

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

*relating to*

**Marketable Title of  
Real Property**

**November 1981**

**CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306**

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*Ex Officio*

November 23, 1981

**To: THE HONORABLE EDMUND G. BROWN JR.**  
*Governor of California* and  
**THE LEGISLATURE OF CALIFORNIA**

The California Law Revision Commission was authorized to study whether the law relating to possibilities of reverter and powers of termination should be revised (Resolution Chapter 15 of the Statutes of 1975) and to study whether a Marketable Title Act should be enacted in California (Resolution Chapter 30 of the Statutes of 1967).

The Commission has concluded that a Marketable Title Act should not be enacted in California but that a series of statutes should be enacted designed to achieve greater marketability of title by removing the cloud on title created by obsolete interests of record. This recommendation relates to ancient mortgages and deeds of trust, unexercised options, rights of entry and possibilities of reverter, and unperformed contracts for sale of real property. Future recommendations will deal with other interests that impair marketability of title.

The Commission wishes to express its gratitude to its consultants and other persons who assisted in the formulation of these recommendations. Its consultants on this study are Professors Paul E. Basye, James L. Blawie, Jesse Dukeminier, Susan French, Russell D. Niles, and Mr. Garrett H. Elmore. The

Commission also wishes to thank Mr. Ronald P. Denitz and Professor Roger Bernhardt for their contributions to the development of the recommendations.

Respectfully submitted,

BEATRICE P. LAWSON  
*Chairperson*

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# RECOMMENDATION

*relating to*

## MARKETABLE TITLE OF REAL PROPERTY

### Introduction

Under the recording laws, a bona fide purchaser of real property takes the property subject to all interests of record and free of unrecorded interests (except interests that would appear from inspection of the property and reasonable inquiry). This necessitates a search of the records by a purchaser to ascertain whether there are adverse interests of record and whether title to the property is marketable. The longer the period of search required, the more difficult and time-consuming the search and the greater the likelihood that obsolete interests of record will appear that will require time and money to clear from the record.

Because of this problem all jurisdictions, including California, have enacted legislation of some sort to mitigate the title-clouding effect of obsolete interests under the recording acts. Such legislation ranges from simple recognition of affidavits to statutes of limitation and maximum periods of duration for selected interests.<sup>1</sup> In addition to the broad range of legislation, there are exhaustive Model Acts<sup>2</sup> as well as Uniform Acts<sup>3</sup> dealing with this problem.

The most far-reaching efforts to cure marketability problems are found in the Marketable Title Acts, which have been adopted in at least 18 jurisdictions in the United States.<sup>4</sup> The Marketable Title Acts operate to limit the search of the records required and to invalidate ancient interests. They do this by providing that a purchaser need only search back through a chain of title for a limited period

<sup>1</sup> See P. Basye, *Clearing Land Titles* (2d ed. 1970).

<sup>2</sup> L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* (1960).

<sup>3</sup> See, e.g., *Uniform Simplification of Land Transfers Act* (1977).

<sup>4</sup> P. Basye, *Clearing Land Titles* §§ 176-193 (2d ed. 1970; suppl. 1981).

of time, say 30 or 40 years. All interests recorded before that time are automatically extinguished unless they have been rerecorded. The assumption of the Marketable Title Acts is that most old interests are obsolete, and if they are not obsolete it is a minimal burden on the interest holder to rerecord every 30 or 40 years.

Although Marketable Title Acts have been well-received in those jurisdictions that have adopted them, they are not free of problems.<sup>5</sup> The California Law Revision Commission has reviewed the advantages and disadvantages of a Marketable Title Act for California and has concluded that adoption of such an act would be undesirable. Of critical importance in the Commission's view is the possibility that under such an act a person who is unaware of the rerecording requirement may lose a valid and substantial property interest simply by the passage of time. The Marketable Title Acts are overly broad and can affect property interests that should not be affected, such as the fee or long-term less than fee interests.

A preferable approach to problems created by obsolete interests of record is a series of provisions more narrowly drawn than a Marketable Title Act and designed to cure specific types of problems with specific types of interests. This recommendation addresses some of the common title-clouding interests in California. The Commission does not consider its work in this area complete, however, and plans additional recommendations addressing other common as well as less common interests that impair marketability of title.

### **Ancient Mortgages and Deeds of Trust**

Real property is ordinarily burdened of record by a deed of trust (or in rare instances, a mortgage). This is the case even though the underlying obligation secured by the mortgage or deed of trust may have been fully satisfied or may be unenforceable due to the running of the applicable statute of limitation. The impairment of marketability of

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<sup>5</sup> See, e.g., Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 *Cornell L. Rev.* 45 (1967).

title to real property caused by ancient mortgages and deeds of trust of record has been and continues to be troublesome.<sup>6</sup>

Existing California law attacks the problem of the recorded ancient mortgage or deed of trust on real property in a number of ways. When the underlying obligation is satisfied, the mortgagee must record a certificate of discharge and the trustee must record a reconveyance, under threat of civil and criminal penalties.<sup>7</sup> The general statute of limitation on the underlying obligation is a relatively short four years, and any waiver of the statute must occur within the limitation period and is good for only an additional four years.<sup>8</sup> Any lien that secures the underlying obligation is extinguished by lapse of the limitation period.<sup>9</sup>

Despite existing California law, there is no assurance that real property burdened by a recorded mortgage or deed of trust will be either marketable or insurable, even though the underlying obligation may be satisfied and enforcement barred by the statute of limitation.<sup>10</sup> At best, a judicial action to quiet title or remove a cloud on title will be necessary; at worst, the encumbrance will burden the property indefinitely.<sup>11</sup>

The "one form of action" rule provides that the only judicial action to enforce the underlying obligation secured by a mortgage or deed of trust is foreclosure.<sup>12</sup> Therefore, when the statute of limitation on the underlying obligation has run, foreclosure is precluded; any lien is also extinguished.<sup>13</sup> However, in legal theory a trustee under a deed of trust owns title to the property (rather than a lien) and the trustee's exercise of the power of sale under the

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<sup>6</sup> See discussion in P. Basye, *Clearing Land Titles* §§ 71-76 (2d ed. 1970).

<sup>7</sup> See, e.g., Civil Code §§ 2941 (civil penalty), 2941.5 (criminal liability).

<sup>8</sup> Code Civ. Proc. §§ 337 (4-year statute of limitation), 360.5 (waiver of statute of limitation).

<sup>9</sup> Civil Code § 2911.

<sup>10</sup> See, e.g., 2 A. Bowman, *Ogden's Revised California Real Property Law* § 17.46 (1975) (discharge by bar of statute of limitation).

<sup>11</sup> This results from the rule that the power of sale under a deed of trust "never outlaws." See, e.g., 3 B. Witkin, *Summary of California Law, Security Transactions in Real Property* §§ 84-85 (8th ed. 1973).

<sup>12</sup> Code Civ. Proc. § 726.

<sup>13</sup> Civil Code § 2911.

deed of trust is not a judicial action to foreclose; consequently the running of the statute of limitation on the underlying obligation, which has the effect of barring enforcement of a mortgage, does not bar exercise of the power of sale under a deed of trust. The deed of trust permanently impairs marketability of title.

Even a mortgage which appears to be barred by the running of the statute of limitation on the underlying obligation may constitute an indefinite cloud on title. The running of the statute of limitation may have been tolled.<sup>14</sup> The running of the statute of limitation may have been stopped and started anew by a partial payment.<sup>15</sup> The statute of limitation may have been waived.<sup>16</sup> None of these factors is ordinarily reflected in the record. And where it is clear that the statute of limitation has in fact run on the underlying obligation, the mortgagor may nonetheless be unable to obtain clear title because of the mortgagor's equitable duty to satisfy the mortgage.<sup>17</sup>

The Law Revision Commission recommends that provisions be added to California law to enable a person to rely on the record in determining marketability of real property burdened by an ancient mortgage or deed of trust of record. The rule that a power of sale under a deed of trust never outlaws, despite the running of the statute of limitation on the underlying obligation, should be reversed;<sup>18</sup> this is a legal technicality that serves only to cloud titles and make real property less marketable.<sup>19</sup> The rule that a mortgagor may not clear title without "doing equity," despite the running of the statute of limitation on

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<sup>14</sup> See, e.g., Code Civ. Proc. §§ 351-358.

<sup>15</sup> See Code Civ. Proc. § 360.

<sup>16</sup> See Code Civ. Proc. § 360.5.

<sup>17</sup> See, e.g., *Puckhaber v. Henry*, 152 Cal. 419, 93 P. 114 (1907). The equitable duty applies only to the original mortgagor and not to a subsequent purchaser, who may clear title of the ancient mortgage. See, e.g., *Fontana Land Co. v. Laughlin*, 199 Cal. 625, 250 P. 669 (1926).

<sup>18</sup> Many states have done this by statute. See P. Basye, *Clearing Land Titles* § 73 (2d ed. 1970).

