#H-250 10/14/80

Memorandum 80-92

Subject: Study H-250 - Revision of Real Property Law (Comments on Professor Blawie's Study)

In October 1979 the Commission considered the study prepared for it by Professor Blawie on "The Present Law of Property and Conveyancing in California with Critical Analysis and Suggestions for Change." The Commission decided at that time to commence work on particular aspects of the real property law revision project when work on the enforcement of judgments statute had been substantially completed. In the meantime, Professor Blawie's study was to be distributed to interested persons and law professors for comment.

The members of the Commission are being sent another copy of the study with this memorandum. Other interested persons have already received a copy of the study. You should read the study if you have not already read it and save it if you have not previously saved it.

Comments on the study are attached as Exhibits 1-9. The Commission has previously received the comments of Ron Denitz, representing Tishman Realty. In addition to general observations made by the commentators, there were a number of specific suggestions for particular changes in the law that would be desirable. These specific suggestions the staff will raise for the Commission in connection with the subjects to which they relate at the time the Commission takes up the particular subjects.

The staff believes that a marketable title act would be the best place to start on the property law reform project. There are good model and uniform acts available as bases, and adoption of such an act would eliminate a number of subsidiary problems. Several commentators felt that this would be a natural starting place (see Exhibits 1, 5, 6) and others felt enactment of a marketable title act would be desirable (see Exhibits 3, 9). There were commentators, however, who questioned the usefulness or desirability of a marketable title act. See Exhibits 4 (Prof. Dukeminier--marketable title act useful only if combined with title registration system) and 6 (Prof. Maxwell--problems not troublesome in California), and earlier comments of Ron Denitz (marketable title act may cause problems). In addition, two commentators felt that there are matters of more pressing concern. See Exhibits 7 (Luther Avery--restructuring to accommodate new society of 21st century) and 8 (Allen Kent--inverse condemnation).

The staff believes that in order to proceed with the real property law study we must make the initial decision whether to adopt a marketable title act. The staff proposes to commence work on the study by preparing for Commission consideration a marketable title act along with a discussion of the policies involved. At that point the Commission should be in a position to make some decisions in this area.

After the marketable title act, the area most commentators felt was in need of attention was a tract indexing system for title records. See Exhibits 3, 4, 9. One commentator felt that the grantor-grantee index serves a useful function in some areas not related to transfer of title, such as judgment liens. See Exhibit 5 (Robert McNamee). Another felt that a broad-based land data records system is essential. See Exhibit 7 (Luther Avery). The staff believes this is primarily a question of politics (will the title insurance companies feel a major source of revenue is being taken away?) and money (how much will it cost to establish effective tract indexes, particularly a state-wide tract index?). These are matters the staff does not feel competent to answer at present. We plan to make inquiries of knowledgeable people before we come up with any suggestions for the Commission.

There was considerable interest in clarifying and simplifying the law governing covenants and future interests. See Exhibits 2, 3, 4. Some of the problems with estates and interests in land will probably arise and be resolved in connection with the marketable title act. To the extent the problems are not resolved in the marketable title act, the staff proposes to work clarifications of the law into the Commission's agenda as time permits on a priority basis. See, for example, Memorandum 80-89 proposing that during the coming year the Commission work on the Uniform Conservation and Historic Preservation Easements Act, which would replace these limited-purpose easements, restrictive covenants, and equitable servitudes with a single property interest serving the same functions.

Two commentators suggested that the Commission give serious consideration to adoption of a title registration (Torrens) system of title assurance. See Exhibits 2 (Prof. Rabin) and 4 (Prof. Dukeminier). The staff has doubts that a title registration scheme would stand a reasonable chance of enactment in view of the opposition of the title insurance industry and in view of California's past disastrous experience

with Torrens title. However, our commentators point out that the Torrens system could be substantially improved by statute. The staff believes that the Commission should at least investigate the possibility of adopting a title registration system and make an initial decision whether it would be feasible or desirable. At a meeting in the near future the staff will schedule a presentation of the title registration system, with viewpoints pro and con from interested people, so that the Commission can decide whether to spend its resources pursuing this matter further.

Commentators also suggested a number of other major areas they felt the Commission should look into:

(1) One commentator pointed out a number of problems with wills. See Exhibit 4 (Prof. Dukeminier). The Commission has been authorized to study the Probate Code and we will take up the problems in connection with this study.

(2) Another commentator suggests the study of real property security law. See Exhibit 6 (Prof. Maxwell). This has been suggested to the Commission before, and in fact the Commission's authority to study creditors' remedies includes authority to study "procedures under private power of sale in a trust deed or mortgage." The problems in this area are significant and this would require substantial Commission and staff resources which are not available at this time. The staff recommends that we continue to defer this matter but that we take it up sometime later, perhaps after the enforcement of judgments law is enacted.

(3) A third commentator suggested that we investigate new economic and legal rights in real estate and land use restrictions. See Exhibit 7 (Luther Avery). The staff suggests that when we finish our study title and conveyancing matters we might turn our attention to these other areas if specific problems in them are apparent or have been pointed out to us.

