9/7/84

Third Supplement to Memorandum 84-68

Subject: Topics and Priorities for 1985 (Uniform Simplification of Land Transfers)

Attached as Exhibit 1 is a letter received from the California Credit Union League. The letter suggests that the Law Revision Commission study the Uniform Simplification of Land Transfers Act with a view to recommending its adoption in California. Attached as Exhibit 2 is background material that will indicate the content of the Uniform Act.

One major study that the Commission has determined to actively consider when time permits is the study of revision of real and personal property law. This area of the law has its source in ancient times and existing rules may not be appropriate for modern times. See, for example, the recent California Supreme Court case attached as Exhibit 4 where some members of the court point out the need for legislative reform of an existing rule.

At its October 1979 meeting, the Commission considered the background study on this topic. Attached as Exhibit 3 is an extract from the Commission's Minutes for the October 1979 meeting. This extract contains the substance of the consultant's summary of the background study and other background information. You will note that the consultant suggests that the Commission "consider the adoption of the Uniform Simplification of Land Transfers Act which deals with many of the problems referred to." The Commission determined at the October 1979 meeting that this major study should be placed on the meeting agenda when time permits after the work on the enforcement of judgments statute was completed. However, thereafter, the Legislature directed the Commission to study the California Probate Code; and, in response to that directive, the Commission has given that topic priority. Nevertheless, although the real and personal property law study has been given a low priority, the Commission has made a number of recommendations relating to various aspects of the real and personal property law study, the most important of which concerned marketable title provisions.

The staff believes that only one major topic can be given priority at a time. We have been giving the probate law study priority. And, because of the magnitude of that study, we must select from the various

aspects of the study which ones will be given priority. We can hardly undertake to give another major study priority unless we are willing to give the Probate Code study less priority. The staff believes that the Commission's decision in October 1979--that real and personal property law is an impoortant area that deserves study--was sound, but we do not believe that the Commission should give it priority over the probate law study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

3rd [illegible]

EXHIBIT 1

CALIFORNIA
CREDIT UNION
LEAGUE

30 May 1984

Mr. John De Moully
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

RE: Uniform Simplification of Land Transfers.

Dear John:

As we discussed, I am writing on the behalf of the California Credit Union League to discuss the adoption of the "Uniform Simplification of Land Transfers Act" (Act) in California.

The Act is currently one which the California Law Revision Commission (CLRC) is authorized to investigate. Interest in secured interests in residential real estate in connection with open end home equity loan programs has created considerably more interest in this Act. This results from questions about priority of security interests among junior lien holders when there are "optional" versus "obligatory" loan advance agreements involved. There has been legislation in this area or at least touching some issues that are related to the open end loan programs that are secured by an interest in residential real property. See AB 3652 Calderon (attached).

It may be prudent to review California law in this area to determine whether if the Act was enacted it would avoid piecemeal enactments to address concerns in the area of open end lending secured by the equity in a residential real estate.

An additional impetus to determine whether the Act would have a beneficial impact in California is the fact that this type of lending is burgeoning. This clearly poses questions about the impact of this type of lending on the consumer and upon the alienability of real property.

Conversations with other representatives of financial institutions' trade associations indicate that they too have a desire to see the questions in connection with open end lending secured by residential real property settled. We are of the opinion that the more thorough and scholarly review conducted by the California Law Revision Commission would be more

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beneficial than the piecemeal amendment of California statutes.

In short, we would like to see a legislative proposal for the adoption of the Uniform Simplification of Land Transfers Act in California. We would also like to be among the groups to which any such drafts are circulated.

Thank you for considering our views. We remain available for any further information you may require in this connection.

Sincerely,

Larry J. Cox

Larry J. Cox
Director of Government Relations

LJC:jm

Enc.

ASSEMBLY BILL No. 3652

Introduced by Assembly Member Calderon

February 17, 1984

An act to add Section 2900 to the Civil Code, relating to real property.

LEGISLATIVE COUNSEL'S DIGEST

AB 3652, as introduced, Calderon. Real property: encumbrances.

Existing law does not provide that a deed of trust or a mortgage or other instrument creating a lien on real property shall secure future advances made under the terms of those instruments, and does not provide that any such advances shall have the same priority as the initial indebtedness secured by the deed of trust or mortgage or other instrument.

This bill would so provide.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

SECTION 1. Section 2900 is added to the Civil Code, to read:

2900. Any mortgage, deed of trust, or other instrument creating a lien on real property shall secure the indebtedness for which the mortgage, deed of trust, or other instrument was given and shall also secure future advances, whether optional or obligatory, provided that such advance or advances do not exceed a maximum principal amount which shall be set forth in the mortgage, deed of trust, or other instrument, plus interest thereon, and any disbursements made for the

payment of taxes, assessments, or insurance, plus interest thereon.

Such future advance or advances shall have the same priority as the initial indebtedness secured by the mortgage, deed of trust, or other instrument as determined by the date of recording.

O

EXHIBIT 2

UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT

Prefatory Note

This Act deals with conveyancing, recording, priorities, limitations, construction (mechanics') and other liens, and public land records. In each of these areas it provides comprehensive provisions designed to unify and modernize the law. The purposes of the Act include the furtherance of the security and certainty of land titles, the reduction of the costs of land transfers, the balancing of the interests of all parties in the construction lien area, and the creation of a more efficient system of public land records.

Article 1 of the Act contains definitions and general provisions applicable throughout the act. A number of these definitions and provisions derive from the Uniform Land Transactions Act.

Article 2 deals with conveyancing and recording. It states the requisites of a valid conveyance. It gives in specific detail the requirements for documents to be recorded in the public land records. Provision is made for the recording of master forms and memoranda of leases.

Article 3 covers priorities, marketable record title, and extinguishment of claims. The priority section details the effects of knowledge, recording, and of the information provided in and accompanying the document to be recorded. The marketable record title provisions provide for the shortening of the necessary period of retrospective title search. The curative and limitations sections give the periods within which various title defects must be asserted.

Article 4 provides for the recording of statutory liens and pending judicial proceedings.

Article 5 is a comprehensive treatment of construction liens (mechanics' and materialmen's liens).

Article 6 governs the maintenance of public land records.

Article 7 contains transitional and repealer provisions.

The Act incorporates principles and provisions derived from many different sources. Particularly influential has been the model legislation prepared by Professor Lewis M. Simes and Clarence B. Taylor for the Section of Real Property Probate and Trust Law of the American Bar Association and for the University of Michigan Law School (see L. M. Simes and C. B. Taylor, The Improvement of Conveyancing by Legislation, Ann Arbor: University of Michigan Law School, 1960). Important ideas for the article on construction liens derive from Florida legislation.

The high cost of real estate transfers has been seen by many analysts in recent years as being a substantial cause of the pricing of housing out of the reach of a large segment of the American public and of discouraging new investment in construction. This Act embodies a number of reforms designed to limit these costs. The required period of title search has been shortened through the adoption of marketable record title provisions similar to those which have proved successful in over a dozen states. The scope of the search has been further reduced by almost entirely eliminating interests other than those stated on the official record or those of which a purchaser has actual knowledge. Wasteful formalities have been made unnecessary.

Considerable attention is paid to the mechanics of the recording system and to the division of functions among the various participants in the process. Persons presenting documents for recording are required to give detailed information to enable the recording officer to index the documents correctly. The recording officer is given discretion in the development of systems for modernization and automation of recording operations and is given the responsibility for moving toward a system of at least limited geographic indexing. At the same time, in anticipation of the eventual computerization of the recording system, the recording office is relieved of all responsibility for making conclusions about the legal effects of documents submitted for recording. The office of state recorder is created to allow for coordination and sharing of experience in the modernization of recording practices.

The article on construction liens seeks to strike a fair balance between the interests of owners, lenders, building contractors, and subcontractors. It puts construction liens on the public land records at as early as possible a date. Buyers and owners of residential real estate, who are likely to be unsophisticated about construction liens, are given special protection.

Work on the Uniform Simplification of Land Transfers Act began as a part of the larger project of modernization and unification of land legislation that resulted in the approval of the Uniform Land Transactions Act by the National Conference of Commissioners on Uniform State Laws at the annual meeting in 1975. The history of that work and the names of the participants in it are given in the prefatory note to that Act. At the 1975 meeting the Special Committee on the Uniform Simplification of Land Transfers Act was created.

