#H-400 2/18/81

Memorandum 81-13

Subject: Study H-400 - Marketable Title (Policy Issues)

Introduction

The Commission has decided as the first step in its property law reform project to investigate the possibility of adoption of a marketable title act in California. The staff has prepared a draft of a marketable title act, which is attached to this memorandum. This memorandum discusses policy issues involved in the draft.

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 likelihood that obsolete interests of record will appear that will require time and money to clear from the record.

Marketable title acts have been adopted in at least 19 jurisdictions in the United States. 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 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.

Simes & Taylor, in The Improvement of Conveyancing by Legislation (1960), state (p. 4) that in one sense, the operation of a marketable title act is all inclusive. It cuts off all interests, subject to a few exceptions unlikely to be encountered, which arise from title transactions prior to the statutory period. It can extinguish ancient mortgages, servitudes, easements, titles by adverse possession, interests

which are equitable as well as legal, future as well as present. Yet in another sense, as a practical matter, the statute will probably cut off nothing at all, because there are no valid outstanding claims. It has been the experience of states with long-term marketable title acts that few if any notices of claim are ever filed, thus indicating that few claims actually exist. Indeed, the very fact that in some states title examination for only a 30 or 40-year period is commonly accepted, without any legislation so providing, indicates that there are in fact no enforceable claims adverse to the 30 or 40-year chain of title.

There are several features worthy of note about marketable title acts for our purposes at this time. Although they operate on the basis of the recording system, they go far beyond the present recording statutes by (1) cutting off interests of record, (2) protecting any person owning or acquiring an interest in property, not just a bona fide purchaser, and (3) validating otherwise invalid interests, if they have been recorded for a sufficient length of time (this last feature will be discussed in detail below). The acts help make title to property more marketable by limiting the record search required and by automatically clearing the record, but they do not give a purchaser "marketable title" to the property. Title is subject to all defects and adverse interests recorded within the search period.

This description of the operation and effect of the marketable title acts is simplified, and of course there are major differences in the statutes of the various jurisdictions. In constructing a marketable title act for Commission discussion the staff has used the Marketable Record Title portion of the Uniform Simplification of Land Transfers Act (1977) as a model. The Uniform Act is drawn substantially from the Model Marketable Title Act prepared by Simes & Taylor, which in turn is based upon earlier marketable title acts, particularly the Michigan statute. Although the staff draft is based on these models, there are a number of basic policy questions the Commission must answer in the preparation of a marketable title statute.

Is It Necessary or Desirable?

Professor James L. Blawie, in his study for the Commission on Present Law of Property and Conveyancing in California with Critical

Analysis and Suggestions for Change (1979), states the case (pp. 24-27) for adoption of a marketable title act in California. A prime motive of the acts is to clear title to land within a state comprehensively and without the expense of litigation. It is basic textbook law that only titles to land in fee simple absolute or in the form of fixed term leases are readily marketable. Land held in any other type of title is effectively removed from the ordinary marketplace. Interests that clog title impair the ability of the ordinary buyer to purchase free and clear at a reasonable price without the threat of future litigation. In a state where no device is provided to clear titles without litigation, the amount of land affected by clogged titles continues to increase as the time from the origin of land title in the state increases. In California a marketable title act should make it possible for title companies to provide title information and to insure titles with less search and fewer risks. Though title is rarely searched by California attorneys or residents, the job, if undertaken, would be much simplified.

Although there was substantial agreement with Professor Blawie's position among persons who reviewed his study, agreement was not unanimous. Professor Richard C. Maxwell's tentative opinion, "which is wholly impressionistic, is that the problems which would be addressed by such legislation are not presently very troublesome in California." Professor Jesse Dukeminier felt that a marketable title act by itself would not do much:

> 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.

The staff does not agree with Professor Dukeminier's analysis. As Simes & Taylor point out (p. 5), it must not be assumed that the marketable title act will necessarily usher in an era of 30 or 40-year title searches. The very fact that there are exceptions in the statute means that a title examiner will have to look beyond the marketable title

period to find instruments that may include the exceptions. But a competent title examiner will be able to see at a glance that most of the instruments do not concern the exceptions, and thus the task will be definitely lightened.

Moreover, the most significant feature of the marketable title acts, in the staff's opinion, is their curative effect. Ancient defects, which do not in fact give rise to substantial claims, but which may be the basis of a refusal to approve a title, are completely wiped out. Even though the title examiner must look at the entire record from the government down to the present time, the examiner is greatly aided by the fact that ancient defects can be ignored. As Professor Blawie told the Commission at the time he presented his study, a marketable title act is particularly important in states with ancient titles--and the oldest titles in California are more than 125 years old. A cloud on title, once imposed, continues indefinitely until on rare occasion someone takes the time and trouble to bring a quiet title action. The marketable title act is effectively an automatic clear title action which makes most titles in a state marketable within 20 or 30 years of the time it is adopted. No jurisdiction which adopted such an act has repealed it, and nearly all printed reports are highly favorable. There is at the present time no responsible opposition to the adoption of the acts, and there appears no reason why any state should not adopt a marketable title act.