(4) A final commentator suggests that we study inverse condemnation law. See Exhibit 8 (Allen Kent). The Commission is already authorized to study inverse condemnation and has done some work in the area. However, the Commission has felt that it is not possible to draft acceptable legislation in this area, except perhaps with respect to

procedural aspects of inverse condemnation. We have placed this study on the back burner.

There are numerous other aspects of Professor Blawie's study that are not mentioned in this memorandum. The staff feels it is premature to schedule Commission consideration of these matters until we are further along in the study. We will have our hands full for the time being with a marketable title act, investigation of tract indexing, convenant and future interest reform, and title registration. Some of the smaller problems we may be able to work into the agenda on a piecemeal basis as staff and Commission time permits.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

STANFORD LAW SCHOOL

February 5, 1980

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School

Dear John:

I have reviewed the background study by Professor Blawie and wish to compliment him and you on the quality of the work.

I think it makes a lot of sense to begin with an investigation of a Marketable Title Act for the State of California; Professor Blawie's paper certainly supports the desirability of this study.

Sincerely yours,

Charlie

Charles J. Meyers

Charles J. Meyers,
Richard E. Lang Professor of Law and Dean

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Stanford California 94305
(415) 497-4455

Exhibit 2

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

February 6, 1980

(Tel: (213) 825-3316)

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: #H-250. A Study of the Present Law of Property and Conveyancing in California With Critical Analysis and Suggestions for Change (11/29/79) by Professor James L. Blawie

Dear Commissioners:

I wish to address two of the points made in Professor Blawie's excellent study.

I. Torrens System

The study concludes, p. (3) that it is "a waste of time" to discuss title registration. I believe that the decision to reject Torrens title registration is a fundamental one and should not be so hastily made. Time spent in investigating the Torrens system would be well spent if it resulted in a radically improved system. As it happens, a serious consideration of the Torrens system would not involve an inordinate amount of time or expense.

Professor Thomas W. Mapp, Institute of Law Research and Reform, The University of Alberta, Edmonton, Alberta, Canada T66 2E1 (tel: 432-3374) has recently published a definitive book, Torrens' Elusive Title (Alberta Law Review, 1978). In this work Professor Mapp notes (p. 4) the Land Registration system is working well in Canada and England and that it is being vigorously expanded. Indeed the Ontario Law Reform Commission has recommended that an improved Torrens system be "the sole system" in Ontario.

A chance for thorough-going reform of our recordation system comes once in a lifetime, if then. It would be tragic if the California Law Revision Commission wasted this chance in opting for a timid piecemeal approach. The Commission should seize the chance of investigating the

Torrens system as a radical improvement; it should not be discouraged by defeatism.

As a first step I suggest that the Commission invite Professor Mapp to speak to the Commission or its staff on the feasibility and advantages of Torrens. He has already concluded (p. 200) that it "is based on sound functional principles; it has operated well in most jurisdictions; it could operate much better in any jurisdiction with an improved statute."

The Commission is the beneficiary of a rare coincidence. Just as Professor Mapp completed his extensive study the Commission has the opportunity to gain the benefit of his work and accomplish something of fundamental benefit to the people of California. I am confident the Commission will explore this suggestion thoroughly.

II. Covenants

Professor Blawie's study makes some sensible suggestions (pp. 79-83, 96) for amending the statutes on covenants. I believe, however, that a total revision is in order. This is not the place to write a detailed analysis. My own study of these statutes leads me to conclude that they represent a patchwork body of inconsistent law badly in need of revision. Sections 1457-1467 were originally enacted in 1872 and remain essentially unchanged. They were written when covenants were obscure, rarely used devices. Today covenants, conditions and restrictions (CC&Rs) are universally used in conventional residential subdivisions as well as common ownership and condominium projects.

It is true, of course, that §§ 1468-1470 are of more recent vintage and cure some of the problems left by the older sections. However, §§ 1468-1470, in my opinion, are poorly drafted and internally inconsistent. To mention a few deficiencies:

> (1) Section 1468 makes no distinction between the running of the benefit of a covenant and the running of a burden. Suppose X, the owner of parcel A, reasonably promises Y, the owner of parcel B, to restrict parcel A to residential purposes for the benefit of parcel B. If plaintiff Z is the current owner of parcel B he will be unable to enforce the restriction against X, who still owns parcel A, if the instrument is unrecorded. No purpose is served by relieving X of his own promise other than to trap the unwary.

(2) The burden of a covenant between one who owns land and one who does not apparently cannot run regardless of the reasonableness of the covenant.

Thank you for the opportunity to comment on these matters. May I also congratulate the Commission on its decision to look into this exciting but too long neglected corner of the law?

Very truly yours,

Edward H. Rabin
Visiting Professor Law

EHR:lrc

Exhibit 3

Lazerow, 15, rue Serrette
75014 Paris - Tél. : 322.09.03

17 February 1980

Dear Mr. DeMoully:

Thank you for the copy of Professor Blawie's "A Study of t Present Law of Property and Conveyancing in California with Critical Analysis and Suggestions for Change". I agree with its suggestions that the Commission consider recommending to the Legislature:

1. A Marketable Title Act;

2. Changes in the recording system, including the institution of a state-wide tract index and changes relating to indexing and scope of title search;

3. An act to consolidate certain traditional future interests under a uniform set of rules;

4. That real property conveyancing and title rules apply generally to personalty; and

5. Miscellaneous property law changes, largely technical.

I endorse 1-3 and 5. Neither my experience nor the Study have convinced me that 4 is necessary.