After the promulgation of the Act in 1976, a committee of the Real Property Division of the Section of Real Property, Probate and Trust Law of the American Bar Association was appointed to study it. As a result of discussions between that committee and representatives of the National Conference, a number of amendments to the Act were approved by the National Conference in 1977.

The members of the ABA committee were:

James M. Pedowitz
New York, New York

Morton P. Fisher, Jr.
Baltimore, Maryland

Robert T. Haines
Chicago, Illinois

Anthony B. Kuklin
New York, New York

Article 1

GENERAL PROVISIONS

PART 1

SHORT TITLE, CONSTRUCTION, APPLICATION, AND SUBJECT MATTER OF THE ACT

Sec.

PART 2

GENERAL DEFINITIONS

PART 3

GENERAL PROVISIONS

Article 2

CONVEYANCING AND RECORDING

PART 1

SCOPE AND DEFINITIONS

PART 2

CONVEYANCING

Sec.

PART 3

RECORDING

Article 3

PRIORITIES, MARKETABLE RECORD TITLE, AND EXTINGUISHMENT OF CLAIMS

PART 1

SCOPE AND DEFINITIONS

PART 2

PRIORITY OF CLAIMS

Sec.

PART 3

MARKETABLE RECORD TITLE

PART 4

CURATIVE PROVISIONS AND LIMITATIONS

Article 4

LIENS AND ENCUMBRANCES

PART 1

SCOPE AND DEFINITIONS

PART 2

LIENS

Sec.

PART 3

NOTICE OF PENDING PROCEEDINGS

Article 5

CONSTRUCTION LIENS

PART 1

GENERAL PROVISIONS

PART 2

EXISTENCE, PRIORITY; BONDS; WAIVER

ARTICLE 1

GENERAL PROVISIONS

PART 1

SHORT TITLE, CONSTRUCTION, APPLICATION, AND SUBJECT MATTER OF THE ACT

Section 1–101. [Short Title]

This Act shall be known and may be cited as the Uniform Simplification of Land Transfers Act.

Comment

The separate articles of this Act may be cited by their titles. Specific authorization for such citation has been omitted as unnecessary.

EXTRACT FROM MINUTES OF OCTOBER 26, 1979 MEETING

STUDY H-300 - REVISION OF REAL AND PERSONAL PROPERTY LAW

Summary of Background Study

Professor James L. Blawie, the Commission's consultant on this topic, prepared a background study which had been distributed to members of the Commission and others prior to the meeting. At the meeting, Professor Blawie summarized his study. The following is the substance of his summary.

> The Commission hired me to take a look at the law of titles and conveyancing in California--that's that deadly future interest and property stuff you may remember from law school. There has been quite a movement in the states in the last few years in the direction of clearing up and simplifying that area of the law. The

result is not merely making the law easier to learn and use, but also lifts a heavy and expensive burden from real estate transactions and expedites the settling of estates.

The most important trend in the past few years has been toward adopting marketable title acts and subsidiary acts to cure recording problems and clear land titles. In brief, marketable title acts are now in effect in 19 states and under consideration in at least a dozen more. The effect of the acts is to pick up the old New England states pattern of cutting off imperfections in title as of a moving date in the past, typically 20 or 30 years from the time title is searched today.

The acts are particularly important in states with ancient titles--and the oldest titles in California are more than 125 years old. A cloud on title, once imposed, continues indefinitely in states without marketable title acts, until on rare occasion, someone takes the time and trouble to sue to clear title. The longer the history of titles in a state, the more titles are clouded and unmarketable, and the more land is effectively taken off the market. The marketable title act is effectively an automatic clear title action which makes most titles in a state marketable within 20 or 30 years of the time it is adopted.

By 1945, 10 states and Ontario had adopted such acts. The judicial and legislative experience with the acts is extensive. Three model acts exist. No jurisdiction which adopted an MTA has repealed it, and all printed reports are highly favorable. There is at the present time no responsible opposition to the adoption of the acts, and there appears no reason why any state should not adopt an MTA.

Certain related statutes should be adopted to simplify title law. The distinctions between estates in land and in personalty which are made in certain statutes are contrary to modern American practice and should be abolished. Contingent reversionary interests should be made subject to the Rule Against Perpetuities. The condition effect of the conditions, covenants and restrictions clause in a deed to real property should be limited to enforcement by suit for injunction and damages and forfeiture eliminated.

As to recording problems--California's look forward or New York rule as to the links in a chain of title and constructive notice thereby, is contrary to practice by title professionals in California; it is used in 10 states at most, was adopted hurriedly and without sufficient consideration by the California Supreme Court, serves no valid purpose, unsettles titles, and should be abandoned in favor of the general American practice whereby each link in the chain of recorded title is reckoned from the time a person takes title as indicated by the date of his deed, until that person loses title of record when his grantee records. I have inquired of Title Insurance and Trust Co., Valley Title Co., St. Paul Title and others as to their practice. All of them limit title search to the conventional period of time unless they are instructed to the contrary, or their first search indicates that something

may have occurred which makes advisable a search of title beyond the point where a particular title holder lost title of record.

By general accord, the present grantor-grantee method of keeping title records in recorder's offices in California is at least a half century obsolete. There is agreement among experts in recording mechanics that the present state systems will be replaced by a system featuring a central computer in the state capital or other most economical location, with key-in terminals in each county recorder's office. Land records would be searched (as at present) up to a cut-off date, perhaps 1985, and thereafter by keying in an access number to the central computer for a screen viewing or print out. This is the same system used by California title companies. Authors who write about recording systems state that the computer system should have been adopted years ago, but that each state seems to be waiting for some other state to make a start or for a federal regulation to require such a system as a method of cutting land closing costs.

The study reviews California statutes, largely parts of the Civil Code, which are not in conformity with California court decisions, state practice, or modern analysis. A change is recommended in Section 702 so that it states that title concepts relevant to real property are also relevant to personal property insofar as feasible. A modification of Section 707 is suggested to do away with the determinable interest and the possibility of reverter, leaving only the estate on condition subsequent and the power of termination. Kentucky and Virginia have such legal patterns, and they have been recommended by scholarly authors for at least 30 years without any dissent.

It is suggested that some consideration be given to allowing the adverse possession statutes to run against present and future interests during the same period, so that title by adverse possession will be cleared in the minimum statutory period. Such change would require modification of Section 826 and other statutes.

The study recommends that the present trend toward making the public record more informative be implemented in California by appropriate statutes and amendments. California makes more documents recordable than most other states. The modern trend is to make real property documents even more readily recordable. Acknowledgment as a prerequisite for recording might be abolished. Affidavits or declarations under penalty of perjury would be used to supplement the record and clear title without the need for judicial proceedings. The names and addresses of all parties to transactions would have to appear on the face of or attached to any instrument to be recorded. Several states require the printed or typewritten name and address of the notary and the attorney or other person who drafted the instrument. Several states require a statement of the marital status of the grantor. It is recommended by several authors that the street address as well as the legal description of property be stated on instruments. Several states have adopted self-indexing; under these statutes any instrument

offered for recording is required to state or have attached sufficient information to place the instrument into its chain of title. It is required that a mortgagor or grantor, for instance, state the name of the person from whom the mortgagor or grantor took title, and refer to the book and page numbers of recording and the recorder's number of the deed or paper by which the grantor, mortgagor or other transferor took title. In the states which have adopted self-indexing, wild deeds have almost disappeared and nearly all chains of title are complete back to the time the statute was adopted. In the usual pattern, most chains of title end before the searcher reaches the origin patent or deed.

These self-indexing and fully informative record statutes have been adopted by and large in the marketable title states. Freed of the necessity to maintain active records more than 20 or 30 years into the past, these states can permit themselves the luxury of maintaining land records which are really complete and informative; and even if the records are lacking in some respect, an affidavit from a person connected with the title has prima facie validity to correct the shortcoming. The present tendency in the other states is toward making it somewhat difficult to record. The marketable title states tend to prefer to make it easy to record, so that the title searcher need not go outside the recorder's office. In line with this trend, these states usually require that the exercise of a power concerning land title be recorded or be ineffective against strangers who rely on the record, and provide that only tax records be exempt from the requirement of recording to be effective against good faith strangers.

