#F-600 4/15/82

Memorandum 82-59

Subject: Study F-600 - Community Property (The Mitchell Case--Requirement of Joinder to Transfer or Encumber Real Property)

Civil Code Section 5127 provides that either spouse has the management and control of community real property but that neither spouse may encumber the property or any interest therein without the joinder of the other spouse. Notwithstanding Section 5127, in Mitchell v. American Reserve Insurance Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980) (Exhibit 1), the husband gave a security interest in the family residence (which was community real property) without the joinder or knowledge of the wife. At some time later the wife sought to quiet title against the encumbrancer on the basis that the security interest given by the husband was invalid, the wife's joinder not having been obtained. The court held that the encumbrance could not affect the wife's half-interest in the property but did bind the husband's half-interest.

The Mitchell case represents a marked shift in California law. Until Mitchell the rules governing dispositions of community real property by one spouse were well established. Despite the language of Civil Code Section 5127 that both spouses "must join" in a transaction involving community real property, this requirement was not held to invalidate a transaction except during marriage, when it could be avoided by the non-joining spouse. Thus, during marriage the wife can set aside the husband's conveyance of community real property in toto. E.g., Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935). After termination of marriage by dissolution or death the wife can set aside the husband's conveyance of community real property only as to her one-half interest. E.g., Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429 (1932) (dissolution); Dargie v. Patterson, 176 Cal. 714, 169 Pac. 360 (1917) (death); Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933) (death). The same rules also apply to transactions involving community personal property, to transactions involving gifts, and to transactions made for consideration, even though different statutes are involved in each of these situations. E.g., Lynn v. Herman, 72 Cal. App.2d 614, 165 P.2d 54 (1946) (gift of personal property, wife recovers all during marriage); Mathews v. Hamburger, 36 Cal. App.2d 182, 97 P.2d 465 (1939) (transfer of personal property for consideration, wife recovers all during marriage); Ballinger v. Ballinger,

9 Cal.2d 330, 70 P.2d 629 (1937) (gift of personal property, wife recovers one-half after death of husband); Gantner v. Johnson, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969) (transfer of real and personal property for consideration, wife recovers one-half after death of husband); but see Dynan v. Gallinatti, 87 Cal. App.2d 553, 197 P.2d 391 (1948) (encumbrance of personal property, wife recovers all after death of husband). For a discussion of the cases, see Schwartz, Gifts of Community Property: Need for Wife's Consent, 11 UCLA L. Rev. 26 (1963).

The reasons for these rules are deeply rooted in the history of California community property law. From the beginning of the California community property system in 1849, the husband had the exclusive management and control of the community property and was considered to be the true owner of the property; the wife's interest was a "mere expectancy" to be realized only if she survived the termination of the marriage by death of her husband or by dissolution of marriage. Van Maren v. Johnson, 15 Cal. 311 (1860). The history of California community property can be viewed as an evolution from this position towards one of equality of the spouses, the major landmarks being the 1927 legislation declaring ownership of community property by the spouses as "present, existing and equal" (now Civil Code Section 5105) and the 1975 legislation giving either spouse the management and control of community property (now Civil Code Sections 5125 and 5127). This history is chronicled in Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 UCLA L. Rev. 1 (1976).

Within this broad progression of the law a series of smaller steps were taken to protect the interest of the wife from erosion by acts of the husband. Professor Reppy, in Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977, 1053 (1975), catalogues the series of statutes that slowly chipped away at the husband's exclusive control of the community property, among them:

- 1891 Husband prohibited from making a gift of community property without wife's consent.
- 1901 Husband prohibited from encumbering or selling household furnishings without wife's written consent.
- 1917 Wife must join in any instrument whereby community realty is encumbered or conveyed.