<sup>19</sup> In California, legal scholars have noted that the only significant difference left in the legal treatment of mortgages and deeds of trust is the early holding that the power of sale in a deed of trust never outlaws while the same power in a mortgage is subject to the statute of limitation. It has been predicted that the California courts will ultimately eliminate this distinction as unreasonable and unnecessary. See R. Bernhardt, *California Mortgage and Deed of Trust Practice* § 3.3 (Cal. Cont. Ed. Bar 1979).

the underlying obligation, should also be reversed;<sup>20</sup> this rule defeats the basic purpose of statutes of limitation.<sup>21</sup>

While the recommended reforms will help reduce the uncertainty caused by an ancient mortgage or deed of trust, judicial action to clear title will still be necessary. Consequently, the Law Revision Commission further recommends that a fixed and absolute period be provided by statute for the duration of record of a mortgage or deed of trust;<sup>22</sup> this will permit a person to rely on the record in determining marketability unaffected by partial payments, waivers, or tolling. The statutory period should be 10 years following the maturity date of the underlying obligation if the date can be ascertained from the record or, if not, 60 years following the date the mortgage or deed of trust was recorded.<sup>23</sup> Any waiver or extension of the statutory period should be effective only if recorded. A provision of this type will enable automatic clearing of ancient mortgages and deeds of trust from the record after lapse of the statutory period without the necessity of judicial action to quiet title or remove a cloud. The burden imposed on mortgagees or trustees to record notice of waiver or extension will be small compared with the benefit of increased marketability of land titles.

### Unexercised Options

Civil Code Section 1213.5 provides that an unexercised option to purchase real property that has been recorded remains a cloud on the title to the property for one year

<sup>20</sup> Statutes in a number of states have reversed the rule that in order to clear title a mortgagor must do equity by paying a debt barred by the statute of limitation. See P. Basye, *Clearing Land Titles* § 75 (2d ed. 1970).

<sup>21</sup> Giving quiet and repose to titles and the maintenance of property in a merchantable condition are integral parts of the social end of prompt assertion of claims sought to be achieved by statutes of limitation. See discussion in P. Basye, *Clearing Land Titles* § 76 (2d ed. 1970).

<sup>22</sup> Many states have enacted statutes of this type. See P. Basye, *Clearing Land Titles* § 76 (2d ed. 1970).

<sup>23</sup> The 10-year period is comparable to that provided in the Model Mortgage Limitation Act (Simes & Taylor 1960) and in the Uniform Simplification of Land Transfers Act (1977) § 3-408. The 60-year period is intended to be sufficiently long to include most home mortgages, particularly variable mortgages that provide for extension of the length of the loan, and to allow for later extensions of credit. The recommended legislation includes a two-year grace period for actions to foreclose mortgages and deeds of trust that would otherwise be terminated by the lapse of the statutory periods at or shortly after enactment of the legislation.

after the option expires according to its terms or by operation of law.<sup>24</sup> An unexercised option that provides no expiration date according to its terms expires by operation of law within a reasonable time after it is executed.<sup>25</sup>

The one-year cloud on title after expiration of an unexercised option unduly impairs the marketability of real property. The property owner may seek to minimize the effect of the cloud on title in a number of ways, none of which is satisfactory. Title may be cleared by obtaining a quitclaim deed from the option holder; however, this is not always possible. A quiet title action is available within the one-year period; but such an action is time-consuming and costly. An effort to shorten or eliminate the one-year cloud by the terms of the option itself is problematical.<sup>26</sup>

The apparent function of the one-year cloud after expiration of an option is to allow the option holder sufficient time to record an exercise or extension of the option that occurs at the end of the term of the option.<sup>27</sup> For this purpose one year is excessive; six months should be sufficient.<sup>28</sup> Civil Code Section 1213.5 should be revised to provide that the cloud on title of an unexercised option to purchase real property lasts for six months after the option expires according to its terms.

If the option does not by its terms provide an expiration date, the option should expire for purposes of notice to third parties six months after it is recorded.<sup>29</sup> This will avoid the need for a court determination of the date of expiration and will enable the option holder to be aware of the exact time when notice of exercise or extension of the option must be recorded. The provision will enhance the marketability of

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<sup>24</sup> See discussion in Review of Selected 1965 Code Legislation 53-54 (Cal. Cont. Ed. Bar 1965).

<sup>25</sup> See 1 B. Witkin, Summary of California Law, Contracts § 129 (8th ed. 1973).

<sup>26</sup> See discussion in Moore & Sturhahn, Options, California Real Estate Sales Transactions § 7.42 (Cal. Cont. Ed. Bar 1967).

<sup>27</sup> Civil Code Section 1213.5 is drawn from the Model Act Concerning Option Contracts as Notice, L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 157 (1960). Simes and Taylor in their discussion of the Model Act do not justify the one-year cloud.

<sup>28</sup> New York has adopted an even shorter period. See N.Y., Real Prop. L. § 294 (McKinney's 1968; Supp. 1980) (30 days).

<sup>29</sup> The Uniform Simplification of Land Transfers Act (1977) has adopted this rule. Section 3-206. See also Conn. G.S.A. § 47-33a (West 1978; Supp. 1980) (18 months); Ala. Code 1975 § 35-4-76 (1977) (20 years).

property if notice of exercise or extension is not recorded within the statutory period by removing the cloud on title simply by the passage of time without need for resort to judicial proceedings.

## Rights of Entry and Possibilities of Reverter

### Introduction

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

The grantor has a reversion following the grant of an estate less than fee that commences in possession upon the termination of the estate granted.<sup>30</sup> Thus, for example, the grant of a life estate or a term of years creates a reversion in the grantor upon the termination of the estate or term.<sup>31</sup>

If an estate is granted in fee but the duration of the estate is subject to a special limitation, a fee simple determinable is created; the grantor retains a possibility of reverter. When the event that limits the duration of the estate occurs, the estate terminates and there is a reversion to the grantor. The reversionary interest is called a possibility of reverter because the event upon which the limitation depends may never occur.<sup>32</sup> No particular words are required to create this estate, but it is necessary that the language show that the grantor intended that the fee estate automatically expires on the occurrence of the event.<sup>33</sup>

If an estate is granted in fee subject to a condition subsequent, the grantor is said to retain a right of entry upon breach of the condition. Exercise of the right of entry terminates the fee simple, hence the right of entry is sometimes classified as a power of termination rather than a reversionary interest.<sup>34</sup> It is distinguished from the

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<sup>30</sup> Civil Code § 768.

<sup>31</sup> 3 B. Witkin, *Summary of California Law Real Property* § 242, at 1970 (8th ed. 1973).

<sup>32</sup> *Alamo School Dist. v. Jones*, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

<sup>33</sup> *McDougall v. Palo Alto Unified School Dist.*, 212 Cal. App.2d 422, 28 Cal. Rptr. 37 (1963).

<sup>34</sup> *Parry v. Berkeley Hall School Foundation*, 10 Cal.2d 422, 74 P.2d 738 (1937).

possibility of reverter by the fact that it is not a limitation upon the estate granted—not a measure of its duration—but a condition upon the occurrence of which the granted estate could be cut off by entry of the grantor.<sup>35</sup>

Whether particular language in a grant creates a possibility of reverter or a right of entry is a fine point. A classic example is that a conveyance in fee simple “until St. Paul’s falls” or “as long as St. Paul’s stands” creates a fee simple determinable with possibility of reverter, whereas a conveyance in fee simple “upon condition that, if St. Paul’s falls, the estate shall terminate” creates a fee simple on condition subsequent with right of entry for condition broken.<sup>36</sup> In doubtful cases the preferred construction, consistent with the general disfavor of forfeitures, is for a fee simple on condition subsequent (which requires an act by the grantor to terminate) rather than a fee simple determinable (which ends on the happening of the event without any act by the grantor).<sup>37</sup> The possibility of reverter is recognized only where there is no ambiguity and no doubt as to the intent of the creating instrument.<sup>38</sup>

### Comparison of Right of Entry with Possibility of Reverter

The right of entry and the possibility of reverter are closely related reversionary interests distinguished primarily by technicalities in the wording of the creating instrument. The two interests are so similar in effect that there is no substantial difference between the two for most purposes.<sup>39</sup> In fact it was not certain until the end of the nineteenth century that American law included the possibility of reverter, and California recognized this interest only in the twentieth century.<sup>40</sup>

The critical difference between the right of entry and the possibility of reverter is that a right of entry requires an act

<sup>35</sup> *Alamo School Dist. v. Jones*, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

<sup>36</sup> *Id.*

<sup>37</sup> Civil Code § 1442; 3 B. Witkin, *Summary of California Law Real Property* § 189, at 1927-1928 (8th ed. 1973).

<sup>38</sup> 2 H. Miller & M. Starr, *Current Law of California Real Estate* §§ 15:6, 15:18 (rev. 1977).

<sup>39</sup> Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins?*, 20 U. Chi. L. Rev. 215 (1953).

<sup>40</sup> *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962 (1935); *Henck v. Lake Hemet Water Co.*, 9 Cal.2d 136, 69 P.2d 849 (1937). See discussion in Ferrier, *Determinable Fees and Fees Upon Conditions in California*, 24 Calif. L. Rev. 512 (1936).



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

Although technically a right of entry permits the holder of the right to take possession, the holder must exercise the right by giving notice and making demand.<sup>41</sup> Upon exercise of the right of entry the fee owner must reconvey the property by grant deed, acknowledged for recording.<sup>42</sup> If the fee owner does not reconvey or give up possession, exercise must be made effective by action for possession or to quiet title;<sup>43</sup> actual entry on the land is unnecessary.<sup>44</sup> The basic five-year statute of limitation apparently applies to the action.<sup>45</sup> However, it has been stated that the statute of limitation does not apply and the person entitled to enforcement has a "reasonable time" within which to exercise the right of entry.<sup>46</sup>

Likewise, although a possibility of reverter is said to take effect automatically, as a practical matter a judicial proceeding is necessary to make it effective.<sup>47</sup> The basic

<sup>41</sup> Civil Code § 791 (reentry may be made after right has accrued, upon three days' notice); see also Civil Code § 793 (action for possession may be maintained after right to reenter has accrued without notice).

