession, the holder must exercise the right by giving notice and making demand.[3] Upon exercise of the right of entry the fee owner must reconvey the property by grant deed, acknowledged for recording.[4] If the fee owner does not reconvey or give up possession, exercise must be made effective by action for possession or to quiet title;[5] actual entry on the land is unnecessary.[6] The basic five-year statute of limitation apparently applies to the action.[7] However, it has been stated that the statute of limitation does not apply and the person

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1. Dunham, Possibilities of Reverter and Powers of Termination--Fraternal or Identical Twins? 20 U. Chi. L. Rev. 215 (1953).

2. Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935); Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849 (1937). See discussion in Ferrier, Determinable Fees and Fees Upon Conditions in California, 24 Cal. L. Rev. 512 (1936).

3. Civ. Code § 791 (reentry may be made after right has accrued, upon three days' notice); see also Civil Code § 793 (action for possession may be maintained after right to reenter has accrued without notice).

4. Civil Code § 1109.

5. Lincoln v. Narom, 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970); 4 H. Miller & M. Starr, Current Law of California Real Estate § 25.22 (rev. 1977).

6. Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935 (1915); Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 294 (1962); 2 A. Bowman, Ogden's Revised California Real Property Law § 23.18 (1975).

7. Code Civ. Proc. §§ 319-320; 2 A. Bowman, Ogden's Revised California Real Property Law § 23.32 (1975).

entitled to enforcement has a "reasonable time" within which to exercise the right of entry.[8]

Likewise, although a possibility of reverter is said to take effect automatically, as a practical matter a judicial proceeding is necessary to make it effective.[9] The basic five-year statute also apparently applies to an action to enforce a possibility of reverter.[10] At least, it seems likely that, absent litigation by the holder of the reverter, the person in possession of the property will take title after five years by adverse possession.[11] However, there are no California cases on this point. In at least one case the holders of a possibility of reverter were allowed to establish their title 19 years after the reversion, without discussion of the statute of limitation.[12]

Abolition of Possibility of Reverter

The possibility of reverter is an unnecessary estate in property law. It serves the same functions as the right of entry and there is no practical difference of any substance between the two. Whether an instrument creates a possibility of reverter or a right of entry is determined by technicalities in the language creating the interest, and there is a strong constructional preference for a right of entry. The possibility of reverter is disfavored in the law because of its automatic forfeiture features and only recently has been given legal recognition.

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8. Lincoln v. Narom Development Co., 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970); 3 B. Witkin, Summary of California Law, Real Property § 188 (8th ed. 1973); 2 H. Miller & M. Starr, Current Law of California Real Estate § 15:5 (rev. 1977). This rule appears to be based upon a waiver theory. See, e.g., City of Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951); Goodman v. Southern Pacific Co., 143 Cal. App.2d 424, 299 P.2d 321 (1956).

9. See discussion in MacEllven, Private Restrictions and Controls, California Land Security and Development § 24.13 (Cal. Cont. Ed. Bar 1960).

10. Cf. 2 A. Bowman, Ogden's Revised California Real Property Law § 23.25 (1975) (no distinction made); Highland Realty Co. v. City of San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956) (statutory reverter).

11. Dunham, Possibility of Reverter and Powers of Termination--Fraternal or Identical Twins? 20 U. Chi. L. Rev. 215, 229 (1953).

12. McDougall v. Palo Alto Unified School Dist., 212 Cal. App.2d 422, 28 Cal. Rptr. 37 (1963).

Application of statutes of limitation to it is uncertain, and it cannot be ascertained from the record whether a forfeiture may have occurred in the remote past. The interest has been severely criticized and its abolition advocated.[1] "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 entry."[2]

The Law Revision Commission recommends that the fee simple determinable with possibility of reverter should be abolished by statute in California.[3] At least one other jurisdiction--Kentucky--has done this.[4] An existing fee simple determinable with possibility of reverter should be deemed to be, and should be enforceable as, a fee simple subject to condition subsequent with power of termination.[5] This will not make a substantial change in practice, but it will make the record more reliable and simplify the law of property and future interests.

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1. 2 H. Miller & M. Starr, Current Law of California Real Estate § 15:5 (rev. 1977); Ferrier, Determinable Fees and Fees Upon Conditions Subsequent in California, 24 Cal. L. Rev. 512 (1936).

2. Blawie, A Study of the Present Law of Property and Conveyancing in California with Critical Analysis and Suggestions for Change 21 (unpublished study prepared for California Law Revision Commission 1979).

3. Cf. Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Cal. L. Rev. 1, 6 (1932) ("Legislation is desirable to remove the existing uncertainty as to determinable fees and possibilities of reverter.").

4. Ky. Acts 1960, ch. 167, § 4, effective June 16, 1960 (Ky. Rev. Stats. § 381.218 (Baldwin 1969)):

> 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.

See Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 2, 71-75 (1960). See also N.Y. Real Prop. Actions and Proceedings Law § 1953 (McKinney ____) (possibility of reverter enforceable only by civil action).

5. A right of entry arising from the breach of a condition is more accurately described as, and is often called, a power of termination. Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 74 P.2d 738 (1937); Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55

Enforcement of Powers of Termination

The doctrine that the law abhors a forfeiture is commonly applied by California courts to the divesting of ownership by rights of entry and possibilities of reverter.[1] This attitude has been manifested in three ways: (1) The courts have construed reversionary language to create a covenant or as mere surplusage;[2] "no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction."[3] (2) The courts have construed the scope of the condition or limitation narrowly, thus reaching the conclusion that no breach has occurred.[4] (3) The courts have found that, although there is a condition and it has been broken, the grantor is barred from enforcing a forfeiture because of waiver or estoppel,[5] changed circumstances,[6] or other equitable defenses.[7]

The legal restraints on enforcement of rights of entry and possibilities of reverter in California is so pronounced that several commentators have suggested that forfeitures be statutorily precluded altogether.[8]

(1951); 3 B. Witkin, Summary of California Law, Real Property § 244 (8th ed. 1973); 2 H. Miller & M. Starr, Current Law of California Real Estate § 15:18 (rev. 1977).

1. See generally discussion in Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 298-301 (1962).

2. See, e.g., discussion and cases cited in 3 B. Witkin, Summary of California Law, Real Property § 187 (8th ed. 1973).

3. Hawley v. Dafitz, 148 Cal. 393, 394, 83 P. 248, 249 (1905).

4. Civil Code § 1442 ("A condition involving a forfeiture must be strictly interpreted against the person for whose benefit it is created."). See, e.g., discussion and cases cited in 4 H. Miller & M. Starr, Current Law of California Real Estate § 25:23-25.

5. See discussion of "Statute of Limitation," below.

6. See discussion of "Obsolete Powers of Termination," below.

7. See, e.g., discussion and cases cited in 2 A. Bowman, Ogden's Revised California Real Property Law §§ 23.29-23.34 (1975).

8. Ferrier, Determinable Fees and Fees Upon Conditions Subsequent in California, 24 Cal. L. Rev. 512, 518 (1936) ("The detriment from their retention would seem definitely to outweigh the gain."). This author would make an exception for grants without consideration for public or charitable purposes and for grants in the nature of oil and gas leases. See also Note, 42 Cal. L. Rev. 194 (1954) (conditional restrictions for land use should be discontinued in favor of covenants).

A right of entry or possibility of reverter would be treated as a restrictive covenant rather than as a power of termination and would be enforceable not by forfeiture but by injunction or damages.[9]

Where the purpose of the power of termination is to enforce a land use restriction such as uniform subdivision lot limitations, treatment as a restrictive covenant is appropriate.[10] However, powers of termination also enforce other types of land use restrictions (typically limitations on use for public or charitable purposes) and non-land use restrictions (such as family or estate planning purposes). For these functions, a conditional gift may be precisely what is intended and what is necessary to effectuate the purposes of the grant; injunctive or damage relief would be inappropriate. It is possible that these functions could also be achieved to a certain extent by use of a trust device. However, the availability of powers of termination provides desirable flexibility in the law. The Law Revision Commission recommends that the power of termination continue to be recognized as an enforceable interest in real property, subject to current strict rules of construction and interpretation.

Duration of Powers of Termination

Rights of entry and possibilities of reverter seriously impair marketability of property. They restrain alienability and sometimes the economic use of property as well, and because their violation involves a forfeiture of the property they may be particularly burdensome.[1]

These problems are aggravated by the fact that there is no limitation on the duration of rights of entry and possibilities of reverter as there is on other future interests in property. Because reversionary

9. Cf. N.Y., McKinney's Real Prop. Actions and Proc. Law § 1953 (similar scheme).

10. This is the conclusion of Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293 (1962).

1. See, e.g., discussion in Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Cal. L. Rev. 1 (1932); Ferrier, Determinable Fees and Fees Upon Conditions Subsequent in California, 24 Cal. L. Rev. 512, 518 (1936) ("Conditions subsequent imposed upon ownership in fee render titles both technically and practically unmarketable and make it difficult to borrow money on mortgage security.").

interests are considered to be "vested," the Rule Against Perpetuities does not apply.[2] This feature, combined with the fact that these interests appear to be devisable and descendable,[3] can result in dispersion of rights of entry and possibilities of reverter among unknown or unavailable owners. A person seeking to assemble a marketable title to the property may find that the interests have considerable nuisance value or that it is impossible to obtain quitclaim deeds from all owners of the interests.[4]

The cases holding that the Rule Against Perpetuities does not apply to possibilities of reverter and rights of entry have been severely criticized.[5] Legal scholars generally concur that in order to relieve the marketability problems created by rights of entry and possibilities of reverter, legislation limiting their duration is necessary.[6] A number of jurisdictions have enacted such legislation, ranging from application of the Rule Against Perpetuities, to rerecording requirements, to maximum time limits for enforcement.[7]

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2. Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919); 3 B. Witkin, Summary of California Law, Real Property § 306 (8th ed. 1973); Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 306 (1962).