In the historical context it is clear why the courts have interpreted these apparent blanket requirements to provide that the wife may, during marriage, recover all community property conveyed in violation of the statutes but after termination of marriage by death or dissolution may recover only her one-half interest. Since the husband was the manager and controller, any conveyance he made was effective to bind his interest; the transaction was not void but only voidable by the nonjoining wife. The husband has testamentary power over one-half the community property and is entitled to his share of the community property at dissolution of marriage; therefore, the husband's death or the dissolution of marriage has the effect of ratifying or validating the husband's transaction. The wife can thereafter recover only her one-half interest in the property.

Since the husband owns a half interest in the community property, why have the cases held that the wife can recover his interest conveyed during marriage as well as her own? Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221 (1935), states four reasons for this rule:

> (1) If only one-half were recovered and that half were considered community property, the husband would retain control and could repeat his actions until a miniscule amount was left.
>
> (2) If only one-half were recovered and that half were considered separate property of the wife, this would amount to a partition of the community during marriage by arbitrary act of the husband, contrary to public policy that allows division of the community only at termination of the marriage by dissolution or death or during marriage with the consent of both spouses.
>
> (3) The cases allowing the wife to recover only one-half are based on the right of the husband to testamentary disposition of half, hence gifts before death are will substitutes; this reasoning does not apply in an ongoing marriage.
>
> (4) If the wife could not recover the whole property during marriage the husband could impair the wife 's right to receive a larger share of the community property at dissolution in case of adultery or extreme cruelty of the husband.

Reasons (1) and (4) are no longer applicable with the advent of equal management and control and no-fault dissolution of marriage and its corresponding equal division of community property. Reason (2) begs the question, since we are trying to determine here just what public policy should be, and why. Reason (3) likewise is merely an attempt to distinguish other cases interpreting the statute; it does not provide any guidance as to whether on policy grounds a wife should be permitted to recover during marriage all or half of the community property disposed of by the husband without her joinder.

In this context the Mitchell case forges new ground. The court based its decision on earlier cases such as Gantner v. Johnson, 274 Cal. App.2d 869, 79 Cal. Rptr. 381 (1969), which held that a conveyance of community property by the husband without the wife's joinder is effective to convey the husband's half-interest in the community property. None of the earlier cases held that a spouse can by a unilateral act sever the community real property and have the severance be effective during marriage, as Mitchell holds.

Mitchell calls into question the basic nature of community property tenure. A major distinguishing feature of community property as opposed to joint tenancy and tenancy in common is that the community property is indivisible except at dissolution of the marriage by death or divorce or except upon mutual agreement of the spouses. The concept is that the property is common property held for common purposes, and therefore is not subject to division and dissipation by either spouse alone.

It can certainly be argued, now that both spouses have equal rights in the property including equal rights to manage and control the property, that the statutory restrictions on disposition of community property are no longer necessary. They were intended to protect the interest of a spouse who was under legal disability; the wife is no longer under legal disability and can protect her own interest. The reasons for the rule having ceased, the rule should be repealed.

On the other hand, Professor Prager argues that the most important legacy of California's separate property years are the reform legislation of 1891 to 1927 limiting the ability of a spouse to unilaterally deal with certain community property. She states that a casual observer could easily conclude that these restrictions are no longer necessary now that equal management has been achieved. "However, because the community property is to be managed by either spouse and the potential for abuse has correspondingly expanded, the restrictions are all the more necessary." 24 UCLA L. Rev. at 80. Professor Prager notes that the restrictions are useful tools for working an equitable division of property at dissolution, given the potential for mismanagement of the community estate when a marriage is in crisis. They also help preserve certain categories of community property in order to further equitable property allocations on the death of one of the spouses.

Consistent with Professor Prager's concern, practitioners have pointed out to the Commission that one effect of Mitchell is that every time a dissolution proceeding is commenced, a lis pendens must immediately be filed to protect the real property.

The court in Mitchell argues that the husband could incur an obligation for which all the community property would be liable; since the husband can subject community real property to claims of creditors indirectly, he should also be able to do it directly by encumbering the property. This reasoning fails to take into account that an encumbrance is a direct impairment of the ability of the spouses to convey the property, to further use the property as security, and to otherwise manage and control the property to the full extent, as is the right of each. Moreover, an encumbrance is not the equivalent of exposing the property to liability for debts since an encumbrance is a waiver of any exemptions that would otherwise be applicable to the property.