That said, the following comments are details of decoration that might be useful to the Commission in constructing its study, rather than structural remodelings of the edifice of Prof. Blawie's fine Study.

1. The Study correctly identifies a major unresolved problem of Marketable Title Acts as being the area of covenants. Two points here. First, I do not share the Study's implication that different principles should be applied to covenants in residential and commercial developments. Second, the Commission might consider the same solution here as for other interests, which would permit any beneficiary of the covenant to re-record every 30 years to protect his interest.

2. I lack the necessary books in Paris to check my recollection, but it seems to me that another point on recording worth examining is the geographic scope of title search. My hazy recollection is that on the question of whether one is responsible for deeds out of a common grantor describing another property, California law is uncertain, or follows the minority Pennsylvania rule. The leading cases are Finley v. Glenn(PA) and Buffalo Academy v. Boehm Bros.(NY).

3. The future interest question boils down to the proposition that, regardless of the names given them, the same rules should apply to the possibility of reverter and the right of re-entry; to the contingent remainder and the executory limitation; and to the vested remainder and the reversion. (Now, i.e., the possibility of reverter is barred by prescription, but the right of re-entry is only barred by waiver or abandonment.)

4. The question of requirements for running of the benefit and burden of covenants, both leasehold and between fee owners, should be re-examined. The aberrant California decisions in note 67 may result from the reduced scope given covenants by Werner v. Graham, & Riley. Also, Lawrence Berger's article in Minn. L. Rev.(1971?) questions both resolutions in Spencer's Case(Study pp. 81, 96).

5. Raab v. Casper(Cal. App. 1975?) puts the adequacy of the California good faith improver statute in question.

6. The prescription sections for realty, CCP §§315-25?, could be redrafted to clearly describe current law.

7. Proposed CC §1106(Study p. 95) might be re-examined to assure that estoppel by deed operates to transfer only the size of the interest purportedly transferred.

Finally, a word of caution. My studies here in France have convinced me that the availability and flexibility of the institution of the trust have given anglo-saxon estate planners a marvelous tool that should be envied by their French counterparts. The action proposed by the Study would not limit that institution, but any drafts that emerge should make it clear that they do not apply to interests held in trust.

Again, many thanks for the opportunity to review this Study.

Sincerely,

Herbert T. Lazerow
Professor of Law
University of San Diego

Exhibit 4

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

February 19, 1980

Mr. John H. DeMoulley
California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. DeMoulley:

Re: Property Law Reform

I am delighted that the Law Revision Commission has turned its attention to property law reform. It is high time, for there is much that needs reforming. Property is noted for the traps that it contains for the unwary--traps that nowadays give rise to malpractice suits against lawyers who are thus ensnared. Removing these unnecessary traps, these complications from history is not only a matter of public service. It is very important for the health of the legal profession itself, the costs of legal services, and the relationship of the bar and the public. I enclose a copy of a lecture I gave at the University of Iowa last spring at which I expounded on the necessity for property reform in view of the liability of lawyers for negligence. In my view, every time a malpractice suit is filed, the message to lawyers becomes clearer: Clean out the stables of property now, or pay later.

Professor Blawie has written a well-researched and most interesting report. I would like to make a number of suggestions for your consideration, beyond those of Professor Blawie, and also comment on his suggestions.

I. The Law of Estates

A. Classification

The law of estates needs simplifying. Some classifications can be dispensed with.

1. Abolish executory interests and subsume them under remainders. Executory interests are springing or shifting interests that historically are the result of the Statute of Uses (1536). There is no reason why executory interests cannot be called remainders and treated as remainders. We need only one label for future interests in transferees: remainders. In New York, by statute, all future interests created in transferees, including

what at common law would be executory interests, are called remainders. N.Y. Estates, Powers and Trusts Law § 6-4.3 (1967). New York EPTL §§ 6-4.7 and 6-4.10 go on to divide remainders into vested and contingent remainders; an executory interest created in favor of an ascertained person on an event certain to happen is treated as, and classified as a vested remainder. All other executory interests are treated as, and classified as, contingent remainders. Thus:

> Example 1. O conveys to A ten years after present date. At common law O had a fee simple subject to an executory interest in A. In New York O has a term of ten years and A has a vested remainder. Under the common law classification you had the conceptual problem of a fee simple, which by definition has a potentially infinite duration, having in this example a certain end ten years from now. All modern commentators say A's interest should be treated like a vested remainder. 3 Simes and Smith, Future Interests § 1236 (2d ed. 1956); 6 Am. Law Prop. § 24.20 (1952).
>
> Example 2. O conveys to A for life, then to B, and if B does not survive A to C. At common law B has a vested remainder subject to divestment by C's executory interest. In New York B and C have remainders.

I recommend that you adopt the New York scheme of classification, eliminating executory interests. As a matter of fact my studies lead me to believe executory interests are treated like remainders and the excessive classification merely clutters up the law. Dukeminier, 43 Minn. L. Rev. 13 (1958). It makes the law of future interests look more difficult than it is, and causes confusion.