<sup>42</sup> Civil Code § 1109.

<sup>43</sup> *Lincoln v. Narom*, 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970); 4 H. Miller & M. Starr, *Current Law of California Real Estate* § 25.22 (rev. 1977).

<sup>44</sup> *Firth v. Los Angeles Pacific Land Co.*, 28 Cal. App. 399, 152 P. 935 (1915); Simes, *Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 *Hastings L.J.* 293, 294 (1962); 2 A. Bowman, *Ogden's Revised California Real Property Law* § 23.18 (1975).

<sup>45</sup> Code Civ. Proc. §§ 319-320; 2 A. Bowman, *Ogden's Revised California Real Property Law* § 23.32 (1975).

<sup>46</sup> *Lincoln v. Narom Development Co.*, 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970); 3 B. Witkin, *Summary of California Law Real Property* § 188, at 1926 (8th ed. 1973); 2 H. Miller & M. Starr, *Current Law of California Real Estate* § 15.5 (rev. 1977). This rule appears to be based upon a waiver theory. See, e.g., *City of Santa Monica v. Jones*, 104 Cal. App.2d 463, 232 P.2d 55 (1951); *Goodman v. Southern Pacific Co.*, 143 Cal. App.2d 424, 299 P.2d 321 (1956).

<sup>47</sup> See discussion in MacEllven, *Private Restrictions and Controls*, in *California Land Security and Development* § 24.13 (Cal. Cont. Ed. Bar 1960).

five-year statute also apparently applies to an action to enforce a possibility of reverter.<sup>48</sup> At least, it seems likely that, absent litigation by the holder of the reverter, the person in possession of the property will take title after five years by adverse possession.<sup>49</sup> However, there are no California cases on this point. In one case the holders of a possibility of reverter were allowed to establish their title 19 years after the reversion, without discussion of the statute of limitation.<sup>50</sup>

### Abolition of Possibility of Reverter

The possibility of reverter is an unnecessary estate in property law. It serves the same functions as the right of entry and there is no practical difference of any substance between the two. Whether an instrument creates a possibility of reverter or a right of entry is determined by technicalities in the language creating the interest, and there is a strong constructional preference for a right of entry. The possibility of reverter is disfavored in the law because of its automatic forfeiture features and only recently has been given legal recognition. Application of statutes of limitation to it is uncertain, and it cannot be ascertained from the record whether a forfeiture may have occurred in the remote past. The interest has been severely criticized and its abolition advocated.<sup>51</sup> "The inevitable conclusion is that the law is needlessly complicated, and that the concept more consistent with modern practice should alone survive, namely, the power of termination or right of entry."<sup>52</sup>

The Law Revision Commission recommends that the fee simple determinable with possibility of reverter should be

<sup>48</sup> Cf. 2 A. Bowman, *Ogden's Revised California Real Property Law* § 23.25 (1975) (no distinction made); *Highland Realty Co. v. City of San Rafael*, 46 Cal.2d 669, 298 P.2d 15 (1956) (statutory reverter).

<sup>49</sup> Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins?*, 20 U. Chi. L. Rev. 215, 229 (1953).

<sup>50</sup> *McDougall v. Palo Alto Unified School Dist.*, 212 Cal. App.2d 422, 28 Cal. Rptr. 37 (1963).

<sup>51</sup> 2 H. Miller & M. Starr, *Current Law of California Real Estate* § 15:5 (rev. 1977); Ferrier, *Determinable Fees and Fees Upon Conditions Subsequent in California*, 24 Calif. L. Rev. 512 (1936).

<sup>52</sup> Blawie, *A Study of the Present Law of Property and Conveyancing in California with Critical Analysis and Suggestions for Change 21* (unpublished study prepared for California Law Revision Commission 1979).

abolished by statute in California.<sup>53</sup> At least one other jurisdiction—Kentucky—has done this.<sup>54</sup> An existing fee simple determinable with possibility of reverter should be deemed to be, and should be enforceable as, a fee simple subject to condition subsequent with power of termination.<sup>55</sup> This will not make a substantial change in practice, but it will make the record more reliable and simplify the law of property and future interests.

### Enforcement of Powers of Termination

The doctrine that the law abhors a forfeiture is commonly applied by California courts to the divesting of ownership by rights of entry and possibilities of reverter.<sup>56</sup> This attitude has been manifested in three ways: (1) The courts have construed reversionary language to create a covenant or as mere surplusage;<sup>57</sup> “no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction.”<sup>58</sup> (2) The courts have construed the scope of the condition or limitation narrowly, thus reaching the conclusion that no breach has occurred.<sup>59</sup> (3) The courts

<sup>53</sup> Cf. Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*, 21 Calif. L. Rev. 1, 6 (1932) (“Legislation is desirable to remove the existing uncertainty as to determinable fees and possibilities of reverter.”).

<sup>54</sup> Ky. Acts 1960, ch. 167, § 4, effective June 16, 1960 (Ky. Rev. Stats. § 381.218 (Baldwin 1979; Supp. 1981)):

The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry. See Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 3, 71-75 (1960). See also N.Y. Real Prop. Actions and Proceedings Law § 1953 (McKinney 1979) (possibility of reverter enforceable only by civil action).

<sup>55</sup> A right of entry arising from the breach of a condition is more accurately described as, and is often called, a power of termination. Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 74 P.2d 738 (1937); Santa Monica v. Jones, 104 Cal. App.2d 463, 232 P.2d 55 (1951); 3 B. Witkin, Summary of California Law *Real Property* § 244, at 1971-1972 (8th ed. 1973); 2 H. Miller & M. Starr, Current Law of California Real Estate § 15:18 (rev. 1977).

<sup>56</sup> See generally discussion in Simes, *Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 Hastings L.J. 293, 298-301 (1962).

<sup>57</sup> See, e.g., discussion and cases cited in 3 B. Witkin, Summary of California Law *Real Property* § 187, at 1924-1926 (8th ed. 1973).

<sup>58</sup> Hawley v. Dafitz, 148 Cal. 393, 394, 83 P. 248, 249 (1905).

<sup>59</sup> Civil Code § 1442 (“A condition involving a forfeiture must be strictly interpreted against the person for whose benefit it is created.”). See, e.g., discussion and cases cited in 4 H. Miller & M. Starr, Current Law of California Real Estate § 25:23-25 (rev. 1977).

have found that, although there is a condition and it has been broken, the grantor is barred from enforcing a forfeiture because of waiver or estoppel,<sup>60</sup> changed circumstances,<sup>61</sup> or other equitable defenses.<sup>62</sup>

The legal restraints on enforcement of rights of entry and possibilities of reverter in California are so pronounced that several commentators have suggested that forfeitures be statutorily precluded altogether.<sup>63</sup> A right of entry or possibility of reverter would be treated as a restrictive covenant rather than as a power of termination and would be enforceable not by forfeiture but by injunction or damages.<sup>64</sup>

Where the purpose of the power of termination is to enforce a land use restriction such as uniform subdivision lot limitations, treatment as a restrictive covenant is appropriate.<sup>65</sup> However, powers of termination also enforce other types of land use restrictions (typically limitations on use for public or charitable purposes) and non-land use restrictions (such as family or estate planning purposes). For these functions, a conditional gift may be precisely what is intended and what is necessary to effectuate the purposes of the grant; injunctive or damage relief would be inappropriate. It is possible that these functions could also be achieved to a certain extent by use of a trust device. However, the availability of powers of termination provides desirable flexibility in the law. The Law Revision Commission recommends that the power of termination continue to be recognized as an enforceable interest in real

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<sup>60</sup> See discussion of "Statute of Limitation," below.

<sup>61</sup> See discussion of "Obsolete Powers of Termination," below.

<sup>62</sup> See, e.g., discussion and cases cited in 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.29-23.34 (1975).

<sup>63</sup> Ferrier, *Determinable Fees and Fees Upon Conditions Subsequent in California*, 24 Calif. L. Rev. 512, 518 (1936) ("The detriment from their retention would seem definitely to outweigh the gain."). Ferrier would make an exception for grants without consideration for public or charitable purposes and for grants in the nature of oil and gas leases. See also Note, 42 Calif. L. Rev. 194 (1954) (conditional restrictions for land use should be discontinued in favor of covenants).

<sup>64</sup> Cf. N.Y., Real Prop. Actions and Proc. Law § 1953 (McKinney 1979) (similar scheme).

<sup>65</sup> This is the conclusion of Simes, *Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 Hastings L.J. 293 (1962).

property, subject to current strict rules of construction and interpretation.<sup>66</sup>

### Duration of Powers of Termination

Rights of entry and possibilities of reverter seriously impair marketability of property. They restrain alienability and sometimes the economic use of property as well, and because their violation involves a forfeiture of the property they may be particularly burdensome.<sup>67</sup>

These problems are aggravated by the fact that there is no limitation on the duration of rights of entry and possibilities of reverter as there is on other future interests in property. Because reversionary interests are considered to be "vested," the Rule Against Perpetuities does not apply.<sup>68</sup> This feature, combined with the fact that these interests appear to be devisable and descendable,<sup>69</sup> can result in dispersion of rights of entry and possibilities of reverter among unknown or unavailable owners. A person seeking to assemble a marketable title to the property may find that the interests have considerable nuisance value or that it is impossible to obtain quitclaim deeds from all owners of the interests.<sup>70</sup>

The cases holding that the Rule Against Perpetuities does not apply to possibilities of reverter and rights of entry have

<sup>66</sup> The law should also make clear that a power of termination is not enforceable by possession but only by notice or civil action. This is consistent with Civil Code Sections 791 (notice) and 793 (action for possession). See also *Jordan v. Talbot*, 55 Cal.2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961) (right of entry in lease).