It is recommended that Civil Code Section 1106 be modified to extend the doctrine of after-acquired title to any property interest purported to be transferred by paper instrument. If I transfer property to you when I don't own it, and I later acquire it, the property is automatically yours. In its present form, which is a departure from general American practice, the statute applies the doctrine of after-acquired title only to fee interests in real property transferred by other than quitclaim deed.

It is recommended that Civil Code Section 1213.5, which clears record title of unexercised options within one year after their expiration, be extended to include simple contracts of sale, which have equal title clogging effect and are closely related in practical use.

Civil Code Section 1464 sets out the common law first rule in Spencer's Case. This rule, which requires the use of the word "assigns" in order to make successors in title subject to covenants and servitudes on the transferor's title, has been rejected in almost every American jurisdiction and survives in California only because of Section 1464. This section should be simply eliminated.

Certain technical changes are suggested as to Code of Civil Procedure Section 872.210 to make it clear that the statute refers to real and personal property partition equally.

The common law rule in Wild's Case still exists in California. It provides a complicated set of rules for dealing with the phrase "To A and his or her heirs" when it occurs in a written instrument. The rule is obsolete and serves no good purpose. It is usually abolished along with the rule in Shelley's Case, Worthier Title, and the Destructibility of Contingent Remainders. Somehow, the Rule in Wild's Case has survived to the present in California. There are several model statutes designed to eliminate the rule, and one is recommended in the study. However it is done, the rule in Wild's Case should disappear from California law without delay.

Several other suggestions for study or change are made in the study, but these largely are concerned with minor or technical points. Essentially, the desirable changes may be summed up in a few phrases--adopt a marketable title act and related reverter and curative statutes; assimilate real property and personal property stututory references as to title insofar as practicable; wipe out the condition effect of the "conditions, covenants and restrictions" in real property deeds; wipe out the determinable estate and the possibility of reverter; consider the adoption of the Uniform Simplification of Land Transfers Act which deals with many of the problems referred to; eliminate look-forward chain of title theory; adopt self-indexing and the theory of the totally informative land record; extend after-acquired title theory to any title transferred by writing; provide that the land record be cleared of expired simple land sale contracts as it now is of unexercised options; abolish the first rule in Spencer's Case; extend the rule against perpetuities to reversionary contingent interests; abolish the Rule in Wild's Case; plan to conform the land records to modern data retrieval methods in the near future.

Most of these suggestions have been proven in practice in other states over a long period of time. Every one has the approbation of writers and scholarly organizations. Not one of the suggestions has any responsible opposition. Not one of the suggestions is controversial in any fashion. Every suggestion will simplify property transfer in California and should lower the cost of land transfer dramatically.

Comments of Mr. Denitz

Mr. Denitz, Tishman West Management Corporation, made some comments on the study. His comments are summarized below.

First, I agree with Professor James L. Blawie that technical correction should be made in the recording acts to simplify the mechanics of land transfers: such techniques as abolition of the requirement that documents be acknowledged before a notary public, making mandatory the requirement that a grantor list the party from whom he derived title, sometimes known as "self-indexing", the optional addition to grant deeds of a street address, and other such technical improvements would be of aid in the reduction of title insurance costs as well as making possible the infrequent search of records by individuals other than title companies.

Second, the law with respect to title searches should be modified, as Professor Blawie suggests, to eliminate the necessity that title companies "search forward".

Third, In moving now to the area of subtantive law, I am in complete agreement with the remarks verbally made by Professor Blawie that Rights of Entry and Possibilities of Reverter (titles subject to which are commonly sometimes known as "determinable fees") should be revised so that Possibilities of Reverter and Rights of Entry are enforceable only by actions for injunction and suits for damages rather than there being any chance that a grantee might be subject to forfeiture of his estate in the land: thus Possibilities of Reverter and Rights of Entry would, in my view, be treated as covenants running with the land and, if a constitutional way can be devised, should be restricted both as to Possibilities of Reverter and Rights of Entry created in the past as well as those which might be inadvertently drafted as such in future deeds.

Fourth, in approaching the main thrust of Professor Blawie's study and the main area of study which the Commission is considering,- namely that involving whether a Marketable Title Act should be enacted in California and whether revisions should be made in the law relating to covenants and servitudes relating to land,- it is essential that the Commission as well as the Legislature have in mind (a) the increasing use of long-term land leases as a financing device and therefore as the vehicle for both commercial and residential development projects, (b) the increased importance of covenants, conditions and restrictions in Shopping Centers, jointly developed or otherwise planned unit development, and in condominium and other situations where amenities must be protected in order to satisfy the bargained-for expectations of the land owners and land occupiers, (c) the need for protection of City-required parking covenants and the preservation of utility easements in order to preserve the viability of a given real estate development project, (d) the effect, if any, which such a Marketable Title Act might have on lenders and investors who, being residents of other States, might not be familiar with the operation or results of the new law, and (e) the effect that such a new law might have on title insurance in this State of our where "title insurance is (in practical fact) title".

Treating briefly each of the foregoing problem areas:

(a) Ground Leasing: Most commercial building development projects are today constructed upon ground leased land and, more and more, I believe we will see single family residences as well as apartment houses "built" on ground leases, the same being both a financing device and the result of the vast increase in the cost of acquisition of fee-title itself (i.e., as costs of fee-mortgage financing and required down payments escalate, more and more "purchasers" will turn to acquisition of ground leases in order to avoid 50% down payments and the cost of repaying principal in a day and age of double-digit mortgage loan interest rates); above all, the sanctity of long-term ground leases, regardless of their restrictive nature and effect on fee-title, must be an exception to the proposed Marketable Title Act if recommenced by the Commission.

(b) Covenants, Conditions and Restrictions: In the world of Shopping Centers, covenants, conditions and restrictions (in that field commonly known as Restrictions, Easements and Agreements) are essential not only for the orderly and continued operation of such a development but also are with very few exceptions a requirement imposed by the major department stores or other "anchor tenants" in order to induce such priority persons to commit themselves to tenancy in the Shopping Center project; in the world of condominium developments and other planned unit developments Covenants, Conditions and Restrictions are the cornerstone of the amenity-package (e.g., tennis courts, open space, swimming pools, saunas and roadways) without which persons would not buy a unit or lease a unit for their own occupancy. The business expectation of both commercial parties and residential parties therefore is firmly grounded in reliance upon as well as enforcement of the Covenants, Conditions and Restrictions reasonably expected, as a business matter, by such persons to remain "in place" throughout the life of their financial commitment to the project or development. Thus it is manifestly insufficient to permit only the developer to enforce Covenants, Conditions and Restrictions; rather, enforcement of such matters should properly be vested in any party who has a substantial property interest in and who derives benefit from those Covenants. Naturally, when a Covenant, Condition or Restriction becomes obsolete, remote or the subject of so-called "changed conditions" as found in the present case law of California, no one should be permitted to enforce the Covenant and some method should be found to eliminate the same of record without the necessity of a long term quiet title action.

(c) Parking Covenants and Utility Easements: In order to obtain a building permit, it is uniformally necessary in major urban areas to provide parking facilities for tenants and, in the case of developments such as hotels, visitors to the project. Frequently the design element of the project precludes the parking being located "on-site" and, happily, Building Departments such

as those in Los Angeles will permit (under applicable Building Codes) the requisite parking, or some part thereof, to be located "off-site" (the requirement in Los Angeles being that the parking must be located not more than 750 ft. from the project). Moreover, the life of a project uniformly requires that utilities and ingress and egress be provided, sometimes across adjacent independently owned (frequently by one's self) property. In all of such cases the economic life of the project or development requires that the parking covenant, utility easement or right of ingress and egress lasts as long as the project does, without possibility of the same being affected by the operation of a Marketable Title Act (and in this connection without the necessity of someone or anyone having to monitor the calendar in order to file a continuation-notice at any point in the life of the project). The other side of the coin, however, and one which deserves some study, is the possibility of removing such covenants or easements when the project itself is removed through demolition or other permanent cessation of the need to which the covenant or easement responded in the first place.