These considerations are particularly important in the common situation, such as was involved in Mitchell, where the property being dealt with is the family home. During marriage this property should not be partitioned, severed, or disposed of without the joinder of both spouses. Under existing law a spouse can prevent this from occurring by recording a declaration of homestead. However, the Commission is recommending repeal of the homestead statute in reliance on the apparent meaning of Section 5127 that both spouses must join in any encumbrance. Mitchell indicates that this reliance may be misplaced.

The staff is convinced that Mitchell should be legislatively overruled insofar as it relates to encumbrance of the family home. In fact, the policy of protecting the family home is sufficiently strong that it should be made clear that the nonjoining spouse should be able to avoid a transaction affecting the family home both during and after marriage. This could be done by the following amendment to Section 5127:

> 5127. Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein , including the interest of either spouse in the family dwelling, is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage,

conveyance, or transfer of real property or of any interest in real property between the husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and that the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

Comment. Section 5127 is amended to overrule Mitchell v. American Reserve Insurance Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980), which held that one spouse could validly encumber that spouse's interest in a community property dwelling effective during marriage without joinder of the other spouse. Under Section 5127 as amended, an encumbrance or other transaction involving the community real property family dwelling requires the joinder of both spouses even as to the interest of one spouse. A purported transaction that does not satisfy this requirement is not validated by dissolution of marriage or death of a spouse.

We could add this amendment to the liability of marital property recommendation (or possibly to the Commission's enforcement of judgments legislation).

This amendment is designed to cure the specific problem raised in Mitchell of the family home. It is not addressed to the fundamental question of management and control of the spouses over community real property generally. The broader questions are: Should there be any limitations at all on the right to dispose of community real property? If so, should the limitations extend to all or only half the property? Does it make a difference if the limitations are sought to be enforced during or after marriage?

After reading the cases and commentary and thinking about the nature of community property and the implications of equal ownership and equal management and control, the staff has come to the conclusion that there is no good reason why a spouse should not be able to dispose of the spouse's own interest in the community real property during marriage,

provided the family home is protected. A spouse alone should not be able to dispose of the whole property--the potential for abuse is too great, particularly as dissolution approaches. But each spouse does own a half interest in the property which is effectuated at death or dissolution. Each spouse can also dispose of the half interest during the marriage and the disposition will be effective so long as the other spouse doesn't find out during the marriage and seek to avoid the disposition. It makes sense to allow the spouses to accomplish this directly during the marriage. True, permitting disposition by a single spouse would in effect enable the one spouse to unilaterally sever and partition the community. But we can see no policy reason why this should not be allowed as to community real property other than the family home.

Under the staff's proposal, either spouse would be permitted to enter into transactions affecting the spouse's interest in community real property without the joinder of the other spouse, except for transactions involving the family home. The staff proposal would preserve the provisions of existing law that validate a purported disposition of the whole property by one spouse in cases where record title is in that spouse's name if an action to rescind is not brought by the other spouse within one year after the disposition is recorded. These rules would apply immediately to all transactions entered into before or after enactment of the new rules, except where there is pending litigation to invalidate the transaction.

To implement this proposal the staff would revise Civil Code Section 5127 to read:

§ 5127. Management and control of community real property

5127. (a) As used in this section:

(1) "Real property" includes an interest in real property.

(2) "Transaction" means a conveyance, encumbrance, or lease for more than one year.

(b) Except as provided in Sections 5113.5 and 5128 and subject to the provisions of this section, either spouse has the management and control of community real property, whether acquired prior to or on or after January 1, 1975.

(c) Both spouses must join in a transaction that affects community real property, including the interest of either spouse in the family dwelling. This subdivision does not apply to a transaction between the spouses.

(d) Notwithstanding subdivision (c):

(1) If both spouses do not join in a transaction that affects community real property, the transaction is valid insofar as it relates to the interest of the spouse that makes the transaction. This paragraph does not apply to the family dwelling.