Despite Professor Blawie's argument, with which the staff agrees, the Commission has on several occasions received expressions of serious reservations from Ronald P. Denitz of Tishman West Management Corp. Mr. Denitz told the Commission at the time Professor Blawie presented his study:

> I have a personal uneasiness with the prospect of the enactment of a far reaching, all encompassing "Marketable Title Act" not only because of the unknown effect which the same might have on land titles and ground lease titles possessed by my company and by other persons in the business community (including companies whom we represent as managing agent), but I am further concerned as to the reaction of Eastern lenders and other participating parties to such an evulsive change in the law of real property titles. Whether the economic life and growth of the business community would be slowed or otherwise injured is an unknown factor at this time and is a practical problem which I am sure all of us would

seek to avoid. Additionally, input from various title companies should be obtained to determine whether a Marketable Title Act would speed up the title insurance process, make it easier to obtain elimination of exceptions to clear title, and cut the costs of title insurance generally.

The concerns that trouble Mr. Denitz have also been expressed by Barnett, Marketable Title Acts--Panacea or Pandemonium, 53 Cornell L. Rev. 45 (1967), in a thorough and critical analysis of the operation and effect of the marketable title acts. Barnett points out (pp. 83-84) that before the marketable title acts appeared, a property owner could virtually rest assured that the interest was indefeasible if promptly recorded, subject only to loss through governmental powers of taxation and eminent domain and through adverse possession or user. Marketable title acts effectively reverse the priorities of the recording system by protecting the last transaction to be recorded before the 30 or 40-year statutory period. Under a marketable title act, all holders of an interest in land, to be safe, must file a notice of claim every 30 or 40 years after the initial recording of acquisition of their interests. Estate plans must make provision for someone to file such notices on behalf of unborn or unascertained persons who are designated to take future interests.

Barnett also questions (pp. 89-91) Simes & Taylor's assertion that the very small number of notices of claim filed under the marketable title acts tends to prove that few of the interests subject to extinguishment are still alive. It may prove merely that many holders of outstanding interests are ignorant of the existence and mode of operation of the marketable title acts. How will the ordinary person get warning that the interest is about to be extinguished, or that it can be preserved by filing a notice? The only holders of outstanding interests in land who are likely to learn of the filing requirement in time to protect themselves are those who are kept constantly advised of new legal developments, such as institutional lenders, oil companies and speculators, and public utilities. Yet it is the type of interest held by these entities that typically are exempted from the operation of the marketable title acts.

> What then, is the real justification for marketable title acts? It seems to lie in simplifying title examination and reducing the amount of curative action needed to make a title good. Abstracts all the way back to the soveriegn will continue to be examined, but title examiners may disregard most matters prior to a root of title at least forty years of record. Is this justification sufficient in light of the potential for injustice inherent in a marketable title act?

Barnett notes (p. 91) that because marketable title legislation eliminates many pre-root title risks and shortens the time needed to make a title investigation, it is no surprise to discover that title companies favor it. Some people have assumed that such legislation would result correspondingly in a reduction of title insurance premiums. The assumption has proved rather naive. Barnett concludes (p. 94) that marketable title acts are a half-way measure intended to bolster an inherently inefficient recording system, when what is needed is an effective title registration system, similar to Torrens. Professor Dukeminier has also expressed this opinion to the Commission.

The Commission should take these reservations into consideration in making a decision whether to propose marketable title legislation.

Constitutionality

Because the marketable title acts have the effect of extinguishing vested interests in property if not preserved by rerecording, the constitutionality of the acts has been questioned on three grounds: (1) that they are retroactive in character; (2) that their operation deprives persons of their property without due process of law; and (3) that they impair contract rights.

According to Professor Paul E. Basye, in Clearing Land Titles (2d ed. 1970) (§ 175 at 384), the marketable title acts have been upheld on each count. In most cases that have arisen the interests in question were created before the passage of any marketable title act. The requirement that notice of them be recorded as the price of their continued existence was not within the contemplation of the parties when the interests were originally created. The validity of legislation having retroactive features is judged largely by weighing objectives and benefits to be gained by its application as against the amount of burden imposed upon the owner of an interest to preserve it.

The leading case is Wichelman v. Messner, 250 Minn. 88 at 121, 83 N.W.2d 800 at 825 (1957), which upheld the Minnesota statute, stating:

> 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.

It should be noted, however, that Barnett questions (p. 90) whether marketable title acts are clearly constitutional, pointing out that Wichelman is the only case directly in point and that before upholding the constitutionality of the act the court "amended" it to bypass a number of problems. Statutes analogous to marketable title acts, such as "reverter" acts that extinguish possibilities of reverter that are contained in old deeds if no declaration of intention to preserve is filed, have met with a mixed reception in the courts. Compare Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965) (statute held unconstitutional) with Hiddleston v. Neb. Jewish Educ. Soc., 186 Neb. 786, 186 N.W.2d 904 (1971) (statute held constitutional).