(d) and (e) Effect on Lenders and Title Companies: I have a personal uneasiness with the prospect of the enactment of a far reaching, all encompassing "Marketable Title Act" not only because of the unknown effect which the same might have on land titles and ground lease titles possessed by my company and by other persons in the business community (including companies whom we represent as managing agent), but I am further concerned as to the reaction of Eastern lenders and other participating parties to such an evulsive change in the law of real property titles. Whether the economic life and growth of the business community would be slowed or otherwise injured is an unknown factor at this time and is a practical problem which I am sure all of us would seek to avoid. Additionally, input from various title companies should be obtained to determine whether a Marketable Title Act would speed up the title insurance process, make it easier to obtain elimination of exceptions to clear title, and cut the costs of title insurance generally.

General Approach to Be Taken by Commission

The Commission determined that this major study should be placed on the meeting agenda when time permits after the work on the enforcement of judgments statute is substantially completed. The staff is to prepare memoranda on the various matters embraced within the study so that the Commission can go into the various matters in detail and determine the policy issues presented.

Obtaining Input From Various Persons and Organizations

Letter to Deans of California Law Schools. A letter should be written to the Dean of each California law school advising that the Commission is commencing its work on this major study and indicating

that any member of the law faculty who is interested in reviewing and commenting on materials prepared in the course of the study may request that he or she be placed on a list of persons to whom such materials will be sent. The first item to be sent to the persons who ask to be placed on the list is a copy of Professor Blawie's study. The study should be sent with a request that the Commission be advised of any areas not covered in the study that should be covered.

Establishment of Special Subcommittee of State Bar Real Property Section. The Commission discussed how the State Bar should be involved in the study. The Executive Secretary reported that the State Bar plans to establish a Real Property Law Section. Noting the excellent results of the cooperative effort with the State Bar Subcommittee in developing the new guardianship-conservatorship statute, the Commission indicated its desire to establish the same type of relationship with the new State Bar Section on Real Property Law. The Executive Secretary was requested to work out the arrangements.

Establishing communications with local bar associations. It was suggested that the Executive Secretary write to the major local bar associations to determine whether the association or a committee of the association is interested in working out some type of arrangement whereby the Commission can receive comments on its tentative proposals in this field and perhaps have a continuing working arrangement with the association on the study (such as having a representative of the association attend Commission meetings when this study is under consideration).

California Association of Realtors. The California Association of Realtors should be advised that the Commission has undertaken this study and an effort should be made to obtain input from the association on a continuing basis.

California Land Title Association. An additional effort should be made to obtain continuing input from the California Land Title Association.

Additional sources of possible assistance. It was suggested that the Executive Secretary contact Professor James E. Krier, Stanford Law School, and Professor Jesse Dukeminier, UCLA School of Law, and determine whether they would be willing to review the background study and suggest possible additional areas of study and otherwise be involved in the study.

EXHIBIT 4

[L. A. No. 31740. Mar. 5, 1984.]

ERNEST E. WARSAW et al., Plaintiffs and Respondents, v.
CHICAGO METALLIC CEILINGS, INC., Defendant and Appellant.

SUMMARY

The owners of a parcel of commercial property brought an action for declaratory and injunctive relief against the adjoining landowner, alleging that they had acquired a prescriptive easement over a strip of defendant's property that abutted their driveway and loading docks. For approximately seven years trucks servicing plaintiffs' facility had used a portion of the strip to turn and back into the loading docks, and it was undisputed that an inability of the trucks to make such use of defendant's property would destroy the commercial value of plaintiffs' building. The action arose when defendant graded a portion of the land at issue in preparation for construction of a warehouse, thus effectively blocking plaintiffs' use of the land. Following denial of plaintiffs' motion for a preliminary injunction, defendant proceeded with construction, which was completed during the pendency of the litigation. After a trial on the merits, the trial court found that plaintiffs had acquired a prescriptive easement over defendant's property and ordered defendant to remove that portion of its building which interfered with the easement. (Superior Court of Los Angeles County, No. C303574, Carlos E. Velarde, Judge.)

The Supreme Court affirmed. The court first held that substantial evidence supported the trial court findings that plaintiffs' use of the property was hostile and that the truckers had followed a definite course and pattern of travel. The court also held that a mandatory injunction was an appropriate remedy under the circumstances. The fact that defendant's decision to proceed with construction may have been reasonable in light of the denial of a preliminary injunction did not change the result. Finally, the court held that defendant was not entitled to any offsetting monetary relief from plaintiffs, who had acquired a title by prescription which was "sufficient against all" (Civ. Code, § 1007), including defendant. That being so, there was no basis in law or equity for requiring them to compensate defendant for the fair market value of the easement so acquired. Nor could plaintiffs be required to contribute to the cost of removing the encroaching structure, since it was erected after plaintiffs' suit was filed with full knowledge of their claim.

(Opinion by Richardson, J., with Mosk, Kaus and Broussard, JJ., concurring. Separate concurring opinion by Grodin, J., with Bird, C. J., concurring. Separate dissenting opinion by Reynoso, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) Easements and Licenses in Real Property § 8—Easements—Mode and Extent of User—Prescriptive Easements—Elements.—A party claiming a prescriptive easement must show use of the property which has been open, notorious, continuous, and adverse for an uninterrupted period of five years (Code Civ.

Proc., § 321). Further, the existence of such an easement must be shown by a definite and certain line of travel for the statutory period.

[See **Cal.Jur.3d,** Easements and Licenses, § 23 et seq.; **Am.Jur.2d,** Easements and Licenses, § 39 et seq.]

(2) **Easements and Licenses in Real Property § 8—Easements—Mode and Extent of User—Prescriptive Easements—Elements—Questions of Fact.**—Whether the elements of a prescriptive easement have been established is a question of fact for the trial court, whose findings will not be disturbed when there is substantial evidence to support them.

(3) **Easements and Licenses in Real Property § 8—Easements—Mode and Extent of User—Prescriptive Easements—Elements—Definite Course of Travel.**—The line of travel over a roadway which is claimed by prescription may not be a shifting course, but must be certain and definite. Slight deviations from the accustomed route will not defeat an easement, but substantial changes which break the continuity of the course of travel will destroy the claim to prescriptive rights. The distance to which a roadway may be changed without destroying an easement is determined somewhat by the character of the land over which it passes, together with the value, improvements, and purposes to which the land is adapted.

(4) **Easements and Licenses in Real Property § 8—Easements—Mode and Extent of User—Prescriptive Easements—Elements—Definite Course of Travel.**—In an action between two commercial property owners in which plaintiffs alleged that they had acquired a prescriptive easement over a strip of defendant's property that abutted their driveway and loading docks, substantial evidence supported the trial court's

[35 Cal.3d 566]

finding that the truckers using the disputed land followed a definite course and pattern of travel, as required in order to establish a prescriptive easement. While the space required to swing around and back into plaintiffs' loading dock varied from driver to driver, and while no two drivers followed precisely the same course, all used the land at issue for the same purpose.

(5a-5c) **Easements and Licenses in Real Property § 7—Easements—Mode and Extent of User—Hostile or Permissive Use.**—In an action between two commercial property owners in which plaintiffs alleged that they had acquired a prescriptive easement over a strip of defendant's property that abutted their driveway and loading docks, substantial evidence supported the trial court's finding that plaintiffs' use of the property was hostile rather than permissive, where there was evidence adduced at trial that despite plaintiffs' unsuccessful attempts to negotiate an express easement, their use of the property continued uninterrupted for approximately seven years, and where there was no evidence that defendant had ever expressly permitted plaintiffs to use the parcel for truck and vehicular traffic. In fact, defendant's adamant refusal to negotiate on the issue was evidence that no permission was given or contemplated.

(6) **Easements and Licenses in Real Property § 7—Easements—Mode and Extent of User—Hostile or Permissive Use.**—Continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence, and, in the absence of evidence of mere permissive use, is sufficient to sustain a judgment.

(7) **Easements and Licenses in Real Property § 7—Easements—Mode and Extent of User—Hostile or Permissive Use—Questions of Fact.**—Whether the use of property over which an easement is sought is hostile or merely a matter of neighborly accommodation is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties.