2. Abolish the determinable fee and possibility of reverter. As your reporter points out there is no justification for the modern existence of two separate estates: (1) The determinable fee and (2) the fee simple subject to condition subsequent. I drafted the Kentucky legislation (Ky. Rev. Stat. § 381.218) appearing on page 69 of your report, which abolished the determinable fee. When I sent this off to Professor Leach at Harvard he exclaimed: "What a wonderful idea! I wish I had thought of it." All scholarly studies point to the uselessness of the determinable fee, which is treated by courts as the equivalent of a fee simple subject to condition subsequent--except under the Rule against Perpetuities. Thus:

> Example 3. O conveys to A so long as used for school purposes, then to B. B's interest violates the Rule against Perpetuities, is struck, and O has a possibility of reverter. A's determinable fee is not made absolute.

Example 4. O conveys to A, but if the land is not used for school purposes, to B. B's interest violates the Rule against Perpetuities and is struck. A has a fee simple absolute.

Commentators say you ought to reach the same result in both cases: A should have a fee simple absolute when B's interest is voided. Agnor, 17 Vand. L. Rev. 1427 (1964).

There is no need for the determinable estate concept in modern law. It is a fiction that the estate ends of its own limitation, that no re-entry is required. If I were drafting the Kentucky statute again I would revise it to eliminate the determinable life estate and the determinable term of years as well as the determinable fee. All these estates should be treated as subject to condition subsequent.

Elimination of excessive categories of estates would help simplify the law, making it no more complex than needed.

3. Termination of possibilities of reverter and rights of entry. These interests are exempt from the Rule against Perpetuities and Professor Blawie documents the need for legislation terminating these interests. Basically there are two ideas to be considered: subjecting these interests to the RAP or to a time period of, say, 30 years.

I strongly suggest that you do one of the following:

a. Subject possibilities of reverter and rights of entry to Rule against Perpetuities. In California we have enacted cy pres (Cal. Civ. Code § 715.5), and a court can reform an invalid interest so that it does not violate the RAP. If possibilities of reverter and rights of entry are subjected to the RAP, the most likely reform--which could be specified by statute--is that a court would validate the possibility of reverter or right of entry for 21 years, then void it. If the court did this, and applied the same reform to the executory interest in Examples 3 and 4 above, then all forfeiture restrictions on land use would be good for 21 years, and no longer, unless expressly drafted to come within the perpetuities period which is rare. It would not matter whether the forfeiture restriction is created in a transferee (and is therefore an executory interest) or in the transferor (and is therefore a possibility of reverter or right of entry). There is no reason why it should matter who has the right to enforce forfeiture--all should be subject to the same time limit.

b. Subject possibilities of reverter and rights of entry to a 21 year time period. If a statute terminates these interests after 21 years, and executory interests are validated for 21 years under the cy pres power, discussed above, then all these interests

are treated alike. Many states have 30 year statutes for possibilities of reverter and rights of entry, but it doesn't make sense to have possibilities of reverter and rights of entry good for 30 years and executory interests subject to the RAP, and possibly validated for only 21 years using the cy pres power. Subject all interests to the same period.

Unfortunately, none of the statutes reproduced by Professor Blawie treats all forfeiture restrictions (whether in favor of transferor or transferee) alike. These statutes terminating possibilities of reverter and rights of entry thus preserve an indefensible distinction.

B. Rules respecting estates

California has eliminated many of the useless common law rules respecting estates, such as Shelley's Case, destructibility of contingent remainders, and worthier title. But some rules remain that ought to be eliminated.

1. Chancellor Kent's Rule. In the 19th century Chancellor Kent laid down a rule that an executory interest limited after a legal fee simple is void if the owner of the fee is given the absolute power to dispose of the property. Thus:

> Example 5. H bequeaths W "all of the money I have on deposit at Home Savings & Loan, but if any money is in said account at W's death it is to go to A." W has absolute ownership and can destroy A's executory interest by withdrawing the money. Hence, under Kent's rule, A's executory interest is void ab initio. At W's death the money goes to W's estate, not to A.

This rule has been sharply criticized by all the commentators. It defeats the transferor's intent and furthers no public policy. It does not make the property alienable because it is alienable by W's withdrawal. See Vanderbilt, C.J., dissenting in Fox v. Snow, 6 N.J. 12, 16-21, 76 A.2d 877, 879-81 (1950); Simes, Future Interests 251 (2d ed. 1966). The rule ought to be abolished by statute. A model abolition statute is N.J. Stat. Ann. § 3A:3-16 (1953).

Chancellor Kent's rule seems not to have been mentioned by Professor Blawie.

2. The Rule in Wild's Case. Professor Blawie at pages 98-103 talks of the Rule in Wild's Case. I recommend that it be abolished. The proposed North Carolina statute seems the best.

3. Life tenant has no power of sale. I agree with Professor Blawie that the English property legislation of 1925 is too complex for the United States. And the social conditions that necessitated such legislation--to remove land from the dynastic dead hand and make it available for development--do not exist in the United States. However, you should consider adopting something like the Price Act in Pennsylvania. Pa. Cons. Stat. Ann. tit. 20 § 6113 (1975). This act converts all legal future interests in personal property into equitable interests, and the life tenant is deemed to be a trustee of the property. The same principle could be applied to real property. If a legal life tenant were by statute given a power of sale, the land could be made alienable.