3. Civil Code § 699 (future interests pass by succession, will, and transfer); Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047 (1917); Victoria Hospital Assn. v. All Persons, 169 Cal. 455, 147 P. 124 (1915). See also discussion in Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Cal. L. Rev. 1 (1932).

4. See discussion in Williams, Restrictions on Use of Land: Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 158 (1958); Webster, The Quest for Clear Land Titles--Whither Possibilities of Reverter and Rights of Entry? 42 N.C.L. Rev. 807 (1964); Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings, L.J. 293, 307 (1962).

5. See discussion in Alamo School Dist. v. Jones, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

6. See discussion in Basye, Clearing Land Titles § 143 (2d ed. 1970); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 201 (1960).

7. Ibid.

Although application of the Rule Against Perpetuities to possibilities of reverter and rights of entry has been suggested for California,[8] this is not an ideal means of limiting their duration.[9] The Rule is indiscriminate in its application to all interests, whether for land use, public, family, estate planning, or other purposes.[10] The Rule is complex and intricate, and is not easily applied in many situations.[11] Because it makes reference to a "life in being," it is not satisfactory for title examination and insurance purposes based on the record.[12] Moreover, since most rights of entry and possibilities of reverter make no reference to a life in being, the operative limitation in the Rule is 21 years, which may be an unduly short limitation period.[13] And the Rule is harsh in effect, voiding rather than limiting the duration of offending interests.[14]

Most of the modern reverter acts speak in terms of fixed periods of duration for possibilities of reverter and rights of entry.[15] Typical statutes limit the duration of possibilities of reverter and rights of entry to 30 years.[16] These statutes are based on the same policy as the Rule Against Perpetuities--the public has an interest in free marketability

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

9. See discussion in L. Simes § C. Taylor, The Improvement of Conveyancing by Legislation 203-204 (1960).

10. An important exception to the Rule is for "eleemosynary" purposes. Civil Code § 715.

11. See, e.g., Lucas v. Hamm, 56 Cal.2d 583, 592, 364 P.2d 685, ___, 15 Cal. Rptr. 821, ___ (1961) ("Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman; that members of the bar, probate courts, and title insurance companies make errors in these matters; that the code provisions adopted in 1872 created a situation worse than if the matter had been left to the common law . . . .").

12. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 2.43 (1974).

13. The California Rule also provides an alternate vesting period of 60 years. Civil Code § 715.6.

14. Civil Code § 715.2.

15. See discussion in P. Basye, Clearing Land Titles § 143 (2d ed. 1970) and L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 205-213 (1960).

16. See, e.g., Model Act Limiting the Duration of Rights of Entry and Possibilities of Reverter (Simes & Taylor 1960).

and use of property and in limiting the restricting influence of the "dead hand" to no more than one generation in the future.[17]

The policy in favor of free alienability of property must be weighed against the policy of enabling long-term control of land use, whether for public, charitable, environmental, residential, estate planning, or other purposes.[18] In balancing these policies the Law Revision Commission has concluded that it is desirable to statutorily limit the duration of possibilities of reverter and rights of entry (which should be treated together as powers of termination) but also to permit extension of the period of duration.

The power of termination should expire after a period of 30 years unless within that time the holder of the power extends the period by recording a notice of intent to preserve the power; an extension should be good for 30 years at a time.[19] There should be a five-year grace period for holders of powers of termination to record a notice of intent to preserve powers that would be immediately or within a short period affected by enactment of the statute.

This scheme will ensure that only those powers of termination will burden property for an extended period that a person has an active interest in preserving. It will also keep record ownership of the power current and help in ascertaining current holders of the power. The scheme has the additional virtue of minimizing potential problems of constitutionality inherent in applying an absolute limitation on powers without the option of extension.[20]

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17. See, e.g., discussion in Webster, The Quest for Clear Land Titles--Whither Possibilities of Reverter and Rights of Entry? 42 N.C.L. Rev. 807 (1964).

18. Cf. Civil Code §§ 815-816 (conservation easements). The proposed limitation on the duration of powers of termination would not affect conservation easements that take the form of powers of termination and are perpetual in duration pursuant to Civil Code Section 815.2.