(8) **Easements and Licenses in Real Proper-**

ty § 11—Easements—Remedies and Actions—Mandatory Injunctions—Removal of Obstruction.—A court of equity may, in a proper case, issue a mandatory injunction for the protection and preservation of an easement, including, where appropriate, an order for the removal of an already erected obstruction. A mandatory injunction may issue even if the cost of removal is great, especially if the encroaching structure was wilfully erected with knowledge of the claimed easement. The determination is within the sound discretion of the trial court.

[35 Cal.3d 567]

(9) Easements and Licenses in Real Property § 11—Easements—Remedies and Actions—Mandatory Injunctions—Removal of Obstruction.—In an action between two commercial property owners in which it was determined that plaintiffs had acquired an easement over a strip of defendant's property that abutted their driveway and loading docks, the trial court properly issued a mandatory injunction ordering defendant to remove that part of a completed structure that interfered with the easement, where the structure to be removed was not begun until after the underlying action had been filed, and where it was completed while the litigation was still pending. The fact that defendant's decision to proceed may have been reasonable in light of the denial of plaintiffs' motion for a preliminary injunction did not change the result.

(10) Appellate Review § 71—Supersedeas and Stay—Obtaining Stay—Decisions Stayed on Perfecting Appeal—Mandatory Injunction—Retention of Jurisdiction by Trial Court.—In an action between two commercial property owners in which it was determined that plaintiffs had acquired an easement over a strip of defendant's property, and in which a mandatory injunction was issued ordering defendant to remove that part of a structure that interfered with the easement, the trial court, in recognition of the fact that plaintiffs continued to suffer damages every day that use of the easement was obstructed, properly retained jurisdiction for the possible awarding of damages in the event of defendant's noncompliance with the injunction. Although the judgment was not enforceable during the pendency of the appeal (Code Civ. Proc., § 916, subd. (a)), such stay in enforcement of the judgment did not a fortiori prevent the accrual of damages which would become part of the judgment if and when it became final and enforceable.

(11a-11c) Easements and Licenses in Real Property § 11—Easements—Remedies and Actions—Offsetting Monetary Relief.—In an action between two commercial property owners in which it was determined that plaintiffs had acquired an easement over a strip of defendant's property that abutted their driveway and loading docks, and in which defendant was ordered to remove that part of a completed structure that interfered with the easement, defendant was not entitled to any offsetting monetary relief from plaintiffs, who had acquired a title by prescription which was "sufficient against all" (Civ. Code, § 1007), including defendant. That being so, there was no basis in law or equity for requiring them to compensate defendant for the fair market value of the easement so acquired. Nor could plaintiffs be required to contribute to the cost of removing the encroaching structure, where it was erected after plaintiffs' suit was filed with full knowledge of their claim.

[35 Cal.3d 568]

(12) Easements and Licenses in Real Property § 8—Easements—Mode and Extent of User—Prescriptive Easements—Liability to Underlying Property Owner.—The statutory procedure for acquiring an easement by prescription retains the traditional common law rule that such an easement may be obtained without incurring any liability to the underlying property owner. If the requisite elements of a prescriptive use are shown, such use for the five-year statutory period of Code Civ. Proc., § 321, confers a title by prescription.

(13) Easements and Licenses in Real Property § 11—Easements—Remedies and Actions—Offsetting Monetary Relief—Requiring Easement Owner to Contribute to Cost of Relocating Encroachment.—A court may order an easement owner to contribute all or part of the cost of relocating or reconstructing an innocent encroachment, as a condition to an award of injunctive relief. Since a court has discretion to balance the hardships and deny removal of an innocent encroachment that does not irreparably injure the plaintiff when the cost of removal would greatly exceed the inconvenience to the plaintiff by its continuance, no compelling reason exists for depriving the trial court of the lesser power of granting an injunction on condition that the plaintiff pay a reasonable portion of the cost of relocation.

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David S. Smith and Lee S. Smith for Plaintiff and Respondent.

OPINION

RICHARDSON, J.—We granted a hearing in this case to consider whether one who acquires a valid prescriptive easement over another's property nonetheless may be required to compensate that person for either (1) the fair market value of the easement, or (2) the cost of removing or relocating any encroaching structures which interfere with use of the easement. We conclude that the statutes which define and validate prescriptive easements neither authorize nor contemplate an award to the underlying property owner of compensation for the reasonable value of the easement, and that under the circumstances in this case it would be improper to charge the owner of the easement with any portion of the cost of removing encroachments.

Although we disagree with the Court of Appeal's resolution of the foregoing issues, its opinion (per Compton, J.) correctly determined the other issues on appeal from the trial court's judgment declaring that plaintiffs had acquired a prescriptive easement over defendant's property. Accordingly, we adopt that portion of the opinion as follows:*

This is an appeal from an equitable decree which declared that plaintiffs had acquired an easement by prescription over the property of defendant. Defendant was ordered to dismantle and relocate a structure which had been erected on its own property but which interfered with plaintiffs' use of the easement. [ ]

This action involves two contiguous parcels of real estate which front on [the west side of] Downey Road in the City of Vernon. Downey Road runs in a generally north-south direction. The two parcels are approximately 650 feet deep. Plaintiffs own the southerly parcel and defendant owns the northerly parcel. Both parcels were acquired in 1972 from a common owner.

At the time of acquisition both parcels were unimproved. Plaintiffs' arrangement with the seller was that the seller would construct on the parcel to be purchased by plaintiffs a large commercial building erected to plaintiffs' requirements. The building covered almost the entire parcel. A 40 foot wide paved driveway was laid out along the northern edge of plaintiffs' property to provide access to loading docks on the northern side of plaintiffs' building.

For its part defendant constructed on its property a substantially smaller building which ran only about one-half the depth of the northerly parcel and left vacant a strip of ground about 150 feet wide along the side of the parcel which abutted plaintiffs' property.

From the beginning it was apparent that

*Brackets together, in this manner [ ], are used to indicate deletions from the opinion of the Court of Appeal; brackets enclosing material (other than the editor's parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. (*Estate of McDill* (1975) 14 Cal.3d 831, 834 [122 Cal.Rptr. 754, 537 P.2d 874].)

plaintiff's 40 foot wide driveway was inadequate since the large trucks which carried material to and from plaintiffs' loading dock could not turn and position themselves at these docks without traveling onto the defendant's property. The inability of these trucks to make such use of defendant's property would destroy the commercial value of plaintiff's building.

[35 Cal.3d 570]

The court found that because of the fact that the possibility of creating an easement over defendant's property was considered and rejected in the original negotiations between the seller, plaintiffs and defendant, no easement by implication was created. The trial court further found that the existence of the driveway on plaintiffs' property militated against the creation of an easement by necessity.

From 1972 until 1979 trucks and other vehicles servicing plaintiffs' facility used a portion of the vacant ground on defendant's property to enter, turn, park and leave the area of plaintiffs' loading dock. On at least two occasions during that period plaintiffs sought, unsuccessfully, to acquire an easement from defendant or to create mutual easements over plaintiffs' and defendant's property.

In 1979 defendant developed plans to construct a warehouse on the southerly portion of the property including that portion of the property being used by plaintiffs. A pad of earth was raised along the southerly portion of defendant's property approximately five feet from the property line. This grading effectively blocked plaintiffs' use of the area and plaintiffs commenced this action for injunctive and declaratory relief.

When the trial court denied plaintiffs' request for a preliminary injunction to prevent further construction, defendant proceeded to erect a building on the contested area.

After a trial on the merits, the trial court found that plaintiffs had acquired a 25 foot wide prescriptive easement over and along the southern portion of defendant's property for the full depth of the property. As noted defendant was ordered to remove that portion of the building which interfered with the described easement. Further the trial court gave defendant 90 days to accomplish the removal and purported to reserve jurisdiction to award damages for failure of defendant to comply with the mandatory injunction. This appeal ensued.

(1a) The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years. (*Gas & E. Co.* v. *Crockett L. & C. Co.* (1924) 70 Cal.App. 283, 290 [233 P. 370]; *Zimmer* v. *Dykstra* (1974) 39 Cal.App.3d 422, 430 [114 Cal.Rptr. 380]; Code Civ. Proc., § 321.) **(2)** Whether the elements of prescription are established is a question of fact for the trial court (*O'Banion* v. *Borba* (1948) 32 Cal.2d 145 [195 P.2d 10]), and the findings of the court will not be disturbed where there is substantial evidence to support them.