<sup>67</sup> See, e.g., discussion in Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*, 21 Calif. L. Rev. 1 (1932); Ferrier, *Determinable Fees and Fees Upon Conditions Subsequent in California*, 24 Calif. L. Rev. 512, 518 (1936) ("Conditions subsequent imposed upon ownership in fee render titles both technically and practically unmarketable and make it difficult to borrow money on mortgage security.").

<sup>68</sup> *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159 (1919); 3 B. Witkin, *Summary of California Law Real Property* § 306, at 2016 (8th ed. 1973); Simes, *Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 *Hastings L.J.* 293, 306 (1962).

<sup>69</sup> Civil Code § 699 (future interests pass by succession, will, and transfer); *Johnston v. City of Los Angeles*, 176 Cal. 479, 168 P. 1047 (1917); *Victoria Hospital Assn. v. All Persons*, 169 Cal. 455, 147 P. 124 (1915). See also discussion in Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*, 21 Calif. L. Rev. 1 (1932).

<sup>70</sup> See discussion in Williams, *Restrictions on Use of Land: Conditions Subsequent and Determinable Fees*, 27 *Tex. L. Rev.* 158 (1948); Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 *N.C.L. Rev.* 807 (1964); Simes, *Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 *Hastings, L.J.* 293, 307 (1962).

been severely criticized.<sup>71</sup> Legal scholars generally concur that in order to relieve the marketability problems created by rights of entry and possibilities of reverter, legislation limiting their duration is necessary.<sup>72</sup> A number of jurisdictions have enacted such legislation, ranging from application of the Rule Against Perpetuities, to rerecording requirements, to maximum time limits for enforcement.<sup>73</sup>

Although application of the Rule Against Perpetuities to possibilities of reverter and rights of entry has been suggested for California,<sup>74</sup> this is not an ideal means of limiting their duration.<sup>75</sup> The Rule is indiscriminate in its application to all interests, whether for land use, public, family, estate planning, or other purposes.<sup>76</sup> The Rule is complex and intricate, and is not easily applied in many situations.<sup>77</sup> Because it makes reference to a "life in being," it is not satisfactory for title examination and insurance purposes based on the record.<sup>78</sup> Moreover, since most rights of entry and possibilities of reverter make no reference to a life in being, the operative limitation in the Rule is 21 years, which may be an unduly short limitation period.<sup>79</sup> And the Rule is harsh in effect, voiding rather than limiting the duration of offending interests.<sup>80</sup>

<sup>71</sup> See discussion in *Alamo School Dist. v. Jones*, 182 Cal. App.2d 180, 6 Cal. Rptr. 272 (1960).

<sup>72</sup> See discussion in Basye, *Clearing Land Titles* § 143 (2d ed. 1970); L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 201 (1960).

<sup>73</sup> *Id.*

<sup>74</sup> Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*, 21 Calif. L. Rev. 1 (1932).

<sup>75</sup> See discussion in L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 203-204 (1960).

<sup>76</sup> An important exception to the Rule is for "eleemosynary" purposes. Civil Code § 715.

<sup>77</sup> See, e.g., *Lucas v. Hamm*, 56 Cal.2d 583, 592, 364 P.2d 685, 690, 15 Cal. Rptr. 821, 826 (1961) ("Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman; that members of the bar, probate courts, and title insurance companies make errors in these matters; that the code provisions adopted in 1872 created a situation worse than if the matter had been left to the common law . . .").

<sup>78</sup> See discussion in 1 A. Bowman, *Ogden's Revised California Real Property Law* § 2.43 (1974).

<sup>79</sup> The California Rule also provides an alternate vesting period of 60 years. Civil Code § 715.6.

<sup>80</sup> Civil Code § 715.2.

Most of the modern reverter acts speak in terms of fixed periods of duration for possibilities of reverter and rights of entry.<sup>81</sup> Typical statutes limit the duration of possibilities of reverter and rights of entry to 30 years.<sup>82</sup> These statutes are based on the same policy as the Rule Against Perpetuities—the public has an interest in free marketability and use of property and in limiting the restricting influence of the “dead hand” to no more than one generation in the future.<sup>83</sup>

The policy in favor of free alienability of property must be weighed against the policy of enabling long-term control of land use, whether for public, charitable, environmental, residential, estate planning, or other purposes.<sup>84</sup> In balancing these policies the Law Revision Commission has concluded that it is desirable to statutorily limit the duration of possibilities of reverter and rights of entry (which should be treated together as powers of termination) but also to permit extension of the period of duration.

The power of termination should expire after a period of 30 years unless within that time the holder of the power extends the period by recording a notice of intent to preserve the power; an extension should be good for 30 years at a time.<sup>85</sup> There should be a five-year grace period for holders of powers of termination to record a notice of intent to preserve powers that would be immediately or within a short period affected by enactment of the statute.

This scheme will ensure that only those powers of termination will burden property for an extended period that a person has an active interest in preserving. It will also

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<sup>81</sup> See discussion in P. Basye, *Clearing Land Titles* § 143 (2d ed. 1970) and L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 205-213 (1960).

<sup>82</sup> See, e.g., *Model Act Limiting the Duration of Rights of Entry and Possibilities of Reverter* (Simes & Taylor 1960).

<sup>83</sup> See, e.g., discussion in Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. Rev. 807 (1964).

<sup>84</sup> Cf. Civil Code §§ 815-816 (conservation easements). The proposed limitation on the duration of powers of termination would not affect conservation easements that take the form of powers of termination and are perpetual in duration pursuant to Civil Code Section 815.2.

<sup>85</sup> Other jurisdictions have similar schemes with differing time periods. See, e.g., Mass. G.L.A. c. 184 §§ 23, 26-30 (1977; 1981 Supp.); Ia. C.A. § 614.24-614.25 (West Supp. 1981). This is also the pattern of Section 3-409 of the Uniform Simplification of Land Transfers Act (1977).

keep record ownership of the power current and help in ascertaining current holders of the power. The scheme has the additional virtue of minimizing potential problems of constitutionality inherent in applying an absolute limitation on powers without the option of extension.<sup>86</sup>

### Obsolete Powers of Termination

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

California case law has applied the doctrine of changed circumstances to obsolete rights of entry<sup>87</sup> and presumably would do likewise were a case involving a possibility of reverter to arise.<sup>88</sup> For example, the courts will refuse to enforce a right of entry by forfeiture of title where, through change in character of the neighborhood, the purpose of the condition is no longer attainable.<sup>89</sup> The doctrine of changed circumstances precludes enforcement of outmoded restrictions in order to prevent title from being encumbered perpetually.<sup>90</sup>

<sup>86</sup> Compare *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232 (Iowa 1975) (rerecording statute constitutional) with *Board of Education of Central School Dist. No. 1 v. Miles*, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965) (rerecording statute unconstitutional). See also *Biltmore Village v. Royal*, 71 So.2d 727 (Fla. 1954) (absolute limitation unconstitutional); *Trustees of Schools of Township No. 1 v. Batdorf*, 6 Ill.2d 486, 130 N.E.2d 111 (1955) (absolute limitation constitutional); *Hiddleston v. Nebraska Jewish Education Society*, 186 Neb. 786, 186 N.W.2d 904 (1971) (absolute limitation constitutional); *Housing and Redevelopment Authority of South St. Paul v. United Stockyards Corp.*, 244 N.W.2d 275 (Minn. 1976) (absolute limitation constitutional); *Cline v. Johnson County Board of Education*, 548 S.W.2d 507 (Ky. 1977) (combination scheme constitutional).

<sup>87</sup> See, e.g., *Townsend v. Allen*, 114 Cal. App.2d 291, 250 P.2d 292 (1952); *Wedum-Aldahl Co. v. Miller*, 18 Cal. App.2d 745, 64 P.2d 762 (1937); *Letteau v. Ellis*, 122 Cal. App. 584, 10 P.2d 496 (1932).

<sup>88</sup> See discussion in *Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 *Hastings L.J.* 293, 307-309 (1962).

<sup>89</sup> See, e.g., *Forman v. Hancock*, 3 Cal. App.2d 291, 39 P.2d 249 (1934); see discussion in 2 *A. Bowman, Ogden's Revised California Real Property Law* § 23.33 (1975).

<sup>90</sup> See discussion in 4 *H. Miller & M. Starr, Current Law of California Real Estate* § 25:25 (rev. 1977).



