#H-400 3/24/81

First Supplement to Memorandum 81-13

Subject: Study H-400 - Marketable Title (Comments of Garrett H. Elmore)

Attached to this memorandum is a letter from Garrett H. Elmore expressing serious concerns about adoption of a marketable title act in California. The Commission has made a contract with Mr. Elmore as a consultant on the real property study because of his long experience with and depth of knowledge about California real property law. Mr. Elmore's letter should help give the Commission some perspective in its deliberations on the desirability of a marketable title act.

Respectfully submitted,

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California Law Revision Commission
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Re: Study H-4000- Memo. 81-13- Marketable Record Title

The undersigned is co-consultant in this study on the basis of doing what I can. I have had time to review Mr. Sterling's excellent memorandum, read most of the casescited, go over the draft attached, read the recent Uniform Simplification (etc.) Act and Uniform Marketable Record Title Act (1976, 1975), read the Cornell Law Review article critical of the Model Act and draw upon some experiences in my 22 years of private practice and about equal "time" with the State Bar of California.

The net conclusion that I draw is that California is not ready for this broad type of Act; that the Act is unfair to property owners with good title and, if enacted, will thrust upon the courts of this state numerous difficult problems involving title to property of both modest and large value; that amendment or repeal of the Act will itself pose problems affecting title, and that the Act is impractical in a state such as California having all types of real property and interests in real property.

I therefore respectfully urge the present approach of a broad marketable record title statute be laid on the shelf and that the energies be directed to solving narrower problems in perhaps a less drastic way. There is much that can be done in reform.

It must be recalled that California did adopt the Torrenssystem and had to repeal it, that in the 1930's and later there was much title litigation based on third person'spicking up adverse title based on failure to pay taxes and/or assessments and/or assessment bonds. It was necessary for the Legislature to enact laws as to presumption of payment and limitation of actions (see Civ. Code 2911, Code Civ. Proc. 801. 1 et seq.) and as to a special proceeding to determine adverse interests, liens or clouds (Code Civ. Pro.801.1).

Also, laws were enacted whereby tax deeded property was"sold " to the State of California which thereafter disposed of it after the five-year period. It must also be recalled that there was a period when court files were being examined for "old judgments" that could be picked up and made the subject of execution proceedings after lying fallow for years.

The point urged to obtain "more study" is that California historically has had persons who made a business of examining public records for one monetary purpose or another to benefit by "slips " or "omissions" of others.

It is my belief that if a re-registration system is enacted for valuable property rights such as fee simple ownership, lessee's interests under ground leases, etc., (to name a few), by the time the grace period ends, there will be enterprisers who examine records including the proposed index of notices of intent to retain. It is true the tax assessment and possession exceptions (Sec. 890.240) are obstacles, but there can be technical gaps in either. Moreover, "using or occupying" real property gives no effect to temporary vacancies at a given time or to the parcels that are under the Williamson Act or otherwise restricted to green belt.

It is necessary, in my opinion, to recognize the sui generis nature of California and proceed carefully before following Uniform or Model Acts. When I was with the State Bar, this was the policy.

It is not required that a person giving an adverse title be acting in good faith or that he or she notify an affectedfamily member or close associate. Examples: A deed given by A, manager, purporting to act as agent of O, his employer, without notifying O. A deed to the interest of a sister, one third co-owner, by a brother, also one-third co-owner, without telling the sister.

It is also believed A, husband, could use a straw man, and acquire a record title to community real property as his separate property.

It is not clear agreements as to joint use of a right of way to interior ranches or as to a common boundary between ranches are not affected by failure to record notice of intent.

One serious objection to proceeding at this time is that no figures or estimates have been obtained as to the potential cost of this "reform" to the"consumers" (read homeowners and small business men and ranchers).

As a person who has one possessory and one fee absolute title affected (with still another fee absolute as of late 1974), I shall not rely upon the "exceptions" or "assurances" of proponents based on experience in mid-west and eastern states.

It will be necessary to examine the chain of title (which I as an attorney can do) or to obtain some report from a title company at x dollars or, if I wish to chance it, to obtain, fill out and record notice of intent to preserve. If my wife is ill, must I have a power of attorney since her name is on one piece of property ("community2). How will I be assured the notice is technically correct? Suppose the property is in an estate for both owners as the end of the grace period nears?

It would seem to me, knowing the use of "new laws" by real estate and securities brokers, the end result may well be advertisements of a "service" to be provided by them, directly or indirectly.

California today has many more parcels than in the 1920's when Torrens was in vogue.Potentially, title certificates and preparation and recording of notices could reach substnatial dollar amounts for the average property owner. It may also be noted that diminished growth laws leaves much subdivided property idle and probably "not used or occupied." Hence, the only exception would be the tax assessment exception. Suppose the property is being bought under contract of sale or the assessment is not entirely according to the last ownership.

Finally, the draft Act seems to provide (retroactively) that if a deed did not refer to restriction (or condition or easement) by referring to precise record location creating the restriction the deed does not preserve the restriction. See Sec. 890.230. The question arises: Will deeds after the Act's effective date either be drawn to repeat all the restrictions or make certain they contain "subject to " wording that refers to prior "interests." This form of conveyancing is not common in California. It increases the expense of deed preparation, with certain malpractice potential.

By California standards, it is submitted something much more specific and less of a "shotgun" approach is needed.

I therefore suggest acts such as dormant mineral rights, old mineral rights leases (Code Civ. Proc. 772.010), presumed payment of old encumbrances, right of re-entry for condition broken be examined or drafted. These acts should have sufficient detail to inform the public as well as the bench and Bar.

Respectfully,

Garrett H. Elmore