4. Easement cannot be excepted in favor of a third party. At common law an easement could not be excepted or reserved in favor of a third party. Thus:

> Example 6. O conveys Blackacre to A, excepting an easement of way over Blackacre in favor of B, owner of adjoining Whiteacre. At common law the exception in favor of a stranger, B, was void. (O could avoid this rule by using two pieces of paper: First, transfer Blackacre to B; then have B transfer Blackacre to A excepting an easement. Whenever a rule can be avoided by using two pieces of paper the bar is asking for malpractice suits if it doesn't eliminate the rule.)

In Willard v. First Church of Christ, Scientist, 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972), the California Court abolished the rule that an easement cannot be reserved in favor of a stranger, but retained it to bar an exception in favor of a stranger. There is no reason in policy to distinguish between a reservation and an exception--only a meaningless conceptual distinction which serves as a trap for the unwary lawyer who uses the word "exception" rather than "reservation."

5. No durable power of attorney. California does not have a durable power of attorney such as is provided by Uniform Probate Code § 5-501. Powers cease upon disability of the principal, but a power that does not so cease is a very useful thing in many situations. A durable power is especially useful for unmarried persons who want a trusted friend to exercise powers upon their incompetence, including arranging hospital care. It is quite usual for spouses to make these decisions when a person becomes incompetent, but where there is no spouse--and the next of kin lives in Missouri or is disliked--there is no way in California a person can be assured his wishes will be carried out.

6. Release of powers of appointment. California copied N.Y. Estates, Powers and Trusts Law § 10-9.2, permitting release of powers of appointment, and then add a mysterious sentence:

"No release of a power is permissible when the result of the release is the present exercise of a power that is not presently exercisable." Cal. Civ. Code § 1388.2(b). I have spent some time on this sentence, and studying the completely uninformative report of the Law Revision Commission on its meaning, and I cannot figure out what the sentence means. Take this case:

> Example 7. O conveys to A for life, then as A appoints by will among A's children, and in default of appointment to A's children equally. As part of a divorce settlement, A releases the special testamentary power, vesting the remainder indefeasibly in the children. As I read Cal. Civ. Code § 1388.2(b), this release is ineffective; if the words of the statute, "the result of the release is the present exercise of a power," mean anything, they must cover the case where release indefeasibly vests the remainder.

This sentence appears to mean that testamentary powers cannot be completely released. I can't fathom why this sentence was added. It is a trap which may upset releases made for tax reasons or in divorse settlements, a trap for the lawyer.

I suggest you repeal this sentence and add the following language, taken from N.Y.E.P.T.L. § 10-5.3(b), added in 1977: "except that where the donor designated persons or a class to take in default of the donee's exercise of the power, a release with respect to appointive property must serve to benefit all those so designated as provided by the donor." I think this language may cover what the drafters of California's power statute had in mind. As Cal. Civil Code § 1388.2(b) now stands, it is a trap.

7. Cal. Civ. Code §§ 1464 and 1465 should be repealed. As Professor Blawie notes on page 96, § 1464 sets out the first Rule in Spencer's Case, and should be abolished. The required use of the word "assigns" is an artificial and unnecessary formality--a trap for lawyers. It also leads to unfortunate cases like Marin County Hosp. Dist. v. Cicurel, 154 Cal. App. 2d 297 (1957).

Section 1465 is useless because § 1468 says covenants run "notwithstanding the provisions of Section 1465." Section 1465 sets forth the discredited idea that covenants should run only when you succeed to the exact estate of the covenantor. Thus if the covenantor had a fee simple and subsequently devised the land to A for life, the covenant would not run to A. A could violate the covenant. This could lead to violation of a well planned community. Fortunately Section 1465 is superseded by Section 1468, but it clutters up the books by its existence.

8. Cal. Civ. Code § 1468 should be amended to provide it applies to covenants in equity as well as at law. The statute is unclear and likely to lead to litigation. There is no reason to preserve the distinction between real covenants and equitable servitudes. The same rules should apply to covenants in law and in equity.

II. Title Assurance System

Professor Blawie believes that a marketable title statute would do good things in California. But I question this. Essentially all a marketable title act does is limit record search to 40 years. Would this cheapen the cost of title search by title insurance companies in California? They do the searching. I doubt it. With their tract indexes, they can go back swiftly to the beginning of title. Marketable title statutes are good where titles are searched by a grantor-grantee index, and the cost of a laborious search through grantor-grantee indexes is great. But we do not do this kind of search.

However, I would like to see the Law Revision Commission propose a combination of title registration and marketable title act. The act would not provide for an adjudication of title, as title registration does. This has proven a costly procedure unliked by the public. But instead of a legal proceeding to adjudicate title, why cannot title be "adjudicated," after the passage of time, by a statute of limitations or a marketable title act? Such a system would have the following outline:

1. After enactment of statute, the first time a property is sold, a title certificate (as in title registration) would be issued which would list the owner, the mortgagees, easements, covenants, etc. The law would require, under penalties of perjury, that the seller, buyer, lender, and insurer list all interests in the property known to them. This initial certificate is to be without prejudice to claims antedating the certificate. Since no investigation is made of earlier claims, the cost of a judicial proceeding is avoided.