This rule is sound, and legal scholars have recommended that it be statutorily recognized.<sup>91</sup> The Law Revision Commission recommends that application of the rule of changed conditions to rights of entry be codified and extended by statute to possibilities of reverter, the two interests being treated together as powers of termination.<sup>92</sup> Although this will not permit clearing the record of obsolete powers by operation of law, it will make clear that obsolete powers of all types may be terminated by judicial action.<sup>93</sup> Thus the fee owner will be able to extinguish a power of termination when the continued impairment of practical and valuable uses of the property and the consequential injury to its utilization and marketability can no longer be justified.<sup>94</sup>

### Statute of Limitation

Existing law governing the limitation period applicable to exercise of a right of entry or a possibility of reverter is not clear.<sup>95</sup> The law governing the power of termination, which will replace the right of entry and the possibility of reverter, should be made clear. The ordinary five-year statute of limitation applicable to other actions concerning title to or possession of real property is appropriate for powers of termination.<sup>96</sup> In order that the cloud of a recorded power of termination not continue for an undue length of time, exercise of the power of termination within the statutory period should be recorded or the power expires of record.<sup>97</sup> Clarification of the statutory limitation

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<sup>91</sup> See, e.g., Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*, 21 Calif. L. Rev. 1, 8-9 (1932).

<sup>92</sup> New York has such a provision. See N.Y., *Real Prop. Actions and Proc. Law* § 1951 (McKinney 1979). See also, *Ariz. Rev. Stat.* § 33-436 (West 1974); *Mich. Stat. Ann.* § 26.46 (1974); *Minn. Stat. Ann.* § 500.20(1) (West 1947); *Wis. Stat.* § 700.15 (West 1981) (nominal conditions or conditions of no substantial or actual benefit may not be enforced).

<sup>93</sup> See discussion in L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 206-208 (1960).

<sup>94</sup> Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. Rev. 807, 838-839 (1964).

<sup>95</sup> See "Comparison of Right of Entry with Possibility of Reverter," above.

<sup>96</sup> *Code Civ. Proc.* §§ 319-320.

<sup>97</sup> The statutory period for expiration of record would not be extended by tolling or for any other reason than a recorded extension. Apparently, existing practice is to ignore the possibility of tolling. See 2 A. Bowman, *Ogden's Revised California Real Property Law* § 23.25 (1975).

period would not affect the general principles that the holder of the power of termination can waive the power or be estopped from exercising the power by failure to timely pursue the remedy.<sup>98</sup>

## Unperformed Contracts for Sale of Real Property

Contracts for sale of real property are of two general types.<sup>99</sup> An agreement for sale (sometimes known as an "earnest money," or "deposit receipt" contract) is ordinarily to be performed within a relatively short period and results in a transfer of title.<sup>100</sup> An installment land contract<sup>101</sup> is ordinarily to be performed over a longer period and is a type of security device as well as an agreement of sale.<sup>102</sup> The installment land contract presents special problems that the Law Revision Commission plans to study in the future. The present recommendation deals only with short-term agreement for sale type contracts.

A contract for sale of real property may be recorded,<sup>103</sup> and recordation has the effect of clouding title. If a buyer defaults, the buyer more often than not fails to execute a release or reconveyance to clear the title. The unreleased contract for sale of the real property continues to impair title and renders the property unmarketable and uninsurable until it is eliminated by a release from the buyer or by quiet title proceedings.<sup>104</sup>

<sup>98</sup> See, e.g., *Santa Monica v. Jones*, 104 Cal. App.2d 463, 232 P.2d 55 (1951) (waiver); *Wedum-Aldahl Co. v. Miller*, 18 Cal. App.2d 745, 64 P.2d 762 (1937) (waiver or estoppel); *Hanna v. Rodeo-Vallejo Ferry Co.*, 89 Cal. App. 462, 265 P. 287 (1928) (waiver or estoppel).

<sup>99</sup> See, e.g., discussion in Bernhardt, *Liability for Breach*, in California Real Estate Sales Transactions §§ 11.45-11.46 (Cal. Cont. Ed. Bar 1967); Hetland, *Land Contracts*, in California Real Estate Secured Transactions § 3.59 (Cal. Cont. Ed. Bar 1970).

<sup>100</sup> See, e.g., discussion in 1 A. Bowman, *Ogden's Revised California Real Property Law* § 11.4 (1974).

<sup>101</sup> See also Civil Code § 2985 (real property sales contracts).

<sup>102</sup> See, e.g., discussion in 3 B. Witkin, *Summary of California Law Security Transactions in Real Property* § 21 (8th ed. 1973). The installment land contract acquired considerable popularity during the early 1970's when it was perceived as circumventing the consequences of a due-on clause in a deed of trust. It was also widely employed in the early 1960's and before then as an inexpensive and expedient financing vehicle. R. Bernhardt, *California Mortgage and Deed of Trust Practice* § 1.7 (Cal. Cont. Ed. Bar 1979).

<sup>103</sup> Gov't Code §§ 27280, 27288.

<sup>104</sup> 1 A. Bowman, *Ogden's Revised California Real Property Law* § 11.27 (1974).

There are many unreleased contracts for sale of real property in the records that impair marketability of property.<sup>105</sup> Title is not cleared automatically by operation of the statute of limitation by the passage of four years after the date for performance of the contract.<sup>106</sup> The statute of limitation does not run against a buyer in possession<sup>107</sup> and there may be other events that do not appear of record but that toll the operation of the statute.<sup>108</sup>

Property that is subject to a contract of sale is unmarketable because the current status of the contract can be determined only by reference to facts outside the record. A means should be provided to enable clearing of an unperformed land sale contract from record title by operation of law, without need for quiet title proceedings or a release from the buyer.<sup>109</sup> An ideal statute for this purpose should first eliminate any extensions of time for performance by facts outside the record, and then should declare the seller's title marketable after expiration of a stated period of time.<sup>110</sup>

The Law Revision Commission recommends that the cloud on title of an unperformed contract for sale of real property be eliminated by passage of five years after the

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<sup>105</sup> P. Basye, *Clearing Land Titles* § 132 (2d ed. 1970). Although there is some discussion in the literature about the extent to which contracts for sale of real property are recorded, the Law Revision Commission is informed by property developers and title insurance personnel that contracts are recorded and cause substantial title impairment problems when unperformed. Compare L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 152 (1960) (contracts commonly recorded) with J. Hetland, *Secured Real Estate Transactions* § 2.5 (Cal. Cont. Ed. Bar 1974) (contracts not acknowledged hence not recordable); but see Bernhardt, *Liability for Breach*, in *California Real Estate Sales Transactions* § 11.72 (Cal. Cont. Ed. Bar 1967) and Hetland, *Land Contracts*, in *California Land Security and Development* § 2.17 (Cal. Cont. Ed. Bar 1960) (means of buyer to obtain recordation).

<sup>106</sup> The statute of limitation for enforcement of a land sale contract is four years. Code Civ. Proc. § 337(1). See also *Stafford v. Ballinger*, 199 Cal. App.2d 289, 18 Cal. Rptr. 568 (1962); Bernhardt, *Liability for Breach*, in *California Real Estate Sales Transactions* § 11.38 (Cal. Cont. Ed. Bar 1967).

<sup>107</sup> See, e.g., *Kidd v. Kidd*, 61 Cal.2d 479, 393 P.2d 403, 39 Cal. Rptr. 203 (1964).

<sup>108</sup> See L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 153 (1960) and P. Basye, *Clearing Land Titles* § 132 (2d ed. 1970).

<sup>109</sup> A requirement should also be added to the law that the buyer must execute a release upon breach of the contract.

<sup>110</sup> Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960).

time for performance of the contract unless waived or extended of record.<sup>111</sup> The five-year period allows for the running of the statute of limitation plus an additional year for possible extenuating circumstances and is consistent with the general five-year statutes of limitation for real property actions.<sup>112</sup> This recommendation would not affect the ability of the seller to clear title before the passage of five years by a quiet title action or by obtaining a release from the buyer.

### RECOMMENDED LEGISLATION

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

An act to add Title 5 (commencing with Section 880.020) to Part 2 of Division 2 of, and to repeal Section 1213.5 of, the Civil Code, relating to real property.

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

#### Civil Code §§ 880.020-886.040 (added)

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

### TITLE 5. MARKETABLE RECORD TITLE

#### CHAPTER 1. GENERAL PROVISIONS

##### Article 1. Construction

#### § 880.020. Declaration of policy and purposes

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

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

<sup>111</sup> The recommended legislation would only eliminate the cloud on title as it affects third parties; it would not alter the rights and obligations of the buyer and seller as between each other.

<sup>112</sup> Code Civ. Proc. §§ 318-320. *Cf.* Uniform Simplification of Land Transfers Act (1977) § 3-206 (six months).

to the extent practicable in order to enable and encourage full use and development of the real property, including both surface and subsurface interests.

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property because the interests are no longer valid or have been abandoned or have otherwise become obsolete.

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

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

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose.

**Comment.** Subdivision (a) of Section 880.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1 (1976; Supp. 1981). The declaration of public policy is intended to demonstrate the significance of the state interest served by this title and the importance of the retroactive application of the law to the effectuation of that interest. See *In re Marriage of Bouquet*, 16 Cal.3d 583, 592, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976) (upholding changes in the community property laws as retroactively applied).

A statute may require recordation of previously executed instruments or of extensions of time if a reasonable time is allowed for recordation. See discussion in 1 A. Bowman, *Ogden's Revised California Real Property Law* § 10.4, at 415-16 (1974). The burden on holders of old interests of recording a notice of intent to preserve or an extension of time is outweighed by the public good of more secure land transactions. See, *e.g.*,

Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957) (upholding Minnesota marketable title legislation):

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

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

#### § 880.030. Effect on other law

880.030. Nothing in this title shall be construed to:

(a) Limit application of the principles of waiver and estoppel, laches, and other equitable principles.