19. Among the jurisdictions that have adopted such a scheme are New York (N.Y., McKinney's Real Prop. Actions and Proc. Law § 1955), Massachusetts (Mass. G.L.A. c. 184 §§ 26-30), and Iowa (Ia. C.A. § 614.24-614.25). This is also the pattern of the Uniform Simplification of Land Transfers Act (1977) Section 3-409.

20. Compare Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975) (rerecording statute constitutional) with Board of Education of Central School Dist. No. 1 v. Miles, 259 N.Y.S.2d 129, 15 N.Y.2d 364, 207 N.E.2d 181 (1965) (rerecording statute unconstitu-

Obsolete Powers of Termination

If the restriction that a right of entry or possibility of reverter is designed to enforce becomes obsolete, the reversionary interest operates as a clog on title. So long as the restriction is reasonable, marketability of the property is not seriously impaired; but when the restriction becomes unreasonable, it is objectionable and marketability is hampered.

California case law has applied the doctrine of changed circumstances to obsolete rights of entry[1] and presumably would do likewise were a case involving a possibility of reverter to arise.[2] For example, the courts will refuse to enforce a right of entry by forfeiture of title where, through change in character of the neighborhood, the purpose of the condition is no longer attainable.[3] The doctrine of changed circumstances precludes enforcement of outmoded restrictions in order to prevent title from being encumbered perpetually.[4]

This rule is sound, and legal scholars have recommended that it be statutorily recognized.[5] The Law Revision Commission recommends that application of the rule of changed conditions to rights of entry be codified and extended by statute to possibilities of reverter, the two

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tional). See also Biltmore Village v. Royal, 71 So.2d 727 (Fla. 1954) (absolute limitation unconstitutional); Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955) (absolute limitation constitutional); Hiddleston v. Nebraska Jewish Education Society, 186 Neb. 786, 186 N.W.2d 904 (1971) (absolute limitation constitutional); Housing and Redevelopment Authority of South St. Paul v. United Stockyards Corp., 244 N.W.2d 275 (Minn. 1976) (absolute limitation constitutional); Cline v. Johnson County Board of Education, 584 S.W.2d 507 (Ky. 1977) (combination scheme constitutional).

1. See, e.g., Townsend v. Allen, 114 Cal. App.2d 291, 250 P.2d 292 (1952); Wedum-Aldahl Co. v. Miller, 18 Cal. App.2d 745, 64 P.2d 762 (1937); Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932).

2. See discussion in Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293, 307-309 (1962).

3. See, e.g., Forman v. Hancock, 3 Cal. App.2d 291, 39 P.2d 249 (1934); see discussion in 2 A. Bowman, Ogden's Revised California Real Property Law § 23.33 (1975).

4. See discussion in 4 H. Miller & M. Starr, Current Law of California Real Estate § 25:25 (rev. 1977).

5. See, e.g., Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Cal. L. Rev. 1, 8-9 (1932).

interests being treated together as powers of termination.[6] Although this will not permit clearing the record of obsolete powers by operation of law, it will make clear that obsolete powers of all types may be terminated by judicial action.[7] Thus the fee owner will be able to extinguish a power of termination when enforcement is no longer of such substantial benefit to the holder to warrant the continued impairment of practical and valuable uses of the property and the consequential injury to its utilization and marketability.[8]

Statute of Limitation

Existing law governing the limitation period applicable to exercise of a right of entry or a possibility of reverter is not clear.[1] The law governing the power of termination, which will replace the right of entry and the possibility of reverter, should be made clear. The ordinary five-year statute of limitation applicable to other actions concerning title to or possession of real property is appropriate for powers of termination.[2] In order that the cloud of a recorded power of termination not continue for an undue length of time, exercise of the power of termination within the statutory period should be recorded or the power expires of record.[3] Clarification of the statutory limitation period would not affect the general principles that the holder of the power of termination can waive the power or be estopped from exercising the power by failure to timely pursue the remedy.[4]

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6. New York has such a provision. See N.Y., McKinney's Real Prop. Actions and Proc. Law § 1951. See also, Ariz. Rev. Stat. § 33-436; Mich. Stat. Ann. § 26.46; Minn. Stat. Ann. § 500.20(1); Wis. Stat. § 230.46 (nominal conditions or conditions of no substantial or actual benefit may not be enforced).

7. See discussion in L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 206-208 (1960).

8. Webster, The Quest for Clear Land Titles--Whither Possibilities of Reverter and Rights of Entry? 42 N.C.L. Rev. 807, 838-839 (1964).

1. See "Comparison of Right of Entry with Possibility of Reverter," above.

2. Code Civ. Proc. §§ 319-320.

3. The statutory period for expiration of record would not be extended by tolling or for any other reason than a recorded extension. Apparently, existing practice is to ignore the possibility of tolling. See 2 A. Bowman, Ogden's Revised California Real Property Law § 23.25 (1975).