2. Each time the tract is sold thereafter a new certificate would be issued (as in title registration). The title would be kept up to date on the successive certificates. After 40 years, or what other period of time is mandated, the certificate would become conclusive, and title registration would be established for that tract. The statute of limitations will then bar earlier claims not noted on the certificate.

3. A tract index would be established now, for future transfers, but old reindexing would not be necessary. This system would accomplish the objectives of a marketable title act--establishing a 40 year search period (or a 30 year or 20 year, whatever period

you deem wise). It would require that all interests be recorded on the certificate within a 40 year period. At the end of 40 years you have in effect changed over to a title registration system. The essence of my proposal is that you bring the statute of limitations (or marketable title act) to the aid of establishing title registration.

The merits of title registration are well known, and most commentators today think it is the best and cheapest system. Why not change to it gradually? It won't help the present generation but after the passage of a few decades it will supersede the recording system.

Under my proposal, as under title registration, adverse possession would be abolished once the certificate is conclusive. Title could then be transferred on the basis of records alone.

In any case, it does not seem to me that a marketable title act by itself would do much. But it could be used in conjunction with a gradual changeover to title registration.

III. Rules about Wills

The following rules should be abolished, or modified.

1. No-residue-of-a-residue-rule. The rule at common law, still followed in California (Estate of Russell, 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968)), is that where there is a residuary gift that lapses, it goes to testator's heirs. Thus:

> Example 8. T devises the residue of her estate to her two friends A and B. B dies before T, and B's gift lapses. The California lapse statute does not apply because B is not kindred of T. B's one-half share passes to T's heirs by intestacy, and not to A.

The no-residue-of-a-residue-rule has been condemned by all modern commentators. See Halbach, 52 Calif. L. Rev. 921, 940 (1964); In re Frolich Estate, 112 N.H. 320, 295 A.2d 448 (1972), abolishing rule. It ought to be abolished in California. It does not carry on the average testator's intent, and serves no public policy.

2. California lapse statute is too narrowly drawn. Calif. Probate Code § 92 provides that if a legatee is "kindred" of testator, and such legatee dies before testator leaving issue, the gift intended for the legatee goes to the legatee's issue. I believe the average person would intend for the issue of any predeceasing legatee, kindred or not, to take the bequest. In Example 8, above, T would want B's issue to take B's one-half share of the residue. Or take this example, from an actual Delaware case:

> Example 9. H devises all his property to W and her heirs. W predeceased H, leaving children by a former marriage. Since W is not kindred of H, her children do not take. The court, however, cleverly read "and her heirs" to mean "or her heirs," and found a substitute gift to W's children if she precedeased H. How lucky the draftsman had used the old-fashioned words for creating a fee simple, "and her heirs."

Restricting the lapse statute to gifts to "kindred" of testator has caused the courts to indulge in many fictions, and strange constructions. I recommend Iowa Code Ann. § 633.273 (1964) as a good lapse statute.

3. Holographic will statute is poorly worded. Calif. Probate Code § 53 has caused needless litigation because it provides that it must be "entirely" written by testator's hand. There are many cases whereby the courts try or don't try to eliminate printed matter. The most recent California case showing this confusion is Estate of Helmar, 33 Cal. App. 3d 109, 109 Cal. Rptr. 6 (1973). The California statute should be repealed and Uniform Probate Code § 2-503 substituted therefor. It provides that the "material provisions" must be in the handwriting of the testator.

4. Will execution statute should provide that witnesses do not have to be present at same time. Cal. Probate Code § 50 provides that both witnesses to a will must be present at the same time. Thus testator cannot sign before one witness and acknowledge his signature later before another one. Thus:

> Example 10. T signs his will before A in one room; A witnesses. T then takes the will before B in another room and acknowledges his signature. B witnesses. The will cannot be probated.

This simultaneous presence of witnesses seems an unnecessary precaution which causes wills needlessly to fail. I recommend changing the statute to provide that the witnesses do not have to be present at the same time.

And while you are revising Cal. Prob. Code § 50 you might eliminate the requirement that a will be signed at the end or adopt language similar to that in N.Y.E.P.T.L. § 3-2.1(a)(1) which deals with the presence of matter following the testator's signature. Otherwise the addition by testator, before signing, of a statement under the signature line, such as "I appoint Joe executor," voids the will. See Matter of Winters, 302 N.Y. 666, 98 N.E.2d 477 (1951).

5. Payable-on-death-designations on bank accounts. There is no reason why p-o-d designations should not be permitted on bank accounts. Death designees are permitted on employers' pension plans, life insurance, and other contractual arrangements. One can use a Totten Trust savings account to avoid the ban on death designees with respect to savings accounts, but not checking accounts.

People want to avoid probate. Banks keep as careful records as companies of other kinds. The room for fraud is no more than with a joint bank account. The ban on p-o-d designations merely pushes people into joint tenancy accounts which is not what they want, and raises serious problems of whether a gift during life is intended. See Dukeminier, 65 Iowa L. Rev. 151, 170 (1979).