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

**Comment.** Subdivision (a) of Section 880.030 is new; notwithstanding the maximum record duration or period of enforceability of interests in property pursuant to this title, the owner of an interest may waive or be estopped from asserting the interest within the prescribed time, or other equitable defenses may apply. Subdivision (b) is drawn from Section 7 of the Model Marketable Title Act.

## Article 2. Application of Title

### § 880.240. Interests excepted from title

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

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

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

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

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

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

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

Subdivision (c) is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation. The interest of a public entity is not subject to fractionalization and the current address of the public entity is always known.

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

### § 880.250. Relation of title to statutes of limitation

880.250. (a) The times prescribed in this title for expiration or expiration of record of an interest in real property or for enforcement, for bringing an action, or for

doing any other required act are absolute and apply notwithstanding any disability or lack of knowledge of any person or any provisions for tolling a statute of limitation and notwithstanding any longer time applicable pursuant to any statute of limitation.

(b) Nothing in this title extends the period for enforcement, for bringing an action, or for doing any other required act, or revives an interest in real property that has expired and is unenforceable, pursuant to any applicable statute of limitation.

**Comment.** Subdivision (a) of Section 880.250 makes clear that there can be no off-record waivers, extensions, or tolling of the expiration time for, or enforceability of, an interest in real property pursuant to this title. While off-record waivers, extensions, or tolling (including partial payments in the case of a mortgage or deed of trust) may be effective for purposes of general statutes of limitation, they cannot extend the duration or enforceability of an interest past the times prescribed in this title. Whether a recorded waiver, extension, or tolling is effective depends upon the statute governing the particular interest. *Compare* Section 882.020 (waiver or extension of time for enforcement of mortgage or deed of trust) *with* Section 885.030 (no waiver or extension of time for expiration of power of termination).

Subdivision (b) is drawn from Section 7 of the Model Marketable Title Act and Section 3-308 of the Uniform Simplification of Land Transfers Act (1977).

### § 880.260. Effect of action and lis pendens

880.260. An interest in real property does not expire or expire of record pursuant to this title at the times prescribed in this title if within the times an action is commenced to enforce, establish, clear title to, or otherwise affect the interest and a notice of the pendency of the action is recorded as provided by law.

**Comment.** Section 880.260 makes clear that there is no expiration of an interest in real property by operation of law pursuant to this title if a lis pendens is recorded before expiration. This is a specific application of the general provisions governing the effect of a lis pendens. See Code Civ. Proc. § 409.



### Article 3. Preservation of Interests

#### § 880.310. Notice of intent to preserve interest

880.310. (a) If the time within which an interest in real property expires pursuant to this title depends upon recordation of a notice of intent to preserve the interest, a person may preserve the person's interest from expiration by recording a notice of intent to preserve the interest before the interest expires pursuant to this title. Recordation of a notice of intent to preserve an interest in real property after the interest has expired pursuant to this title does not preserve the interest.

(b) Recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable pursuant to other law, whether before or after the notice of intent to preserve the interest is recorded, and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable. Recordation of a notice of intent to preserve an interest in real property creates a presumption affecting the burden of proof that the person who claims the interest has not abandoned and does not intend to abandon the interest.

**Comment.** Subdivision (a) of Section 880.310 is drawn from Sections 2(d) and 4(a) of the Model Marketable Title Act and Sections 3-303(3) and 3-305 of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) imposes no limit on the number of times a notice of intent to preserve may be recorded; so long as the interest has not expired at the time of recordation, preservation of an interest in perpetuity is possible. If a person owns a part interest in real property, the notice of intent preserves only the part interest owned by the person for whom the notice is recorded. If a person owns an interest in real property that is one of several related interests in real property, the notice of intent preserves only the interest owned by the person for whom the notice is recorded and not the related interests of other persons. However, a person may record an interest on behalf of other owners of the interest, if so authorized by the others. See Section 880.320 (who may record notice).

Subdivision (b) is drawn from Section 3-309 of the Uniform Act, with the addition of language to make clear that a notice of

intent to preserve does not affect the validity of any interest in real property under law apart from this title but that the notice creates a presumption against abandonment.

**§ 880.320. Who may record notice**

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

(a) A person who claims the interest.

(b) Another person acting on behalf of a claimant if the person is authorized to act on behalf of the claimant or if the claimant is one of a class whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest.

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

**§ 880.330. Contents of notice**

**880.330.** Subject to all statutory requirements for recorded documents:

(a) A notice of intent to preserve an interest in real property shall be in writing and signed and verified by or on behalf of the claimant. If the notice is made on behalf of a claimant, the notice shall include a statement of the authority of the person making the notice.

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

(1) The name and mailing address of the claimant. If the notice is made by or on behalf of more than one claimant the notice shall contain the name and mailing address of each claimant.

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

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

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

**§ 880.340. Form of notice**

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

## MARKETABLE TITLE

## RECORDING INFORMATION

Recording requested by:  
After recording return to:

FOR USE OF COUNTY RECORDER

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

## NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to Title 5 (commencing with Section 390.010) of Part 2 of Division 2 of the Civil Code (Marketable Record Title).

Claimant

Name:  
Mailing address:  
(must be given for each claimant)

Interest

Character (e.g., power of termination):  
Record location of document creating or  
evidencing interest in claimant:

Real Property

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

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true. If this notice is made on behalf of a claimant, I assert under penalty of perjury that I am authorized to act on behalf of the claimant.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
(claimant)

\_\_\_\_\_  
(person acting on behalf of  
claimant)

State of \_\_\_\_\_,

County of \_\_\_\_\_, ss.

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

Signed: \_\_\_\_\_ Official Seal:

Office: \_\_\_\_\_

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

**§ 880.350. Recording and indexing notice**

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

(b) The county recorder shall index a notice of intent to preserve an interest in real property in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the claimant under the notice shall be deemed to be the grantor. If a notice of intent to preserve is recorded by or on behalf of more than one claimant, each claimant shall be deemed to be a grantor and a separate index entry shall be made for each claimant.

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

**§ 880.360. Slander of title by recording notice**

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

**Comment.** Section 880.360 is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation, and makes clear that recordation of a notice of intent to preserve an interest under this title is not privileged. Section 880.360 does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for

slander of title, with the addition of reasonable attorney's fees. See 4 B. Witkin, *Summary of California Law Torts* § 328 (8th ed. 1974).

### § 880.370. Grace period for recording notice

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

**Comment.** Section 880.370 is drawn from Section 10 of the Model Marketable Title Act and Section 7-101 (d) of the Uniform Simplification of Land Transfers Act (1977) (two years).

## CHAPTER 2. ANCIENT MORTGAGES AND DEEDS OF TRUST

### § 882.010. Statute of limitation outlaws mortgage or deed of trust

882.010. If the period prescribed by statute for commencement of an action on a debt or other obligation secured by a mortgage, deed of trust, or other instrument that creates a security interest in real property has expired, the lien of the mortgage, deed of trust, or other security interest also expires and is not enforceable by foreclosure, power of sale, or any other means commenced thereafter.

**Comment.** Section 882.010 codifies the rule that the running of the statute of limitation on a debt outlaws foreclosure or exercise of a power of sale under a mortgage and reverses the rule that the running of the statute of limitation on a debt outlaws foreclosure but does not outlaw exercise of a power of sale under a deed of trust. See, *e.g.*, *Faxon v. All Persons*, 166 Cal. 707, 137 P. 919 (1913) (mortgage); *Flack v. Boland*, 11 Cal.2d 103, 77 P.2d 1090 (1938) (deed of trust). The basic statute of limitation on a debt secured by a mortgage or deed of trust is four years, but this period can be extended by partial payment or waiver or by ordinary tolling principles. See Code Civ. Proc. §§ 337 (four-year statute of limitation); 360 (partial payment turns back statute); 360.5 (waiver of statute of limitation); 351-358 (tolling of statute). For an absolute limit on enforceability of a mortgage or deed of trust, see Section 882.020 (expiration of record of mortgage or deed of trust).

**§ 882.020. Expiration of record of mortgage or deed of trust**

**882.020.** (a) Unless the lien of a mortgage, deed of trust, or other instrument that creates a security interest of record in real property to secure a debt or other obligation has earlier expired pursuant to Section 882.010, the lien expires and is not enforceable by foreclosure, power of sale, or any other means commenced after the following times:

(1) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the record, 10 years after that date.

(2) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is not ascertainable from the record, or if there is no final maturity date or last date fixed for payment of the debt or performance of the obligation, 60 years after the date the instrument that created the security interest was recorded.

(b) The times prescribed in this section may be waived or extended only by an instrument that is effective to waive or extend any other applicable statute of limitation beyond the prescribed times and that is recorded before expiration of the prescribed times. Upon recordation of a waiver or extension beyond the times prescribed in this section, the prescribed times shall be computed as if the waiver or extension were the original instrument that created the security interest.

**Comment.** Section 882.020 prescribes a maximum time for enforcement of a mortgage or deed of trust. It operates to bar enforcement of a mortgage or deed of trust after the time prescribed even though the general statutes of limitation may not have run due to tolling, partial payment, or waiver. See Comment to Section 882.010 (statute of limitation outlaws mortgage or deed of trust). The section does not extend the time provided by the general statutes of limitation that apply to enforcement of a mortgage or deed of trust. *Cf.* Code Civ. Proc. § 337 (four-year limitation period). The cloud on title of a mortgage or deed of trust that is barred by the general statutes of limitation before the time prescribed in this section may be removed by judicial action, or may be removed by operation of law after passage of the time prescribed in this section. See Section 882.030 (effect of expiration).