(2) If both spouses do not join in a transaction that affects community real property and record title to the community real property does not reveal the community character of the real property or the existence of the marriage relation, the transaction is valid insofar as it relates to the interests of both spouses if made with a person in good faith without knowledge of the community character of the real property or the existence of the marriage relation, unless an action to avoid the transaction insofar as it relates to the interest of the spouse that does not join in the transaction is commenced within one year after recordation of the transaction in the office of the recorder of the county in which the real property is situated. This paragraph does not apply to the family dwelling.

(e) This section applies to all transactions that affect community real property, whether made before, on, or after the operative date of this section, except that an action to avoid a transaction that affects community real property commenced before the operative date is governed by the law applicable at the time the action was commenced.

Comment. Section 5127 supersedes former Section 5127. Subdivision (a) omits language in the former law that related to execution of an instrument; this codifies case law holding that joinder in the transaction is sufficient. See, e.g., Rice v. McCarthy, 73 Cal. App. 655, 239 Pac. 56 (1925). Subdivision (b) continues former law without change.

Subdivision (c) omits language in the former law that related to action by a duly authorized agent; this duplicated general provisions of law. See, e.g., Section 2305 (agent). Subdivision (c) also overrules Mitchell v. American Reserve Ins. Co., 110 Cal. App.3d 220, 167 Cal. Rptr. 760 (1980), which held that one spouse could validly encumber that spouse's interest in a community real property family dwelling effective during marriage without joinder of the other spouse. Under subdivision (c) an encumbrance or other transaction involving the community real property family dwelling requires the joinder of both spouses even as to the interest of one spouse. A purported transaction that does not satisfy this requirement is not validated by dissolution of marriage or death of a spouse.

Subdivision (d)(1) codifies the rule that a purported disposition of community real property by one spouse acting alone is effective as to that spouse's interest in the property when validated by dissolution of marriage or death of the spouse. See, e.g., Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933) (death); Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429 (1932) (dissolution); Dargie v. Patterson, 176 Cal. 714, 169 Pac. 360 (1917) (death). It reverses the rule that the nonjoining spouse may void such a transaction in toto during marriage. Compare Britton v. Hammell, 4 Cal. 2d 690, 52 P.2d 221 (1935). Under subdivision (d)(1) a transaction by either spouse without the joinder of the other spouse is effective as to the interest of the spouse that makes the transaction. A conveyance of the community interest of one spouse severs the community property estate and makes the nonjoining spouse a cotenant with the person to whom the interest was conveyed. This rule does not apply to the family dwelling, for which joinder of both spouses is required to affect the interest of either. See subdivision (c).

Subdivision (d)(2) continues the substance of former law, as interpreted by the cases. See, *e.g.,* Rice v. McCarthy, 73 Cal. App. 655, 239 Pac. 56 (1925) (presumption of validity is conclusive). It makes clear the interrelation of the presumption of validity and the one-year statute of limitation. Subdivision (d)(2) omits transitional provisions that related to transactions that occurred prior to January 1, 1975; these provisions are no longer necessary. The intent to apply the provisions of Section 5127, as amended, to all transactions affecting community real property regardless of the time the transactions were made, is expressed in subdivision (e).

A conforming change in Code of Civil Procedure Section 872.210 would also be desirable:

872.210. (a) A partition action may be commenced and maintained by any of the following persons:

(1) A coowner of personal property.

(2) An owner of an estate of inheritance, an estate for life, or an estate for years in real property where such property or estate therein is owned by several persons concurrently or in successive estates.

(b) Notwithstanding subdivision (a), an action between spouses ~~or putative spouses~~ for partition of their community ~~or quasi-community property or their quasi-marital interest in property~~ real property family dwelling or community personal property may not be commenced or maintained under this title.