6. In a remainder to "heirs" of the testator heirs should be ascertained at time of possession. Take this case:

> Example 11. T devises property to A for life, then to my heirs. The general rule is that T's heirs are ascertained at T's death. They have vested transmissible interests at that time. If an heir dies before A, the interest is taxed in the heir's estate.

All estate planners advise against creating transmissible future interests, for tax reasons. It would be a good idea to have a statute providing that "heirs" in the preceding case were determined as if T died immediately after A, so as to avoid creating transmissible interests. Several states have statutes doing this. I refer you to Pa. Cons. Stat. Ann. tit. 20, § 2514 (1975) for an example. Massachusetts also has a similar statute.

7. Residuary clause should not exercise general power of appointment. Cal. Civ. Code § 1386.2 (1970) provides that a residuary clause exercises a general power of appointment unless a contrary intent affirmatively appears. This is a very dubious rule, and some states that formerly followed this rule are abandoning it. See Mass. Gen. Laws Ann. c. 191, § 1A(5) (1969, Supp. 1978); French, 1979 Duke L.J. 747. You should rethink whether this is a desirable rule.

The above suggestions for changes in the probate laws are merely illustrative of a large number of changes needed in the probate laws. These are explored in the recent article by Niles, Probate Reform in California, 31 Hastings L.J. 185 (1979). Niles has very carefully itemized the major issues that need discussion, and has suggested solutions the Law Revision Commission should seriously consider.

Hooray for the Law Revision Commission for opening the door to a needed cleansing of the stables of property! It may be that this field is so large that you should have three study areas: Estates, Title Assurance, and Probate.

Sincerely,

Jesse Dukeminier
Professor of Law

JD:bd

Exhibit 5

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February 21, 1980

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Attention: John H. DeMoully

Dear Mr. DeMoully:

Thank you for your letter of February 13, 1980, concerning the real property law revision project and the enclosed study of Professor Blawie.

I concur in the opinion that attention should first be given to the adoption of a Marketable Title Act. At the moment the only aspect of real property law not covered which I would like to see covered is the recommendation of a statute that would allow a joint tenant to terminate the joint tenancy by deeding to himself rather than a strawman. I believe the conference of delegates at the State Bar convention in 1979 recommended this, but I have not followed through the recommendation closely enough to know if the legislature acted upon the recommendation.

I would recommend that the only exception of a Marketable Title Act should be the lessor's rights under a lease. I would favor a term of 20 years for the statutory period, but believe 30 years would probably be more politically acceptable. Although I disagree with the statement that in modern times there is little difference between the possibility of reverter and the right of re-entry, I do agree with the recommendation that the possibility of reverter should be abolished. I am unalterably opposed to a reimbursement fund for compensation to persons whose interests are cut off by the operation of a Marketable Title Act. I realize that there will be some individuals whose rights may have been lost because they did not know of the adoption of the Act and had failed to file a notice of intention to preserve. For those individuals who failed to file the notice within the time specified in the adoption of the Act, I think that upon appli-

cation to the court and a showing of just cause or excusable neglect they should be able to obtain an order during the first 20 years of the Act permitting them to file a late notice of intention to preserve. If they do nothing within the first 20 years, I think their rights should be cut off.

Executory interests, restrictive covenants and equitible servitudes should be made subject to the provisions of the Act.

Although the grantor-grantee indexing is obsolete,it is still necessary in many situations not involving documents concerned with the transfer of title. For example, abstract of judgments. I think the centralization of all data in a computer bank in Sacramento has potentially greater problems than the continuation of the grantor-grantee index system on a local level. I think recordation should be maintained at the local level, with tract indexing substituted for grantor-grantee indexing where feasible.

I believe the comments concerning the warranty deed and quitclaim deed and doctrine of after acquired title is incorrect. I would not favor abolishing the quitclaim deed or the doctrine that after acquired title is not conveyed by the quitclaim deed. There are many instances where the grantor of a quitclaim deed executes it to remove a cloud on a title, but has no intention of granting any interest he may subsequently acquire in the title by purchase, inheritance, or otherwise.

I think self indexing is desirable, but feel that it should not go so far as to require the current addresses of the preceeding transferors. Such addresses are often difficult, if not impossible, to obtain. Reference to the recorded data identifying the documents should be sufficient. I do not concur in the recommendation that the rule that every natural person is conclusively presumed capable of having children until death be abolished. I know couples who have adopted children after they have passed the child bearing age and in view of the right to adopt and I believe the rule is factually and legally correct. With respect to the rule in Wild's case, I concur with the recommended statute. In conclusion, I think the commission should give priority to a Marketable Title Act. However, I think to make the act truly effective it is necessary to redefine the interest known as possibility reverter right of re-entry and executory conditions. Since the breach of a condition creating a possibility of reverter results in the automatic unrecorded transfer of title, I think that to be effective a Marketable Title Act has to consider and resolve

this problem.