[35 Cal.3d 571]

(1b) Further, the existence of a prescriptive easement must be shown by a definite and certain line of travel for the statutory period. (*Dooling* v. *Dabel* (1947) 82 Cal.App.2d 417 [186 P.2d 183].) **(3)** "The line of travel over a roadway which is claimed by prescription may not be a shifting course, but must be certain and definite. Slight deviations from the accustomed route will not defeat an easement, but substantial changes which break the continuity of the course of travel will destroy the claim to prescriptive rights . . . . [Citations.] [M]anifestly the distance to which a roadway may be changed without destroying an easement will be determined somewhat by the character of the land over which it passes, together with the value, improvements, and purposes to which the land is adapted." (*Matthiessen* v. *Grand* (1928) 92 Cal.App. 504, 510 [268 P.675].)

(4) The trial court found that "the truckers using [the disputed parcel] did, in fact, follow a definite course and pattern, and while admittedly, no two truck drivers followed the exact course . . . and the traffic situation . . . varied from day to day, the deviation taken by various drivers over the seven-year period was only slight."

The evidence revealed that truck drivers who were making deliveries to or receiving

goods from plaintiffs used the parcel to approach the building, swing around and back into plaintiffs' loading dock. Since the drivers varied in their abilities, the space required to complete this manuever was variable. No two drivers followed precisely the same course, but all used the parcel for the same purpose—to turn their vehicles so they could enter plaintiffs' loading docks. There was substantial evidence to support the findings on this issue.

Defendant contends that there was no evidence supporting use of several hundred feet of the westerly portion of the parcel. From the trial transcript, it is difficult to discern exactly to which portion of the parcel specific bits of testimony pertain. [ ] [Our review of the record, however, discloses substantial evidence supporting the establishment of a prescriptive easement over the westerly portion at issue.]

(5a) Defendant contends that there was no substantial evidence that plaintiffs' use of the property was hostile rather than permissive. Again, we find that this contention is without merit.

(6) The issue as to which party has the burden of proving adverse or permissive use has been the subject of much debate. However, [ ] [we agree with the view, supported by numerous authorities,] that continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and in the absence of evidence of

[35 Cal.3d 572]

mere permissive use it will be sufficient to sustain a judgment. (*MacDonald Properties, Inc.* v. *Bel-Air Country Club* (1977) 72 Cal.App.3d 693 [140 Cal.Rptr. 367], [702, and cases cited].)

(5b) Defendant relies on evidence that plaintiffs at one time attempted to purchase the disputed parcel from the seller and at various times attempted to negotiate for an express easement. [¶] (7) Whether the use is hostile or is merely a matter of neighborly accommodation, however, is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties. (*Taormino* v. *Denny* (1970) 1 Cal.3d 679 [83 Cal.Rptr. 359, 463 P.2d 711]; *Fobbs* v. *Smith* (1962) 202 Cal.App.2d 209 [20 Cal.Rptr. 545].)

(5c) There was evidence adduced at trial that despite plaintiffs' unsuccessful attempts to negotiate an express easement, their use of the property continued uninterrupted for approximately seven years. There was no evidence that defendant had ever expressly permitted plaintiffs to use the parcel for truck and vehicular traffic. In fact defendant's adamant refusal to negotiate on the issue is evidence that no permission was given or contemplated.

(8) Defendant's next assignment of error is addressed to the trial court's order to remove that part of the completed structure which interferes with plaintiffs' easement. Defendant argues that a mandatory injunction may not issue to enjoin a completed act. However, there is extensive authority standing for the proposition that a court of equity may, in a proper case, issue a mandatory injunction for protection and preservation of an easement including, where appropriate, an order for removal of an obstruction already erected. (*Clough* v. *W. H. Healy Co.* (1921) 53 Cal.App. 397 [200 P. 378]; *Pacific Gas & Elect. Co.* v. *Minnette* (1953) 115 Cal.App.2d 698 [252 P.2d 642].) The determination as to whether such remedy is appropriate is within the sound discretion of the trial court. (*Pacific Gas & Elec. Co.* v. *Minnette, supra.*) A mandatory injunction may issue even if the cost of removal is great under certain circumstances [, especially if the encroaching structure was wilfully erected with knowledge of the claimed easement. (See *Brown Derby Hollywood Corp.* v. *Hutton* (1964) 61 Cal.2d 855, 859 [40 Cal.Rptr. 848, 395 P.2d 896]; *Dolske* v. *Gormley* (1962) 58 Cal.2d 513, 521 [25 Cal.Rptr. 270, 375 P.2d 174]; *Raab* v. *Casper* (1975) 51 Cal.App.3d 866, 873 [124 Cal.Rptr. 590]; *D'Andrea* v. *Pringle* (1966) 243 Cal.App.2d 689, 698 [52 Cal.Rptr. 606]; *Pacific Gas & Elec. Co.* v. *Minnette, supra,* 115 Cal.App.2d at p. 710; *Christensen* v. *Tucker* (1952) 114 Cal.App.2d 554, 563-564 [250 P.2d 660]; *Morgan* v. *Veach* (1943) 59 Cal.App.2d 682, at p. 689 [139 P.2d 976].)

[35 Cal.3d 573]

As the court in *Morgan* explained:] "An appropriate statement relative to defendants' as-

sertion that an injunction would work an inequitable burden is in 28 Am.Jur., section 56, page 253 as follows: 'In view of the drastic character of mandatory injunctions, the rule under consideration as to balancing the relative conveniences of the parties applies with special force to a prayer for such mandatory relief. Where, therefore, by innocent mistake or oversight, buildings erected . . . slightly encroach . . . and the damage to the owner of the buildings by their removal would be greatly disproportionate to the injury . . . the court may decline to order their removal . . . . But relief by way of a mandatory injunction will not be denied on the ground that the loss caused by it will be disproportionate to the good accomplished, where it appears that the defendant acted with a full knowledge of the complainant's rights and with an understanding of the consequences which might ensue . . . .'

"In a note in 57 A.L.R., first column, page 343, it was said: 'Wilfulness on the part of the defendant in proceeding with the violation of the restriction after warning by the complainant, especially after suit is brought, is a ground for equitable relief by mandatory injunction greatly stressed by the courts.'" (P. 689.)

(9) In the case at bench, the structure to be removed was not begun until after the underlying action was filed. It was completed while the litigation was still pending. Defendant gambled on the outcome of the action and lost. The fact that its decision may have been reasonable in light of the denial of the preliminary injunction does not change the result.

(10) [ ] [Defendant next challenges the trial court's] retention of jurisdiction to award damages in the event of defendant's noncompliance with the mandatory injunction within 90 days of judgment. Defendant argues that this portion of the judgment interferes with its right to an automatic stay of the injunction on appeal. (*Byington* v. *Superior Court* (1939) 14 Cal.2d 68, 70 [92 P.2d 896].)

Code of Civil Procedure section 916, subdivision (a), provides: "Except as provided in Sections 917.1 through 917.9 and in Section 117.7, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, *including enforcement of the judgment or order*, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (Italics added.)

The order reserving jurisdiction was made by the court in apparent recognition of the fact that plaintiffs continued to suffer damages every day that

[35 Cal.3d 574]

use of the easement was obstructed. If defendant's contentions had been upheld on appeal, there would of course have been no basis for an award of damages. Hence the judgment was not enforceable during the pendency of the appeal.

On the other hand, a stay in the enforcement of the judgment during the pendency of the appeal does not a fortiori prevent the accrual of the damages which become part of the judgment if and when the judgment becomes final and enforceable. [ ] [The trial court's retention of jurisdiction for the possible awarding of damages thus was appropriate under the circumstances of this case.] (End of Court of Appeal opinion.)

(11a) We next consider whether defendant is entitled to any offsetting monetary relief from plaintiffs. Defendant contends that the trial court's judgment is overly harsh because it both granted plaintiffs an easement over a 16,250-square-foot parcel of defendant's property free of charge and also required defendant to incur the entire cost of relocating or reconstructing its building. Would application of equitable principles dictate that plaintiffs either pay to defendant the fair market value of the easement they acquired, or contribute a portion of the costs of relocating? We think not.

