

Memorandum 81-32

Subject: Study H-401 - Marketable Title (Ancient Mortgages
and Deeds of Trust)

Background

One common cloud on title to real property is the ancient deed of trust (or in rare cases, the ancient mortgage). The ancient mortgage or deed of trust appears of record to be a valid interest in the property, but the obligation that it secures may in fact have been satisfied or the statute of limitations on the obligation may have run. Nonetheless, the security interest remains a cloud on title because no certificate of satisfaction or reconveyance has been recorded. A title company for a number of reasons will not ignore the ancient mortgage or deed of trust, or insure over it.

The statute of limitations on an obligation secured by a mortgage or deed of trust is four years. Code Civ. Proc. § 337. As a consequence an action to foreclose must be brought within four years after default, since under the "one form of action rule" the only means by which the underlying obligation may be enforced is foreclosure. Code Civ. Proc. § 726. If the limitations period for foreclosure runs without an action being brought, any mortgage lien is extinguished as a matter of law. Civil Code § 2911; *Faxon v. All Persons*, 166 Cal. 707, 137 Pac. 919 (1913). However, a power of sale under a deed of trust is not extinguished as a matter of law upon the running of the limitations period because the deed of trust is technically not a "lien"; the trustee holds title and may exercise the power of sale even though the statute of limitations bars foreclosure on the underlying obligation. See, e.g., *Flack v. Boland*, 11 Cal.2d 103, 77 P.2d 1090 (1938). It is a familiar principal of California law that the power of sale under a deed of trust "never outlaws." See, e.g., discussion in 3 B. Witkin, *Summary of California Law, Security Transactions in Real Property* §§ 84-85 (8th ed. 1973).

Even an ancient mortgage that appears to be barred by the statute of limitations may have hidden life not reflected in the record. There

may have been a waiver of the right to plead the statute of limitations; such a waiver may be good for up to four years at a time. See Code Civ. Proc. § 360.5. A payment on principal or interest during the period the statute of limitations is running has the effect of an acknowledgment or promise of a continuing contract and starts the limitation period running anew. Code Civ. Proc. § 360. Ordinary tolling principles may be applicable. See, e.g., Code Civ. Proc. §§ 351-358. And even where the statute of limitations has in fact run, there is an equitable duty of the original mortgagor to satisfy the obligation and title cannot be cleared until it is satisfied. See, e.g., Puckhaber v. Henry, 152 Cal. 419, 93 Pac. 114 (1907). However, a subsequent purchaser of the property is not equitably bound to satisfy the obligation, there being no privity of contract, and may clear the title of the ancient mortgage. See, e.g., Fontana Land Co. v. McLaughlin, 199 Cal. 625, 250 Pac. 669 (1926).

Remedial Legislation

Because of the uncertainty caused by a cloud on title of an ancient mortgage or deed of trust, most jurisdictions have enacted legislation, such as that in California, to impose a relatively short statute of limitations for enforcement of a mortgage and to provide that the mortgage lien expires when the statute of limitations has run. See discussion in P. Basye, Clearing Land Title § 74 (2d ed. 1970); see also Code Civ. Proc. § 337 (four-year statute of limitations) and Civil Code § 2911 (extinction of liens). Many jurisdictions have also declared that a deed of trust may not be foreclosed by exercising the power of sale after the time when a mortgage could be foreclosed by action, or after the debt which it was given to secure has become barred. See P. Basye, Clearing Land Titles § 73 (2d ed. 1970). California has not done this yet; however, 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 limitations, and it is likely that the courts will ultimately eliminate even this distinction as unreasonable and unnecessary. See, e.g., R. Bernhardt, California Mortgage and Deed of Trust Practice § 3.3 (Cal. CEB 1979). Statutes in a number of states, but not California, have also reversed the rule that in order to clear title, a mortgagor must "do equity" by

paying a mortgage debt barred by the statute of limitations. See P. Basye, Clearing Land Titles § 75 (2d ed. 1970).

These statutes, while they help reduce the uncertainty caused by an ancient mortgage of record, do not enable a person to rely on the record in determining marketability, because of the possibility of off-record extensions and other tolling events. Many states in recent years have enacted statutes that enable a person to rely on the record. These statutes provide in effect that a mortgage ceases to be a lien, and foreclosure is not permitted, after a stated number of years from the maturity of the mortgage debt as shown by the record or from the date to which payment has been extended by agreement or memorandum of record during that period. Under this type of statute nothing in the way of disability or any other fact not of record is permitted to toll or extend the operation of the statute. Under statutes of this type, the burden imposed on mortgagees to record notice of extension is small compared to the increased marketability of land titles. A number of jurisdictions have such a statute for subsequent purchasers, but not for the original mortgagor. See discussion in P. Basye, Clearing Land Titles § 76 (2d ed. 1970).

Simes & Taylor have prepared a Model Mortgage Limitation Act intended to accomplish two objectives: (1) the enforcement of a mortgage is absolutely limited by a fixed statute of limitations following the maturity date or record extension date of the mortgage, and (2) the total time of enforceability of a mortgage from its initial recordation is limited (unless rerecorded) so that a title searcher need search back in the records for mortgages only a limited period of time. See Simes & Taylor, The Improvement of Conveyancing by Legislation 142 (1960). The Uniform Simplification of Land Transfers Act (1977) also makes provision for expiration of a recorded security interest within a fixed period unless extended of record. See Section 3-408.