Subdivision (a) adopts a 10-year maximum enforcement period after maturity of the obligation secured by the mortgage or deed of trust. This period is drawn from the comparable 10-year period of the Model Mortgage Limitation Act § 4(a) and the Uniform Simplification of Land Transfers Act (1977) § 3-408(a). Subdivision (a) adopts a 60-year maximum enforcement period after recordation of the security instrument in cases where the maturity date of the obligation cannot be ascertained from the record, whether because the obligation provided no maturity date, because the maturity date is variable depending on facts not in the record, or because the obligation specifies no maturity date. The effect of subdivision (a) is to prescribe a maximum life for a mortgage or deed of trust based exclusively on the record for marketability of title purposes.

Subdivision (b) provides for waiver or extension of the time for enforcement of a mortgage or deed of trust under subdivision (a). The waiver or extension must operate to waive or extend the general statutes of limitation and must be recorded to be effective. This accomplishes the purpose of enabling a determination of enforceability based on the record alone. Under this provision, a waiver or extension may be made only for a period of four years at a time. See Section 360.5 (four-year period).

### **§ 882.030. Effect of expiration**

**882.030.** Expiration of the lien of a mortgage, deed of trust, or other security interest pursuant to this chapter is equivalent for all purposes to a certificate of satisfaction, reconveyance, release, or other discharge of the security interest, and execution and recording of a certificate of satisfaction, reconveyance, release, or other discharge is not necessary to terminate or evidence the termination of the security interest. Nothing in this section precludes execution and recording at any time of a certificate of satisfaction, reconveyance, release, or other discharge.

**Comment.** Section 882.030 is drawn from the Model Mortgage Limitation Act § 4 and from the Uniform Simplification of Land Transfers Act (1977) § 3-408(b). Under this section, running of the enforcement periods prescribed in Sections 882.010 (statute of limitation outlaws mortgage or deed of trust) and 882.020 (expiration of record of mortgage or deed of trust) has the effect of complete discharge of the mortgage or deed of trust; this reverses the rule that a mortgage or deed of



trust barred by the statute of limitations may be equitably enforced. See, *e.g.*, *Puckhaber v. Henry*, 152 Cal. 419, 93 P. 114 (1907).

#### § 882.040. Transitional provisions

882.040. (a) Except as otherwise provided in this section, this chapter applies on the operative date to all mortgages, deeds of trust, and other instruments that create a security interest in real property to secure a debt or other obligation, whether executed or recorded before, on, or after the operative date.

(b) This chapter shall not cause the lien of a mortgage, deed of trust, or other security interest in real property to expire or become unenforceable before the passage of two years after the operative date of this chapter.

**Comment.** Section 882.040 provides a two-year grace period to enable enforcement of security interests that would be outlawed by the enactment of this chapter and a shorter grace period for enforcement of interests that would be outlawed within two years after enactment of this chapter. The two-year grace period does not operate as an extension of the statute of limitation itself or of the time within which an effective waiver or extension of the statute of limitation must be made pursuant to Code of Civil Procedure Sections 337 (statute of limitation) and 360.5 (waiver of statute of limitation).

### CHAPTER 3. [RESERVED]

### CHAPTER 4. UNEXERCISED OPTIONS

#### § 884.010. Expiration of record

884.010. If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times:

(a) Six months after the option expires according to its terms.

(b) If the option provides no expiration date, six months after the date the instrument that creates the option is recorded.

**Comment.** Subdivision (a) of Section 884.010 reduces the period of former Section 1213.5 for expiration of record of an option from one year to six months after expiration by its terms.

Under subdivision (b) an option with no prescribed term expires of record six months after its recordation rather than one year after its expiration by operation of law as provided under former Section 1213.5. This modifies the rule that if an option provides no expiration date it may be exercised within a reasonable time after it is executed. See, *e.g.*, 1 B. Witkin, Summary of California Law, Contracts § 129 (8th ed. 1973). Subdivision (b) does not prescribe the time within which such an option must be exercised; it only limits the effect of the option on third persons. See Section 884.020 (effect of expiration).

Nothing in Section 884.010 affects the application of the Rule Against Perpetuities to an option, whether the option expires within a fixed or indefinite period in accordance with its terms or whether it expires by operation of law within a reasonable time after it is executed. See, *e.g.*, 3 B. Witkin, Summary of California Law, Real Property § 304 (8th ed. 1973).

Nothing in Section 884.010 affects an option to purchase included in the terms of the lease of a lessee in possession. See Section 880.240(a) (interests excepted from title).

### § 884.020. Effect of expiration

**884.020.** Upon the expiration of record of an option to purchase real property, the recorded instrument that creates or gives constructive notice of the option ceases to be notice to any person or to put any person on inquiry with respect to the exercise or existence of the option or of any contract, conveyance, or other writing that may have been executed pursuant to the option.

**Comment.** Section 884.020 continues the substance of a portion of former Section 1213.5. An option that has expired of record does not affect third persons but may still affect the parties to the option. See Section 884.010 (expiration of record) and Comment thereto.

### § 884.030. Transitional provisions

**884.030.** (a) Except as otherwise provided in this section, this chapter applies on the operative date to all recorded instruments that create or give constructive notice of options to purchase real property, whether executed or recorded before, on, or after the operative date.

(b) This chapter shall not cause an option that expires according to its terms within one year before, on, or within one year after the operative date of this chapter to expire of record until one year after the operative date.

(c) This chapter shall not cause an option that provides no expiration date to expire of record until one year after the operative date of this chapter.

(d) Nothing in this chapter affects a recorded instrument that has ceased to be notice to any person or put any person on inquiry with respect to the exercise or existence of an option pursuant to former Section 1213.5 before the operative date of this chapter.

**Comment.** Subdivision (a) of Section 884.030 continues the effect of former Section 1213.5 to govern all options now in existence or hereafter created. Subdivision (b) is intended to protect fixed term option holders who may have relied on the one-year expiration period formerly provided in Section 1213.5. Subdivision (c) is intended to protect indefinite term option holders before the operative date of this statute from expiration until an adequate time after the operative date, during which time an exercise or extension of the option may be recorded. Subdivision (d) makes clear that this chapter does not revive options that have expired pursuant to prior law.

## CHAPTER 5. POWERS OF TERMINATION

### § 885.010. “Power of termination” defined

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

(b) For the purpose of applying this chapter to other statutes relating to powers of termination, the terms “right of reentry,” “right of repossession for breach of condition

subsequent,” and comparable terms used in the other statutes mean “power of termination” as defined in this section.

**Comment.** Section 885.010 redefines the right of entry as a power of termination, the more descriptive and technically accurate of the two terms. See, *e.g.*, *Parry v. Berkeley Hall School Foundation*, 10 Cal.2d 422, 74 P.2d 55 (1937). Places in the code where old terminology is used include Section 791 and 793 (“right of re-entry”) and 1046 (“right of reentry, or of repossession for breach of condition subsequent”).

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

#### § 885.020. Fee simple determinable and possibility of reverter abolished

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

**Comment.** Section 885.020 abolishes the estate known at common law as the fee simple determinable and the interest known as the possibility of reverter. *Cf.* Section 763 (estates tail abolished); *Ky. Rev. Stats. § 381.218 (Baldwin 1979)* (fee simple determinable and possibility of reverter abolished). These interests were recognized late in California jurisprudence and added little to California land law. See *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962 (1935) (recognizing fee simple determinable and possibility of reverter). Section 885.020 applies to existing estates and interests as well as to those created after its enactment. See Section 885.070 (transitional provisions). Section 885.020 does not affect determinable life estates or determinable terms for years; it applies only to fee simple estates. See Section 885.010 (“power of termination” defined).

**§ 885.030. Expiration of power of termination**

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

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

(2) If an instrument reserving, transferring, or otherwise evidencing the power of termination, or if a notice of intent to preserve the power of termination, is recorded or rerecorded within the time prescribed in paragraph (1), thirty years after the date the instrument or a notice of intent to preserve the power of termination is recorded or rerecorded.

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

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

**§ 885.040. Obsolete power of termination**

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

(b) As used in this section, a power of termination is obsolete if any of the following circumstances applies:

(1) The restriction to which the fee simple estate is subject is of no actual and substantial benefit to the holder of the power.

(2) Enforcement of the power would not effectuate the purpose of the restriction to which the fee simple estate is subject.

(3) It would be otherwise inequitable to enforce the power because of changed conditions or circumstances.

**Comment.** Section 885.040 is drawn from New York law. See N.Y., Real Prop. Actions and Proc. Law § 1951 (McKinney 1979). It codifies the rule that reversionary interests will not be enforced if the restriction does not benefit the holder of the interests. See, *e.g.*, *Young v. Cramer*, 38 Cal. App.2d 64, 100 P.2d 523 (1940) (holder of interest not an owner of appurtenant property). It also codifies existing case law relating to obsolete rights of entry. See, *e.g.*, *Letteau v. Ellis*, 122 Cal. App. 584, 10 P.2d 496 (1932) (changed circumstances).

A power of termination may expire pursuant to this section if it becomes obsolete notwithstanding the fact that the 30-year statutory duration of the power has not elapsed and notwithstanding the fact that a notice of intent to preserve the power may have been filed. See Section 885.030 (expiration of power of termination). For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration).