Comment. Section 872.210 is amended to reflect the change in Civil Code Section 5172 to permit either spouse to unilaterally sever, effective during marriage, the community real property other than the family dwelling. Section 872.210 is also amended to delete the references to quasi-community and quasi-marital property. These references were unnecessary, since the occasion for division of either type of property only arises at termination of marriage by dissolution or death. See Civil Code §§ 4452 (quasi-marital property), 4800 (quasi-community property); Prob. Code § 201.5 (quasi-community property).

A final matter the Commission should consider is whether similar rules should apply to transactions involving community personal property. There appear to be different policies applicable to personal property than are applicable to real property. The staff will address this matter in a separate memorandum.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

[Civ. No. 58273. Second Dist., Div. Two. Sept. 15, 1980.]

JANE S. MITCHELL, Plaintiff and Respondent, v. AMERICAN RESERVE INSURANCE COMPANY et al., Defendants and Appellants.

SUMMARY

In an action to quiet title to, or to have declared that the beneficiaries of a deed of trust had no interest in, her former residence, plaintiff attacked the validity of a deed of trust executed by her husband without her knowledge or consent. The subject property was community property when the deed of trust was executed, but thereafter the husband executed a quitclaim deed to plaintiff. After receiving the quitclaim deed, plaintiff learned of the deed of trust when she was attempting to sell the residence. She sold the residence and brought this action as part of the transaction. The trial court entered judgment determining that the trust deed and the promissory note secured thereby were void. (Superior Court of Los Angeles County, No. NWC 60260, S. S. Schwartz, Judge.)

The Court of Appeal reversed, holding that, while plaintiff was entitled to her interest in the property free from the burden of the deed of trust, it remained validly a lien upon the husband's interest and survived the husband's quitclaim conveyance to plaintiff. The court also held that, notwithstanding that she had sold the property to another, plaintiff was entitled to maintain the action in order to be able to fulfill her obligation to the purchaser to provide title free from encumbrances. (Opinion by Roth, P. J., with Compton and Beach, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Husband and Wife § 35—Title, Management, and Control—Community Property—Power to Convey or Encumber—Effect.—Pursu-

ant to Civ. Code, § 5116, which provides that property of the community is liable for the contracts of either spouse which are made after marriage, the power of a consenting spouse to create an encumbrance on community real property extends in absolute terms no further than to burden his or her own interest, leaving in the nonconsenting spouse the ability to remove the encumbrance insofar as it relates to that spouse's interest. But what is removed is only the encumbrance, without any effect upon the underlying obligation which it secures.

[See **Cal.Jur.3d,** Family Law, § 459; **Am.Jur.2d,** Community Property, § 77 et seq.]

(2) **Husband and Wife § 36—Title, Management, and Control of Property—Community Property—Power to Convey or Encumber—Limitations on Power—Effect of Trust Deed Executed by One Spouse.** —In an action by a wife to quiet title to residential property or for a declaration that the beneficiaries of a trust deed executed by plaintiff's husband without her joinder or knowledge had no interest in the property, the trial court erred in entering judgment determining that the trust deed and the promissory note secured thereby were void. Since the residence was community property at the time the husband executed the trust deed, plaintiff was entitled to free her half interest from the burden of the encumbrance, but it remained a valid lien on the husband's half interest, which survived intact despite his subsequent quitclaim conveyance to plaintiff.

(3) **Real Estate Sales § 49—Performance of Contract—Title of Vendor—Curing Defect in Title—Parties.**—A woman who had conveyed real property to another had standing to maintain an action to quiet title to the premises. Though one without title or interest in property generally cannot maintain an action to quiet title, a vendor of real estate who, expressly or impliedly, has warranted his title to be free from encumbrances may take those steps necessary to pursue the letter and spirit of his covenant and thereby fully perform his obligation under the warranty.

COUNSEL

Jonas, Donahue, Kinigstein & Hoffman and Richard N. Rust for Defendants and Appellants.

Albert A. Dorn for Plaintiff and Respondent.

Opinion

ROTH, P. J.—Respondent was married to Will M. Mitchell in 1935 and they resided in California from and after 1937. In June of 1971, the couple purchased a residence in Los Angeles County, title to the property being taken in joint tenancy.