4. See, e.g., Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951) (waiver); Wedum-Aldahl Co. v. Miller, 18 Cal. App.2d 745, 64 P.2d 762 (1937) (waiver or estoppel); Hanna v. Rodeo-Vallejo Ferry Co., 89 Cal. App. 462, 265 P. 287 (1928) (waiver or estoppel).

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Title 5 (commencing with Section 880.020) to Part 2 of Division 2 of the Civil Code, relating to rights of entry and possibilities of reverter.

The people of the State of California do enact as follows:

401/752

Civil Code §§ 880.020-885.070 (added)

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

TITLE 5. MARKETABLE RECORD TITLE

CHAPTER 1. GENERAL PROVISIONS

Article 1. Construction

§ 880.020. Declaration of policy and purposes

880.020. (a) The Legislature declares as public policy that:

(1) Real property is a basic resource of the people of the state and should be made freely alienable and marketable to the extent practicable.

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property.

(3) Such interests and defects produce litigation to clear and quiet titles, cause delays in real property title transactions, and hinder marketability of real property.

(4) Real property title transactions should be possible with economy and expediency. The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication

to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose.

Comment. Subdivision (a) of Section 880.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1 (19__). The declaration of public policy is intended to demonstrate the significance of the state interest served by this title and the importance of the retroactive application of the law to the effectuation of that interest. See In re Marriage of Bouquet, 16 Cal.3d 583, 592, 546 P.2d 1371, ____, 128 Cal. Rptr. 427, ____ (1976) (upholding changes in the community property laws as retroactively applied).

A statute may require recordation of previously executed instruments if a reasonable time is allowed for recordation. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 10.4 at 415-16 (1974). The burden on holders of old interests of recording a notice of intent to preserve is outweighed by the public good of more secure land transactions. See, e.g., Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957) (upholding Minnesota marketable title legislation):

> A number of marketable title acts have been passed by various states. Such limiting statutes are considered vital to all who are engaged in or concerned with the conveyance of real property. They proceed upon the theory that the economic advantages of being able to pass uncluttered title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate. These statutes reflect the appraisal of state legislatures of the 'actual economic significance of these interests weighed against the inconvenience and expense caused by their continued existence for unlimited periods without regard to altered circumstances.' . . . They must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests.

Subdivision (b) is drawn from Section 9 of the Model Marketable Title Act. If the application of a particular statute or common law rule conflicts with the provisions of this title, this title governs.

404/083

§ 880.030. Effect on other law

880.030. Nothing in this title shall be construed to:

(a) Extend the period for bringing an action or doing any other required act under a statute of limitation.

(b) Limit application of the principles of waiver and estoppel.

(c) Affect the operation of any statute governing the effect of recording or failure to record, except as specifically provided in this title.

Comment. Subdivision (a) of Section 880.030 is drawn from Section 7 of the Model Marketable Title Act and Section 3-308 of the Uniform Simplification of Land Transfers Act (1977). Subdivision (b) is new; notwithstanding the maximum record duration or period of enforceability of interests in property pursuant to this title, the owner of an interest may waive or be estopped from asserting the interest within the prescribed time. Subdivision (c) is drawn from Section 7 of the Model Act.

404/087

Article 2. Application of Title

§ 880.240. Interests excepted from title

880.240. The following interests are not subject to expiration pursuant to this title:

(a) The interest of a person using or occupying real property and the interest of a person under whom a person using or occupying real property claims, to the extent the use or occupancy would have been revealed by reasonable inspection or inquiry.

(b) An interest of the United States or pursuant to federal law in real property that is not subjected by federal law to the recording requirements of the state and that has not terminated under federal law.

(c) An interest of the state or a local public entity in real property.

(d) A conservation easement pursuant to Chapter 4 (commencing with Section 815) of Title 2.

Comment. Subdivision (a) of Section 880.240 is drawn from Section 3-306(2) of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) makes clear that if a person in possession claims under another person, whether by lease, license, or otherwise, the interest of the other person does not expire.

Subdivision (b) is drawn from Section 6 of the Model Marketable Title Act and Section 3-306(4) of the Uniform Act. The Comment to the Model Act states, "The exception as to claims of the United States would probably exist whether stated in the statute or not."

Subdivision (c) is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation.

Subdivision (d) recognizes that a conservation easement may be created that is perpetual in duration. Section 815.2.

404/096

Article 3. Preservation of Interests

§ 880.310. Notice of intent to preserve interest

880.310. (a) A person may preserve the person's interest in real property from expiration pursuant to this title by recordation of a

notice of intent to preserve the interest within the period prescribed by statute. The running of the period prescribed by statute is not suspended by the disability or lack of knowledge of any person or tolled for any other reason.

(b) Recordation of a notice of intent to preserve an interest in real property after the period prescribed by statute does not preserve an interest that has previously expired pursuant to this title.