(12) Initially, the statutory procedure for acquiring an easement by prescription quite clearly retains the traditional common law rule that such an easement may be obtained without incurring any liability to the underlying property owner. Civil Code section 1007, enacted in 1872, provides that "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property *confers a title thereto*, denominated a title by prescription, *which is sufficient against all* . . . ." (Italics added.) We have confirmed that if the requisite elements of a prescriptive use are shown, "Such use for

the five-year statutory period of Code of Civil Procedure section 321 *confers a title by prescription.*" (*Taormino* v. *Denny*, *supra*, 1 Cal.3d at p. 686, fns. omitted, italics added.)

(11b) Thus, plaintiffs herein have acquired a title by prescription which is "sufficient against all," including defendant. That being so, there is no basis in law or equity for requiring them to compensate defendant for the fair market value of the easement so acquired. To exact such a charge would entirely defeat the legitimate policies underlying the doctrines of adverse possession and prescription "'to reduce litigation and preserve the peace by *protecting* a possession that has been maintained for a statutorily deemed sufficient period of time.'" (Italics added, *Gilardi* v. *Hallam* (1981) 30 Cal.3d 317, 324 [178 Cal.Rptr. 624, 636 P.2d 588], quoting from an earlier case; see also the Restatement of Property, intro. note at pp. 2922-2923; 3 Powell, The Law of Real Property (1981 ed.) ¶ 413, pp. 34-103—34-104.)

[35 Cal.3d 575]

As described by Professor Powell, "Historically, prescription has had the theoretical basis of a lost grant. Its continuance has been justified because of its functional utility in helping to cause prompt termination of controversies before the possible loss of evidence and in *stabilizing* long continued property uses." (*Ibid.*, fn. omitted, italics added.) If the doctrine of prescription is truly aimed at "protecting" and "stabilizing" a long and continuous use or possession as against the claims of an alleged "owner" of the property, then the latter's claim for damages or fair compensation for an alleged "taking" must be rejected.

The Court of Appeal recently described the rationale underlying the related adverse possession doctrine as follows: "[I]ts underlying philosophy is basically that land use has historically been favored over disuse, and that therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner. [Fn. omitted.] Hence our laws of real property have sanctioned certain types of otherwise unlawful taking of land belonging to someone else, while, at the same time, our laws with respect to other types of property have generally taken a contrary course. This is now largely justified on the theory that the intent is not to reward the taker or punish the person dispossessed, but to reduce litigation and preserve the peace by protecting a possession that has been maintained for a statutorily deemed sufficient period of time . . . . [¶] Quite naturally, however, dispossessing a person of his property is not easy under this theory, and it may even be asked whether the concept of adverse possession is as viable as it once was, or whether the concept always squares with modern ideals in a sophisticated, congested, peaceful society . . . . [¶] *Yet this method of obtaining land remains on the books*, and if a party proves all five of the [requisite] elements [citation], he can claim title to another's land . . . ." (*Finley* v. *Yuba County Water Dist.* (1979) 99 Cal.App.3d 691, 696-697 [160 Cal.Rptr. 423], italics added.)

Similarly, the system of acquiring an interest in land by prescription "remains on the books," and any decision to alter that system by requiring the payment of compensation clearly would be a matter for the Legislature. Defendant cites no authorities indicating that the present system is unconstitutional in any respect.

(13) Assuming that an award of compensation for the value of the easement is unavailable, may the courts nonetheless order the easement owner to contribute all or part of the cost of relocating or reconstructing an encroaching building? It is at least arguable that a court of equity could order, in an appropriate case, that the plaintiff contribute a portion of the cost of relocating an *innocent* encroachment, as a condition to an award of injunctive relief. As previously noted, it is well established that a court has dis-

[35 Cal.3d 576]

cretion to balance the hardships and *deny* removal of an encroachment if it was innocently made and does not irreparably injure the plaintiff, and where the cost of removal would greatly exceed the inconvenience to the plaintiff by its continuance. (See *Brown Derby Hollywood Corp.* v. *Hatton*, *supra*, 61 Cal.2d at p. 858; *Dolske* v. *Gormley*, *supra*, 58 Cal.2d at p. 520-521; *Raab* v. *Casper*, *supra*, 51 Cal.App.2d at p. 872; *Donnell* v. *Bisso Broth-*

ers (1970) 10 Cal.App.3d 38, 45 [88 Cal.Rptr. 645].) If, as the foregoing cases establish, an outright denial of injunctive relief would be sustained under those circumstances, then no compelling reason exists for depriving the trial court of the *lesser* power of granting the injunction on condition that the plaintiff pay a reasonable portion of the cost of relocation. (See *Collester* v. *Oftedahl* (1941) 48 Cal.App.2d 756, 760-761 [120 P.2d 710] [injunctive relief conditioned upon payment of costs]; cf. *Farmers Ins. Exch.* v. *Ruiz* (1967) 250 Cal.App.2d 741, 747-748 [59 Cal.Rptr. 13]; 2 Witkin, Cal. Procedure (2d ed. 1970) Provisional Remedies, § 82, at p. 1520; 2 Pomeroy's Equity Jurisprudence (5th ed. 1941) § 385 et seq. ["He who seeks equity must do equity"].)

(11c) In the present case, however, it is apparent that it would be inequitable to charge plaintiffs, who lawfully perfected an easement by prescription, for the cost of removing an encroaching structure erected by defendant with prior notice of plaintiffs' claim. As previously noted, defendant's building was erected *after* plaintiffs' suit was filed and remained pending. Under similar circumstances, the courts have deemed an encroachment to be wilful and have ordered its removal despite a disproportionate hardship to the defendant. Likewise, plaintiffs should not be required to contribute to the cost of relocating encroaching structures which were erected by defendant with full knowledge of plaintiffs' claim.

The judgment is affirmed.

Mosk, J., Kaus, J., and Broussard, J., concurred.

GRODIN, J., Concurring.—I cannot accept the majority's attempted justification for the current law of prescriptive easements. How, in today's urban society, litigation is reduced or the peace is preserved by allowing persons situated as are these plaintiffs to acquire rights in what is concededly the land of another without a cent of payment is beyond my comprehension. I therefore agree entirely with the policy criticisms contained in Justice Reynoso's dissenting opinion.

I am persuaded, however, that if change is to come to this arcane area of the law it should come through the Legislature rather than through the courts. It is not alone the existence of Civil Code section 1007 which per-

[35 Cal.3d 577]

suades me, for as my dissenting colleague observes that section, adopted in 1872, was early interpreted as merely fixing the time within which a right by prescription may be acquired. But, in 1965 the Legislature modified the harsh application of the prescriptive easement doctrine by adding Civil Code section 1008, which permits a property owner to avoid acquisition of an easement by the simple expedient of posting a sign.[1] Given that modification, and that degree of legislative attention, I would leave the next move to Sacramento. I therefore join in affirming the trial court's judgment.

Bird, C. J., concurred.

REYNOSO, J.—I respectfully dissent from that portion of the majority opinion which denies compensation of fair market value for the easement.

A. *Fair Market Value*

Plaintiffs called upon the power of the trial court, acting in equity, to declare and protect a prescriptive easement. The court agreed. Yet the practical result, as indicated by the Court of Appeal opinion (per Compton, J.), is that: "A simple affirmance of the judgment would result in plaintiffs, who are admittedly trespassers, acquiring practical possession of a sixteen thousand two hundred fifty (16,250) square foot parcel of defendant's valuable property free of charge . . . ."

The majority argues that the result, unjust or not, is ordained by statute. I disagree. My review of the statutes cited by the majority convinces me that they have not removed from the

[1]Civil Code section 1008 provides: "No use by any persons or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: 'Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.'"

courts the traditional power to invoke the equitable doctrines which deal with fairness. Those doctrines persuade me that plaintiffs should pay fair market value for the property interest acquired.

1. *Statutory Scheme*

The law of prescriptive easements and their enforcement enjoyed a long history at common law before 1872. In that year Civil Code section 1007 was enacted. It merely codified the general concept of prescriptive easement

[35 Cal.3d 578]

found at common law.[1] We must look, therefore, to common law precepts to resolve the issue at hand.