Staff Draft

Attached to this memorandum is a staff draft of a tentative recommendation to clear the cloud created by ancient mortgages and deeds of trust of record. The staff draft has two aspects:

(1) The draft adopts the rule that when the statute of limitations on the underlying obligation has run, enforcement of the security

interest in the property is barred. This will enable a quiet title action or an action to remove a cloud created by the evidence of a power of sale under a deed of trust. See Section 882.010.

(2) The draft imposes an absolute limitation on the duration of a mortgage or deed of trust, regardless of the statute of limitation. The mortgage or deed of trust is no longer enforceable 10 years after maturity of the underlying obligation or, if the maturity date cannot be ascertained of record, 30 years after the mortgage or deed of trust was recorded. This will have the effect of automatically clearing the record of ancient mortgages or deeds of trust by operation of law. See Section 882.020.

You should review the staff draft tentative recommendation with care. If it appears acceptable, we will circulate the tentative recommendation for comment among interested persons and groups.

Respectfully submitted,

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STAFF DRAFT
TENTATIVE RECOMMENDATION
relating to
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 title to real property caused by ancient mortgages and deeds of trust of record has been and continues to be troublesome.¹

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.² 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.³ Any lien that secures the underlying obligation is extinguished by lapse of the limitation period.⁴

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.⁵

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1. See discussion in P. Basye, *Clearing Land Titles* §§ 71-76 (2d ed. 1970).
 2. See, e.g., Civil Code §§ 2941 (civil penalty), 2941.5 (criminal liability).
 3. Code Civ. Proc. §§ 337 (4-year statute of limitation), 360.5 (waiver of statute of limitation).
 4. Civil Code § 2911.
 5. See, e.g., 2 A. Bowman, *Ogden's Revised California Real Property Law* § 17.46 (1975) (discharge by bar of statute of limitation).

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.⁶

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.⁷ Therefore, when the statute of limitation on the underlying obligation has run, foreclosure is precluded; any lien is also extinguished.⁸ 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 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.⁹ The running of statute of limitation may have been stopped and started anew by a partial payment.¹⁰ The statute of limitation may have been waived.¹¹ 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.¹²

6. 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).

7. Code Civ. Proc. § 726.

8. Civil Code § 2911.

9. See, e.g., Code Civ. Proc. §§ 351-358.

10. See Code Civ. Proc. § 360.

11. See Code Civ. Proc. § 360.5.

12. See, e.g., Puckhaber v. Henry, 152 Cal. 419, 93 Pac. 114 (1907). The equitable duty applies only to the original mortgagor and not

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;¹³ this is a legal technicality that serves only to cloud titles and make real property less marketable.¹⁴ The rule that a mortgagor may not clear title without "doing equity," despite the running of the statute of limitation on the underlying obligation, should also be reversed;¹⁵ this rule defeats the basic purpose of statutes of limitation.¹⁶

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;¹⁷

to a subsequent purchaser, who may clear title of the ancient mortgage. See, e.g., *Fontana Land Co. v. McLaughlin*, 199 Cal. 625, 250 Pac. 669 (1926).

13. Many states have done this by statute. See P. Basye, *Clearing Land Titles* § 73 (2d ed. 1970).
14. 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. CEB 1979).
15. 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).
16. 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).
17. Many states have enacted statutes of this type. See P. Basye, *Clearing Land Titles* § 76 (2d ed. 1970).

this will permit a person to rely on the record in determining market-ability 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, 30 years following the date the mortgage or deed of trust was recorded.¹⁸ 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.

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

An act to add Title 5 (commencing with Section 882.010) to Part 2 of Division 2 of the Civil Code, relating to mortgages, deeds of trust, and other instruments creating security interests in real property.

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

SECTION 1. Title 5 (commencing with Section 882.010) is added to Part 2 of Division 2 of the Civil Code, to read:

18. These periods are comparable to those provided in the Model Mortgage Limitation Act (Simes & Taylor 1960) and in the Uniform Simplification of Land Transfers Act (1977) § 3-408. 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.

TITLE 5. MARKETABLE RECORD TITLE

CHAPTER 1. [RESERVED FOR GENERAL PROVISIONS]

CHAPTER 2. ANCIENT MORTGAGES AND DEEDS OF TRUST

67700

§ 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 Pac. 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 Sections 337 (4-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).

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

882.020. (a) The lien of mortgage, deed of trust, or other instrument that creates a security interest of record in real property to secure a debt or other obligation 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, 30 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 recorded before expiration of the prescribed times and that is effective to waive or extend any other applicable statute of limitation beyond the prescribed times. After 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.

(c) The times prescribed in this section are absolute and apply notwithstanding any other applicable statute of limitation and notwithstanding any provisions for tolling a statute of limitation. Nothing in this section extends the period for enforcement or revives a security interest that has expired and is unenforceable pursuant to any other applicable statute of limitation.

Comment. Section 882.020 prescribes a maximum time for enforcement of a mortgage or deed of trust, notwithstanding the general statutes of limitation that apply to enforcement of a mortgage or deed of trust. Cf. Section 337 (4-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). This section 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).

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 30-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. See also Section 360.5 (4-year waiver period).

Subdivision (c) makes clear that there can be no off-record waivers, extensions, or tolling of the time for enforcement of the mortgage or deed of trust under subdivision (a). While off-record waivers, extensions, or tolling, including partial-payments, may be effective for purposes of the general statutes of limitation, they cannot extend the time for enforcement past the times prescribed in this section. See Comment to Section 882.010 (statute of limitation outlaws mortgage or deed of trust).

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§ 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 of a certificate of satisfaction, reconveyance, release, or other discharge at any time.

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 Pac. 114 (1907).

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§ 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.

§ 882.040

(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.