Very truly yours,

R McNamee

ROBERT P. McNAMEE

RPM/cb
cc: James W. Blawie

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW POSTAL CODE 27706

February 13, 1980

John H. DeMoully
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear John:

I have read Professor Blawie's background study. It is an extremely competent survey of changes and devices that might indeed constitute improvements in the California law governing titles and conveyances in the broad sense. I think I agree that, if a study is to start off in the general direction in which Professor Blawie's paper points, the question whether a Marketable Title Act should be adopted in California is a good first item on your agenda. My tentative opinion, which is wholly impressionistic, is that the problems which would be addressed by such legislation are not presently very troublesome in California.

An area which, it seems to me, has produced a good deal of litigation is represented by the recent case of Finley v. Yuba County Water Dist., 160 Cal.Rptr. 423 (1979), involving boundary disputes and the disparate doctrines of adverse possession and agreed boundaries.

I realize that the subject may be beyond the present legislative authority, but I suggest that a consideration of the possibility of simplifying real property security law through the mechanism of the Uniform Land Transactions Act might be another useful application of resources.

Sincerely,

Richard C. Maxwell

RCM:drc

Exhibit 7

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April 15, 1980

OUR FILE NUMBER
9911.00-1

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Attention: John H. DeMonlly
Executive Secretary

STUDY OF THE LAW OF PROPERTY AND CONVEYANCING

Dear Mr. DeMonlly:

I have reviewed the Study of the Law of Property and Conveyancing ("the Study") and I have the following comments on the two questions: (1) aspects of real property law that should be covered, and (2) alternative approaches for various matters:

1. In general, I believe the law of real property should be restructured so as to facilitate a "cadastral" system, and that there is a great need in society for modernization of Land Data Systems as were discussed in the Proceedings of the North American Conference on Modernization of Land Data Systems (1975). I enclose a copy of the Proceedings for your review concerning what is needed for a multi-purpose land data system.

2. My second general area that I believe is not adequately covered in the Study is the problem of "real estate specialities" or new economic or legal rights. For example, I see no discussion of problems peculiar to statutory regulation of residential or commercial landlord-tenant relations and nothing dealing with the special problems of condominiums and nothing dealing with the special problems of "sandwich financing." See, for example, the current draft revision of the Restatement of the Law of Property and the rules proposed relating to landlord-tenant law.

3. I see no reference in the study to the peculiar problems caused by the regulations that are building a layer of law of zoning and land use regulation that are fast becoming as important as title itself and in some cases more so (because if the land use regulation destroys the value, land becomes a liability, not an asset).

I guess what I am saying is that the Study is very interesting and I agree that there is need for the reform proposed in the Study. However, I believe that reform will bring the law up to the 1950's and what is needed is a restructuring to accommodate a new society of the 21st Century.

Yours sincerely,

LUTHER J. AVERY

LJA:cet/1205

KACOR REALTY

WRITER'S DIRECT DIAL NUMBER:
(415) 271-3384

June 12, 1980

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. DeMoully:

I have reviewed the background study prepared by Professor James L. Blawie.

It appears to me that the study does not provide for interactions with or cutting off of federal claims. For example, Indian aboriginal claims founded on congressional action or executive order entered many decades ago often arise or are urged. Current title practice often does not disclose such potential claims. Federal cooperation will be required, particularly in this state where the government is the owner of so much real property.

Other aspects of real estate law which should more appropriately be covered are the constant governmental intrusions into and interference with a property owner's use and development of his real property. Down zoning, predatory inclusionary zoning, and governmental actions in lieu of but tantamount to non-paying condemnation are the areas where revision of law should be entertained. The actions of the Coastal Commission and the rules that come out of the cases involving the Cities of Palo Alto, Tiburon and the County of Sacramento should be reexamined.

In my opinion, while adoption of a Marketable Title Act in California is a fine idea, there are other matters of much greater importance which we should address in this study.

I will be happy to continue assisting you on this project.

Very truly yours,

Allen J. Kent
Counsel

AJK:ir

E. T. O'Farrell
ATTORNEY AT LAW

John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Real Property Law Revision Project

Dear Mr. DeMoully:

I have completed my study of Professor Blawie's report. I find it extremely well researched and comprehensive.

I agree with Professor Blawie that a major revision of the real property law in California is needed. I personally favor a complete revision and enactment of legislature in the form of the English Law or a derivative thereof. However, I also agree that the chance of passage of such legislation in California would be slim to none.

As an alternative I would suggest a marketing title act, patterned after the Uniform Act, but with a twenty year limit. Again I agree that obtaining passage with a twenty year limit would be slim, but a compromise for thirty year limit should be possible. I am not in complete agreement with all of the provisions of any of the acts presently in existence or proposed, but I do suggest that a proposed act should be drafted. After a proposed marketing title act has been drafted, it could be submitted for comment and revision before being presented for legislative consideration.

There are numerous provisions which I would like to see included in such an act, but practically all of these were covered or discussed in Professor Blawie's report. I would suggest that any act drafted or proposed, also provide for possible standard deed forms and information to be included therein.

Further, I agree with Professor Blawie that the present grantor-grantee recording systems used in most counties is archaic and should be revised to a track index type of system.

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I feel that without a rough draft of proposed legislation for consideration, presenting a list of my specific suggestions for provisions to be included would be premature. However, if such a list would be helpful or desired, please advise.

Sincerely,

Tom O'Farrell

E. T. O'FARRELL
Attorney at Law

ETO/nb