**§ 885.050. Exercise of power**

885.050. A power of termination shall be exercised only by notice or by civil action and, if the power of termination is of record, the exercise shall be of record. The notice shall be given, and any civil action commenced, within five years after breach of the restriction to which the fee simple estate is subject.

**Comment.** Section 885.050 provides that even if a power of termination is phrased in terms of a right of entry, the power may be exercised only by notice or by civil action. This is consistent with Sections 791 (notice) and 793 (action for possession). See

also *Jordan v. Talbot*, 55 Cal.2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961) (right of entry in lease).

Section 885.050 makes clear that the statutory limitation period applicable to a power of termination is five years. *Cf.* Code Civ. Proc. §§ 319-320 (five years). Former law was not clear. *Compare, e.g.*, 3 B. Witkin, *Summary of California Law Real Property* § 188, at 1926 (8th ed. 1973) (enforcement within a "reasonable time") and *Lincoln v. Narom Development Co.*, 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitation not applicable) with 2 A. Bowman, *Ogden's Revised California Real Property Law* § 23.32 (1975) (five years pursuant to Code of Civil Procedure Section 320).

Although Section 885.050 prescribes the limitation period for exercise of a power of termination to enforce breach of a restriction, it does not otherwise affect the existence or continued vitality of the power of termination as to other breaches. Nor does Section 885.050 preclude earlier termination of a power of termination through waiver or estoppel. See Section 880.030(a) (application of waiver and estoppel). See, *e.g.*, *Santa Monica v. Jones*, 104 Cal. App.2d 463, 232 P.2d 55 (1951) (waiver); *Wedum-Aldahl Co. v. Miller*, 18 Cal. App.2d 745, 64 P.2d 762 (1937) (waiver or estoppel); *Hanna v. Rodeo-Vallejo Ferry Co.*, 89 Cal. App. 462, 265 P. 287 (1928) (waiver or estoppel).

### § 885.060. Effect of expiration

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

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

**Comment.** Section 885.060 provides for the clearing of record title to real property by operation of law after a power of termination has expired under Section 885.030 (expiration of power of termination). Title can be cleared by judicial decree prior to the time prescribed in Section 885.030 in case of an

obsolete power of termination. See Section 885.040 (obsolete power of termination); *Hess v. Country Club Park*, 213 Cal. 613, 2 P.2d 782 (1931).

**§ 885.070. Transitional provisions**

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

(b) If breach of the restriction to which the fee simple estate is subject occurred before the operative date of this chapter and the power of termination is not exercised before the operative date of this chapter, the power of termination shall be exercised, or in the case of a power of termination of record, exercised of record, within the earlier of the following times:

(1) The time that would be applicable pursuant to the law in effect immediately prior to the operative date of this chapter.

(2) Five years after the operative date of this chapter.

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

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



## CHAPTER 6. UNPERFORMED CONTRACTS FOR SALE OF REAL PROPERTY

### § 886.010. Definitions

886.010. As used in this chapter:

(a) "Contract for sale of real property" means an agreement wherein one party agrees to convey title to real property to another party upon the satisfaction of specified conditions set forth in the contract and which requires conveyance of title within one year from the date of formation of the contract, whether designated in the agreement a "contract for sale of real property," "land sale contract," "deposit receipt," "agreement for sale," "agreement to convey," or otherwise.

(b) "Recorded contract for sale of real property" includes the entire terms of a contract for sale of real property that is recorded in its entirety or is evidenced by a recorded memorandum or short form of the contract.

**Comment.** Section 886.010 is drawn from Sections 2985 and 2985.51 and Business and Professions Code Section 10029 (real property sales contracts), but applies only to contracts of a type not covered by the other sections (contracts to be performed within one year). The section also applies to agreements to convey that are dependent on performance of conditions other than payment of money. Real property sales contracts (not to be performed within one year), popularly called installment land contracts, are not dealt with in this chapter.

### § 886.020. Release of contract for sale of real property

886.020. If the party to whom title to real property is to be conveyed pursuant to a recorded contract for sale of real property fails to satisfy the specified conditions set forth in the contract and does not seek performance of the contract or restitution of amounts paid under the contract, the party shall, upon demand therefor, execute a release of the contract, duly acknowledged for record, to the party who agreed to convey title. Willful violation of this section by the party to whom title is to be conveyed makes the party liable for damages the party who agreed to convey title sustains by reason of the violation, including but not limited to court costs and reasonable attorney's fees in an action to clear title

to the real property. Nothing in this section makes a release or a demand therefor a condition precedent to an action to clear title to the real property.

**Comment.** Section 886.020 is new. *Cf.* Section 2941 (reconveyance upon termination of a mortgage or deed of trust); Section 1109 (reconveyance of estate on condition that is defeated by nonperformance). Section 886.020 is intended to enhance marketability of title clouded by an unperformed real property sales contract without the need to quiet title or await the lapse of the five-year period provided in Section 886.030 (expiration of record of unperformed contract for sale of real property).

**§ 886.030. Expiration of record of contracts for sale of real property**

886.030. (a) Except as otherwise provided in this section, a recorded contract for sale of real property expires of record at the later of the following times:

(1) Five years after the date for conveyance of title provided in the contract or, if no date for conveyance of title is provided in the contract, five years after the last date provided in the contract for satisfaction of the specified conditions set forth in the contract.

(2) If there is a recorded extension of the contract within the time prescribed in paragraph (1), five years after the date for conveyance of title provided in the extension or, if no date for conveyance of title is provided in the extension, five years after the last date provided in the extension for satisfaction of the specified conditions set forth in the contract.

(b) The times prescribed in this section may be waived or extended only by an instrument that is recorded before expiration of the prescribed times.

**Comment.** Section 886.030 prescribes the maximum duration of a contract for sale of real property of record for purposes of marketability. The maximum duration does not affect the rights and obligations of the parties to the contract but only the effect of the recorded notice of the contract on third parties. See Section 886.040 (effect of expiration). Section 886.030 operates to clear record title of the contract after the time prescribed even though the general statute of limitation to enforce the contract may not have run due to tolling, possession by the purchaser, or for some other cause. The section does not extend the time

provided by the general statute of limitation that applies to enforcement of a real property sales contract. See Code Civ. Proc. § 337(1) (four-year limitation period). The cloud on title of an unperformed real property sales contract, whether or not barred by the general statute of limitation, may be removed by judicial action or may be removed by operation of law after passage of the time prescribed in this section. See Section 886.040 (effect of expiration).

Subdivision (a) adopts the five-year period of the Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960). The effect of subdivision (a) is to prescribe a maximum life for a real property sales contract based exclusively on the record for marketability of title purposes.

Subdivision (b) provides that a waiver or extension of the expiration date of a real property sales contract must be recorded to be effective. This accomplishes the purpose of enabling a determination of marketability based on the record alone.

#### **§ 886.040. Effect of expiration**

**886.040.** Upon the expiration of record of a recorded contract for sale of real property pursuant to this chapter, the contract has no effect, and does not constitute an encumbrance or cloud, on the title to the real property as against a person other than a party to the contract.

**Comment.** Section 886.040 is drawn from the Model Act Limiting Encumbrances Arising from Recorded Land Contracts (Simes & Taylor 1960). A contract for sale of real property that has expired of record does not affect third persons but may still affect the parties to the contract. See Section 886.030 (expiration of record of contract for sale of real property) and Comment thereto. In addition, expiration of record does not affect the interest of a person in possession of the real property. Section 880.240 (interests excepted from title).

#### **§ 886.050. Transitional provision**

**886.050.** (a) Except as otherwise provided in this section, this chapter applies on the operative date to all recorded contracts for sale of real property, whether recorded before, on, or after the operative date.

(b) This chapter shall not cause a recorded contract for sale of real property to expire of record before the passage of two years after the operative date of this chapter.

**Comment.** Section 886.050 makes clear the legislative intent to apply this chapter immediately to existing contracts for sale of real property. It provides a two-year grace period to enable enforcement of contracts that would expire upon enactment of this chapter and a shorter grace period for enforcement of contracts that would expire within two years after enactment of this chapter. The two-year grace period does not operate as an extension of the statute of limitation itself. See Code Civ. Proc. § 337(1) (statute of limitation). Notwithstanding the grace period for expiration, a person required to execute a release of the contract pursuant to Section 886.020 (release of unperformed contract for sale of real property) has an immediate duty to do so upon request therefor upon the operative date of this chapter.

### REPEALED PROVISION

#### Civil Code § 1213.5 (repealed)

SEC. 2. Section 1213.5 of the Civil Code is repealed.

~~1213.5. When a recorded instrument has created, or shall hereafter create, an option to purchase real property, which, according to its terms, or by operation of law, has expired, and one year has elapsed since such time of expiration, and no conveyance, contract or other instrument has been recorded showing that such option has been exercised or extended, then the written instrument whereby such option was created shall cease to be notice to any person or put any person on inquiry, with respect to the exercise or existence of such option or of any contract, conveyance or other writing which may have been executed pursuant thereto.~~

**Comment.** Former Section 1213.5 is superseded by Sections 884.010-884.030 (unexercised options).

### NO APPROPRIATION OR REIMBURSEMENT

SEC. 3. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the Legislature finds and declares that there are savings as well as costs in this act which, in the aggregate, do not result in additional net costs.

**Comment.** Section 3 recognizes that any costs of recording and indexing notices of intent to preserve an interest are offset by the fees for recording and indexing pursuant to Government Code Section 27361 *et seq.*

(452-500 Blank)