(c) Recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable pursuant to other law, whether before or after the notice of intent to preserve the interest is recorded, and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable.

Comment. Subdivision (a) of Section 880.310 is drawn from the first two sentences of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977). If a person owns a part interest in real property, the notice of intent preserves only the part interest owned by the person for whom the notice is recorded. If a person owns an interest in real property that is one of several related interests in real property, the notice of intent preserves only the interest owned by the person for whom the notice is recorded and not the related interests of other persons.

Subdivision (b) is comparable to Section 2(d) of the Model Act and Section 3-303(3) of the Uniform Act.

Subdivision (c) is drawn from Section 3-309 of the Uniform Act, with the addition of language to make clear that a notice of intent to preserve does not affect the validity of any interest in real property under law apart from this title.

404/101

§ 880.320. Who may record notice

880.320. A notice of intent to preserve an interest in real property may be recorded by any of the following persons:

(a) A person who claims the interest.

(b) Another person acting on behalf of a claimant if the claimant is under a disability, unable to assert a claim on his or her own behalf, or one of a class whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest.

Comment. Section 880.320 is drawn from the third sentence of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977).

§ 880.330. Contents of notice

880.330. Subject to all statutory requirements for recorded documents:

(a) A notice of intent to preserve an interest in real property shall be in writing and signed and verified by or on behalf of the claimant.

(b) The notice shall contain all of the following information:

(1) The name and mailing address of the claimant.

(2) A description of the interest claimed. The description shall include a reference by record location to the recorded document that creates or evidences the interest.

(3) A legal description of the real property in which the interest is claimed. The description may be the same as that contained in the recorded document that creates or evidences the interest.

Comment. Section 880.330 is drawn from portions of Sections 4(a) and (5) of the Model Marketable Title Act and from Sections 2-302(b) and 2-308(b) of the Uniform Simplification of Land Transfers Act (1977). Under subdivision (b), if the interest is a restriction that affects the use or enjoyment of more than one parcel of real property that was created by a recorded document containing a general description of all of the parcels, the legal description required may be the same as the general description. The introductory portion of Section 890.330 makes clear that all other statutory requirements must be complied with. See, e.g., Section 1170 (recorded document must be duly acknowledged or proved and certified).

404/105

§ 880.340. Form of notice

880.340. Subject to all statutory requirements for recorded documents, a notice of intent to preserve an interest in real property shall be in substantially the following form:

RECORDING INFORMATION

Recording requested by:
After recording return to:

FOR USE OF COUNTY RECORDER

Indexing instructions. This notice must be indexed as follows: Grantor and grantee index--claimant is grantor.

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to Title 5 (commencing with Section 890.010) of Part 2 of Division 2 of the Civil Code (Marketable Record Title).

Claimant — Name:
Mailing address:

Interest — Description (e.g., mineral rights, power of termination):
Record location of document creating or evidencing interest:

Real Property — Legal description (may be same as in recorded document creating or evidencing interest):

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true.

Signed:_____ Date:_____

_____
(claimant)

_____
(person acting on behalf of claimant)

State of _____,

County of _____, ss.

On this _____ day of _____, in the year _____, before me (here insert name and quality of officer), personally appeared _____, known to me (or proved to me on the oath of _____) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the instrument.

Signed: _____ Official Seal:

Office: _____

Comment. Section 880.340 incorporates the requirements of Section 880.330 (contents of notice). The introductory portion of Section 880.340 makes clear that all other statutory requirements must be complied with. See, e.g., Gov't Code § 27361.6 (printed forms).

404/131

§ 880.350. Recording and indexing notice

880.350. (a) A notice of intent to preserve an interest in real property shall be recorded in the county in which the real property is situated.

(b) The county recorder shall index a notice of intent to preserve an interest in real property in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the claimant under the notice shall be deemed to be the grantor.

Comment. Section 880.350 is drawn from a portion of Section 5 of the Model Marketable Title Act. The manner of recording the notice is prescribed in Government Code Section 27322 and the fee for recording is prescribed in Government Code Section 27361 et seq.

404/145

§ 880.360. Slander of title by recording notice

880.360. A person shall not record a notice of intent to preserve an interest in real property for the purpose of slandering title to the real property. If the court in an action or proceeding to establish or quiet title determines that a person recorded a notice of intent to preserve an interest for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.

Comment. Section 880.360 is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation, and makes clear that recordation of a notice of intent to preserve an interest under this title is not privileged. Section 890.360 does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of reasonable attorney's fees. See 4 B. Witkin, Summary of California Law Torts § 328 (8th ed. 1974).

§ 880.370. Grace period for recording notice

880.370. If the period prescribed by statute during which a notice of intent to preserve an interest in real property must be recorded expires before, on, or within five years after the operative of the statute, the period is extended until five years after the operative date of the statute.