At common law, the declaration of whether a prescriptive easement existed was considered an action at law.[2] It remains so. (2 Defuniak, Handbook of Modern Equity (1956) § 31, pp. 55-56, hereinafter Defuniak.) However, the protection of the declared right was generally considered, and still is, an action in equity. (Walsh on Equity (1930) § 35, p. 184; hereinafter Walsh; Defuniak, § 31, p. 56.)

Mere citation to Civil Code section 1007 resolves nothing. The term "title by prescription," for example, describes the rights which a person acquires upon establishing a prescriptive easement. Nothing more. The case at bench assumes acquisition; the real issue deals with the conditions which the court may impose to protect that judicially declared easement. Thus, in *Taormino* v. *Denny* (1970) 1 Cal.3d 679 [83 Cal.Rptr. 359, 463 P.2d 711], cited by the majority, our court did no more than affirm the prescriptive right over a private roadway. (See also *Niles* v. *City of Los Angeles* (1899) 125 Cal. 572 [58 P. 190]; *Clarke* v. *Clarke* (1901) 133 Cal. 667 [66 P. 10].) Not surprisingly, the parties have not cited the section before the trial court, the appellate court, or before us. Neither the trial court nor the Court of Appeal mentioned it. And no papers before us mention the code section. Yet, the section erroneously forms the basis for the majority opinion.

2. *The Power of the Court Acting in Equity*

The Court of Appeal correctly identified the nature of plaintiff's cause of action and the issue in this appeal when it wrote: "This is an appeal from an *equitable decree* which declared that plaintiffs had acquired an easement by prescription over the property of defendant." (Italics added.) Neither the parties nor the majority disagree with that characterization.

We come, therefore, to the power of the court in equity. Whether the trial court must order the plaintiffs to pay fair market value for the prescrip-

[35 Cal.3d 579]

tive easement, as the Court of Appeal concluded, depends on the breadth of discretion which the court in equity enjoys. Let us briefly explore the concept of equity.

Equity's origins lie in the King's extraordinary judicial power, exercised through the Chancery, to administer justice whenever "it was probable that a fair trial in the ordinary Courts would be impeded, and also whenever, . . . the regular administration of justice was hindered. (5 Pomeroy's Equity Jurisprudence (1941) § 31 p. 37, hereinafter Pomeroy.) The Chancellor was obliged to look only to "Honesty, Equity, and Conscience [ ]" to decide conflicts. (*Id.*, § 35, p. 40.) Today, it is only

[1]Our 1872 codification generally followed the 1865 New York codification. (See 1 Powell, The Law of Real Property (1981 ed.) ¶ 83, p. 307.) New York, like California, recognized the applicability of the common law. (Generally, see *id.*, at ¶ 59, p. 186.) Indeed, California had already incorporated the common law of England, if not in conflict with constitutional or statutory provisions, as it existed in 1850. (See Civ. Code, § 22.2 [formerly Pol. Code, § 4468]; *Martin* v. *Superior Court* (1917) 176 Cal. 289 [168 P. 135]; McMurray, *Seventy-five Years of California Jurisprudence* (1925) 13 Cal. L.Rev. 445.)

[2]In *Clarke* v. *Clarke* (1901) 133 Cal. 667, 669 [66 P. 10], we find this description: "Prescription, at common law, was a mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment. It had its origin in a grant evidenced by usage, and was allowed on account of its loss, either actual or supposed, and for this reason only those things could be prescribed for which could be created by grant. The presumption of the grant of an easement in the lands or over the lands of another is sometimes indulged."

a matter of degree that separates the early Chancellors who decided "whether reason and conscience demanded special intervention. . . ." (Walsh, § 53, p. 282) from the modern judges and their grants of equitable relief. (*Id.*) The modern judge remains the repositor of special relief; he stands in the states' stead "modifying the rigor of hard and fast rules at law where reason and conscience demand it." (*Ibid.*)

What would be fair under the circumstances of the case at bench? The problem began because plaintiff built a large commercial building without leaving sufficient room for delivery trucks to approach the loading docks. The building which defendant had built left a 150-foot wide strip of unimproved land. The 40-foot wide driveway plaintiffs had constructed was simply insufficient for its purposes. Therefore, the delivery trucks went on to defendant's land. In the original negotiations the creation of an easement was considered by the seller, plaintiffs and defendant, but none was negotiated. Later, plaintiffs offered to purchase an easement at least twice. Finally, when defendant raised a dirt pad of land on his land (apparently in preparation for the construction) which prevented the trucks from trespassing more than five feet, plaintiffs brought this action.

Traditionally the courts have not imposed a condition that fair market value be paid before a prescriptive easement will be declared and protected. However, in my view, the courts do have such power. In the case at bench that power should be exercised.

The role which the court in equity can play is seen in two disparate examples, one old and one new. First, we look to the traditional case wherein the building of one owner trespasses upon that of another. Where the law recognizes a legal wrong in such a trespass, and would normally order the removal of the encroaching building (as was done in the case at bench), the court in equity may instead order that money damages be paid by the encroaching party as a condition of protecting the encroachment, particularly where the encroachment was unintentional. (See Walsh, § 55, pp. 284-85.)

[35 Cal.3d 580]

Second, I cite a quite different example which does not deal with property. The courts, pursuant to their inherent equitable powers, have created several exceptions to the statutory rule (Code Civ. Proc., § 1021) which requires each party to pay his or her own attorney fees. (See *Serrano* v. *Priest* (1977) 20 Cal.3d 25, 34-47 [141 Cal.Rptr. 315, 569 P.2d 1303].) These examples simply illustrate the not too startling notion that courts of equity, in search of fairness, may (1) impose conditions before a decree protecting rights will issue, (2) grant monetary damages, and (3) extend statutory rights. I cite these only to stress that no reason abides in the history, concept or modern practice of equity which would so restrict the power of the court that it could not impose a requirement that fair market value be paid by the trespasser who is granted a prescriptive easement.

Finally, I turn to the fairness issue. By permitting the prescriptive easement in the case at bench the state, acting through the court, endorses a private action akin to eminent domain. Practically,[3] it is the taking of property rights from defendant and giving them to plaintiff. Can it be fair to reward a wrongdoer and punish an innocent property owner?

The majority says "yes." It is fair, according to the majority, for several reasons including (1) reducing litigation, (2) protecting possession, and (3) preference for use over disuse of land. None of these reasons is convincing. First, no litigation was reduced. Society should not be in the business of forcing an owner of land to bring suit when a trespass has occurred. Such a policy increases litigation. Second, the possession of the easement has in fact been protected; plaintiffs are only required to pay for the easement. Third, modern society evidences a preference for planned use, not the ad hoc use of a trespasser. It is questionable that in the urban setting of the case at bench, such use by the trespasser is preferred by society.

I do not rely solely on my personal view of fairness. Rather, it is my role as a judge, as it was with the chancellor, to apply a "concep-

[3]The fiction that a lost "title" is newly found by the trespasser and that therefore he or she has a title sufficient as to all flies in the face of reality. The facts in the case at bench cannot accommodate that fiction.

tion of justice in accordance with the prevailing reason and conscience of the time." (Walsh, § 53, p. 281.) (See also 5 Pomeroy, Equity Jurisprudence, § 67, p. 89; "[Equity] is so constructed . . ., that it possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age.") The final decree of the trial court, approved by the majority, contravenes today's basic notions of fairness and justice. A requirement that plaintiffs pay fair market value for the land use given them is the least our society expects.

[35 Cal.3d 581]

B. *Disposition*

The suggestion of the concurring opinion that the Legislature should study this area of law bears underscoring. The statutes need to reflect today's realities. Certainly—they should at least ameliorate the harsh consequences the majority feels compelled to enforce. However, I note that the recent legislative changes referred to in the concurrence only provide a landowner relief from the *creation* of a prescriptive easement. There remains the need for an equitable avenue by which the courts may relieve a landowner subject to a prescriptive easement of an otherwise inequitable burden.

I would affirm the judgment. However, I would remand to the trial court for further proceedings to fix an amount of reasonable compensation to be paid by plaintiffs to defendant. That compensation would be the fair market value of the property interest acquired. From that compensation damages, if any, sustained by plaintiff should be subtracted.