In October of 1973, Will, without the joinder or knowledge of respondent, executed a promissory note in the amount of $10,000, secured by a trust deed on the residence. His purpose in so doing was to induce appellant to issue a bail bond in favor of a third party, with the understanding liability under the note would arise if the bond were forfeited.

About two years later, respondent first became aware of this transaction, when she was attempting to sell the residence. Title at that time, and from some two or three months earlier, was held solely by respondent following Will's execution in her favor of a quitclaim deed covering his interest.

In spite of the encumbrance, respondent sold the residence to one Bilofsky on August 26, 1977, and as part of that transaction instituted this action September 1, 1977, to quiet title or to have declared that appellants had no interest in the property. After trial without a jury, a judgment was entered determining, inter alia, that the bail bond note and trust deed were void.

In so deciding, the trial court relied upon its finding the residence property was the community property of the spouses and upon its perception of the effect of Civil Code section 5127 in view of that and the other facts hereinabove recited. Accepting the trial court's finding, we are nevertheless persuaded its ultimate conclusion was in error.

The statute in question provides in pertinent part that: "Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instru-

ment by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered. . . ."[1]

In the context of a conveyance, the section has been understood to mean that "a deed to community real property for a valuable consideration, executed without the wife's consent, while ineffective as to her interest, is valid and binding as to the husband's half interest. . . . In such a case the conveyance of the wife's one-half interest without her consent is not void but voidable. . . ." (*Gantner* v. *Johnson* (1969) 274 Cal.App.2d 869, 876-877 [79 Cal.Rptr. 381].)

(1) By analogy, where the case involves an encumbrance, the power of the consenting spouse extends in absolute terms no further than to burden his or her own interest, leaving in the nonconsenting spouse the ability to remove the encumbrance insofar as it relates to that spouse's interest. But what is removed is only the *encumbrance*, without any effect upon the underlying obligation which it secures. That this is so seems evident from a consideration of Civil Code section 5116, which provides that "The property of the community is liable for the contracts of either spouse which are made after marriage. . . ."

Thus in the instant matter, if appellants had done no more than obtain Will's execution of the promissory note, without also securing that note by way of trust deed, it could hardly be urged the note did not constitute a valid obligation of the community. How, then, can it correctly be maintained that having also obtained the trust deed, the obligation of the note, at respondent's instance, should be extinguished?

It is clear to us no such result is intended from a proper application of section 5127, which contemplates only that the nonconsented to encumbrance is subject to being expunged, but which deals not at all with the underlying obligation secured by the encumbrance. In other words, it is the manner of securing obligations which the section speaks to and not the creation of those obligations.

(2) Accordingly, while respondent was entitled to free her one-half interest from the burden of the trust deed, it remained validly a lien

[1]The statute at that time provided that ". . . the husband has the management and control of the community real property, but the wife. . . must join with him in executing any instrument by which such community real property or any interest therein. . . is sold, conveyed, or encumbered. . . ."

upon Will's interest in the property, which survived intact in spite of his quitclaim conveyance to respondent.

(3) Finally, it is contended respondent cannot maintain the present action even for the limited purpose described, since she was not the owner of the property when suit was filed, having previously conveyed to Bilofsky. We are satisfied the point, under the circumstances present, is not well taken. While it is settled as a general rule that one without title or interest in property cannot maintain an action to quiet title (*Reed* v. *Hayward* (1943) 23 Cal.2d 336, 340 [144 P.2d 561]), it is likewise recognized that a vendor of real estate who, expressly or impliedly, has warranted its title to be free from encumbrances may take those steps necessary to pursue the letter and spirit of his covenant and thereby to fully perform his obligation under the warranty. (See *Federal Home Loan Bank* v. *Long Beach Fed. S & L Ass'n.* (S.D.Cal. 1954) 122 F.Supp. 401, 432-433.)

The judgment appealed from is reversed and the cause remanded for further proceedings consistent with this opinion.

Compton, J., and Beach, J., concurred.