Comment. Section 880.370 is drawn from Section 10 of the Model Marketable Title Act and Section 7-701(d) of the Uniform Simplification of Land Transfers Act (1977) (two years).

404/151

[CHAPTER 2. ANCIENT MORTGAGES AND DEEDS OF TRUST]

[CHAPTER 3. DORMANT MINERAL RIGHTS]

[CHAPTER 4. UNEXERCISED OPTIONS]

404/152

CHAPTER 5. POWERS OF TERMINATION

§ 885.010. "Power of termination" defined

885.010. (a) As used in this chapter, "power of termination" means the power to terminate a fee simple estate in real property to enforce a restriction in the form of a condition subsequent to which the fee simple estate is subject, whether the power is characterized in the instrument that creates or evidences it as a power of termination, right of entry or reentry, right of repossession, or otherwise, and includes a possibility of reverter that is deemed to be and is enforceable as a power of termination pursuant to Section 885.020. A power of termination is an interest in the real property.

(b) As used in other statutes relating to powers of termination, the terms "right of reentry," "right of repossession for breach of condition subsequent," and comparable terms mean "power of termination" as defined in this section.

Comment. Section 885.010 redefines the right of entry as a power of termination, the more descriptive and technically accurate of the two terms. See, e.g., Parry v. Berkeley Hall School Foundation, 10 Cal.2d

422, 74 Pac.2d 55 (1951). Places in the code where old terminology is used include Section 791 and 793 ("right of re-entry") and 1046 ("right of reëntry, or of repossession for breach of condition subsequent").

Despite redefinition, the power of termination is an interest in property and is subject to provisions governing property interests. See, e.g., Section 699 (future interests pass by succession, will, and transfer). A power of termination is transferable whether it would be classified at common law as a right of entry or possibility of reverter. See Section 1046. This resolves uncertainty in the case law. See, e.g., Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047 (1917) and Victoria Hospital Assn. v. All Persons, 169 Cal. 455, 147 Pac. 124 (1915).

404/154

§ 885.020. Fee simple determinable and possibility of reverter abolished

885.020. Fees simple determinable and possibilities of reverter are abolished. Every estate that would be at common law a fee simple determinable is deemed to be a fee simple subject to a restriction in the form of a condition subsequent. Every interest that would be at common law a possibility of reverter is deemed to be and is enforceable as a power of termination.

Comment. Section 885.020 abolishes the estate known at common law as the fee simple determinable and the interest known as the possibility of reverter. Cf. Section 763 (estates tail abolished); Ky. Rev. Stats. § 381.218 (Baldwin 1969) (fee simple determinable and possibility of reverter abolished). These interests were recognized late in California jurisprudence and added little to California land law. See Dabney v. Edwards, 5 Cal.2d 1, 53 Pac.2d 962 (1935) (recognizing fee simple determinable and possibility of reverter). Section 885.020 applies to existing estates and interests as well as to those created after its enactment. See section 885.070 (transitional provisions).

404/155

§ 885.030. Expiration of power of termination

884.030. (a) A power of termination of record expires at the later of the following times:

(1) Thirty years after the date the instrument reserving, transferring, or otherwise evidencing the power of termination is recorded.

(2) Thirty years after the date a notice of intent to preserve the power of termination is recorded. A notice of intent to preserve the power of termination is not effective unless it is recorded within 30 years after the date the instrument reserving, transferring, or otherwise evidencing the power of termination is recorded or, if a prior notice of

intent to preserve the power of termination is recorded, within 30 years after the date the prior notice of intent to preserve the power of termination is recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument reserving, transferring, or otherwise evidencing the power of termination or in another recorded document unless the instrument or other recorded document provides an earlier expiration date.

Comment. Section 885.030 provides for expiration of a power of termination after 30 years, notwithstanding a longer or indefinite period provided in the instrument reserving the power. The expiration period supplements the Rule Against Perpetuities, which has been held inapplicable to powers of termination. See Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159 (1919). The expiration period can be extended for up to 30 years at a time by recordation of a notice of intent to preserve the power of termination. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the power of termination does not enable enforcement of a power that has expired because it has become obsolete due to changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest) and 885.040 (obsolete power of termination) and Comments thereto. For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration). This section does not affect conservation easements pursuant to Sections 815-816. See Section 880.240 (interests excepted from title) and Comment thereto.

404/156

§ 885.040. Obsolete power of termination

885.040. (a) If a power of termination becomes obsolete, the power expires.

(b) As used in this section, a power of termination is obsolete if the restriction to which the fee simple estate is subject is of no actual and substantial benefit to the holder of the power, whether by reason of changed conditions or circumstances or for any other reason.

Comment. Section 885.040 is drawn from New York law. See N.Y., McKinney's Real Prop. Actions and Proc. Law § 1951. It codifies the rule that reversionary interests will not be enforced if the restriction does not benefit the holder of the interests. See, e.g., Young v. Cramer, 38 Cal. App.2d 64, 100 Pac.2d 523 (1940) (holder of interest not an owner of appurtenant property). It also codifies existing case law relating to obsolete rights of entry. See, e.g., Letteau v. Ellis, 122 Cal. App. 584, 10 Pac.2d 496 (1932) (changed circumstances).

A power of termination may expire pursuant to this section if it becomes obsolete notwithstanding the fact that the 30-year statutory duration of the power has not elapsed and notwithstanding the fact that

a notice of intent to preserve the power may have been filed. See Section 885.030 (expiration of power of termination). For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration).

404/157

§ 885.050. Time for exercise of power

885.050. (a) A power of termination shall be exercised within five years after breach of the restriction to which the fee simple estate is subject.

(b) If a power of termination of record is not exercised of record within the time prescribed in subdivision (a), the power expires.

(c) The time prescribed in subdivision (a) is absolute and is not suspended by the disability or lack of knowledge of any person or tolled for any other reason.

Comment. Subdivision (a) of Section 885.050 makes clear that the statutory limitation period applicable to a power of termination is five years. Cf. Code Civ. Proc. §§ 319-320 (five years). Former law was not clear. Compare, e.g., 3 B. Witkin, Summary of California Law, Real Property § 188 (8th ed. 1973) (enforcement within a "reasonable time") and Lincoln v. Narom Development Co., 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitation not applicable) with 2 A. Bowman, Ogden's Revised California Real Property Law § 23.32 (1975) (five years pursuant to Code of Civil Procedure Section 320).

Subdivision (b) provides for the record expiration of powers of termination that are not exercised of record within the statutory limitation period. See Section 885.060 (effect of expiration).

Section 885.050 does not preclude earlier termination of a power of termination through waiver or estoppel. See Section 880.030(b) (application of waiver and estoppel). See, e.g., Santa Monica v. Jones, 104 Cal. App.2d 463, 232 Pac.2d 55 (1951) (waiver); Wedum-Aldahl Co. v. Miller, 18 Cal. App.2d 745, 64 Pac.2d 762 (1937) (waiver or estoppel); Hanna v. Rodeo-Vallejo Ferry Co., 89 Cal. App. 462, 265 Pac. 287 (1928) (waiver or estoppel).

A power of termination may be exercised by notice or by action for possession. See Section 791 (notice) and 793 (action for possession).

404/159

§ 885.060. Effect of expiration

885.060. (a) Expiration of a power of termination pursuant to this chapter makes the power unenforceable and is equivalent for all purposes to a termination of the power of record and a quitclaim of the power to the owner of the fee simple estate, and execution and recording of a termination and quitclaim is not necessary to terminate or evidence the termination of the power.

(b) Expiration of a power of termination pursuant to this chapter terminates the restriction to which the fee simple estate is subject and makes the restriction unenforceable by any other means, including but not limited to injunction and damages.

Comment. Section 885.060 provides for the clearing of record title to real property by operation of law after a power of termination has expired under Sections 885.030 (expiration of power of termination) and 885.050 (time for exercise of power). Title can be cleared by judicial decree prior to the time prescribed in Section 885.030 in case of an obsolete power of termination. See Section 885.040 (obsolete power of termination); Hess v. Country Club Park, 213 Cal. 613, 2 Pac.2d 782 (1931).

404/160

§ 885.070. Transitional provisions

885.070. (a) Subject to Section 880.370 (grace period for recording notice) and except as otherwise provided in this section, this chapter applies on the operative date to all powers of termination, whether executed or recorded before, on, or after the operative date.

(b) This chapter shall not cause a power of termination to expire for lack of exercise of record after breach of the restriction to which the fee simple estate is subject before the passage of two years after the operative date of this chapter.

Comment. Subdivision (a) of Section 885.070 makes clear the legislative intent to apply this chapter immediately to existing powers of termination. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a power of termination that expires by operation of this chapter before, on, or within five years after the operative date of this chapter.

Subdivision (b) provides a two-year grace period to enable enforcement of powers of termination that would be barred upon enactment of this chapter by the absolute limitation period for enforcement provided by Section 885.050 (time for exercise of power) and a shorter grace period for enforcement of powers of termination that would be barred within two years after enactment of this chapter.

31066

Uncodified Section (added)

SEC. 2. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the Legislature finds and declares that there are savings as

well as costs in this act which, in the aggregate, do not result in additional net costs.

Comment. Section 2 recognizes that any costs of recording and indexing notices of intent to preserve an interest are offset by the fees for recording and indexing pursuant to Government Code Section 27361 et seq.