Other statutes analogous to marketable title acts are "dormant mineral interests" statutes that provide that mineral rights more than 20 or 25 years old that are not currently in use are extinguished unless rerecorded. Recent attacks on such statutes have resulted in holdings that the Indiana statute is constitutional (Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980)) and the Illinois statute is unconstitutional (Wilson v. Bishop, 412 N.E.2d 522 (Ill. 1980)), while the Michigan statute is constitutional as applied to claimants under a reservation of minerals in a conveyance (Van Slotten v. Laresen, 86 Mich. App. 467, 272 N.W.2d 675 (1978)) but unconstitutional as applied to owners of subsurface rights where the owners and their interests were known and identifiable (Bickel v. Fairchild, 83 Mich. App. 467, 268 N.W.2d 881 (1978)).

All these cases involve a balancing of the harm to the individual holders of interests against the public good to be achieved by the statute. How would the California courts respond to a marketable title act? In the California Supreme Court's most recent pronouncement on retroactive property legislation, In re Marriage of Bouquet, 16 Cal.3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976) (holding changes in the community property laws constitutional as retroactively applied), the court pointed out that such legislation, though frequently disfavored, is not absolutely proscribed; the vesting of property rights does not render them immutable, and vested rights may be impaired "with due process of law" under many circumstances. The court stated (16 Cal.3d at 592):

> In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.

In the staff's opinion, there is a strong likelihood that the California courts will sustain the constitutionality of a marketable title act, particularly if the act allows sufficient time for all persons having interests in the property to become informed of the act and its effects and to rerecord their interests. To ensure this result, the staff believes it would be helpful to provide a liberal grace period for rerecording existing interests and to make a strong statement of legislative policy in the act concerning the need for and social utility of the act. The staff has added a statement of legislative policy to the draft; the grace period is discussed later in this memorandum.

Marketable Title Period

How long should the marketable title period be? The various jurisdictions have periods ranging from 20 to 50 years, with 40 years being the most common. The Model Act has a 40 year period, and the Uniform Act has a 30 year period. Some jurisdictions have begun with longer periods and after some experience under the acts have shortened the periods.

Professor Basye states (§ 173 at p. 375) that since the underlying purpose of the legislation is to fix a period of time beyond which title searches and examinations need not go, this period must not be either unduly long or unduly short. If it is too long, its basic value will be lost. If it is too short, an excessive number of notices of interests to be preserved will need to be recorded to prevent their extinction, and the greater will be the likelihood of overlooking compliance with the recording requirements. Professor Basye suggests a 40-year period seems reasonable and is likely to represent a fair balance.

Professor Blawie points out (p. 48) that the drafters of the Model Act selected a 40-year period because it appeared to be a legislatively acceptable compromise and should satisfy most people because it represents the effective adult lifetime of an ordinary person. Professor Blawie states that it is better to provide a longer period and no exceptions to the statute than it is to provide a shorter period and write in exceptions to the operation of the statute.

Persons who have written to the Commission commenting on Professor Blawie's study and who have expressed opinions concerning the statutory period prefer a 20-year statute. Robert P. McNamee, a San Jose attorney, states, "I would favor a term of 20 years for the statutory period, but I believe 30 years would probably be more politically acceptable." E.T. O'Farrell, a Riverside attorney, suggests a statute 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."

The staff has drafted the statute with a 30-year statute because that seems to be the direction of drift of the foregoing comments and because 30 years would accommodate the typical residential mortgage, a significant factor in the post-Wellenkamp, high-interest-rate era.

Tolling

The marketable title act, while it has the effect of a statute of limitations in precluding actions to recover property after a certain period of time, is broader than a statute of limitations in that it actually extinguishes old interests. Unlike the statutes of limitations, there is no tolling of the marketable title period for minority, incompetence, imprisonment, residence outside the state, etc.

Professor Blawie states (p. 33) that the reason there is no tolling appears to be the conviction of the marketable title drafters that virtually no one, even the unborn owner of a contingent interest, is without effective representation under modern codes. Whether by the doctrine of virtual representation, by the appointment of a guardian ad litem, next friend, trustee appointed for the purpose, relative, public administrator or guardian, or in some other fashion, it appears that the owner of any interest is taken to be effectively represented under the statute for purposes of suit or filing of notice.

The staff has no problem with making the marketable title period absolute and precluding tolling. Tolling would render the marketable title act useless in its objective of enabling people to rely on the record and of limiting the period of title search required.

Kind of Interest Protected

Should the operation of the marketable title act be limited to fee simple interests, or should a person be able to use the act to clear title to any interest, such as an easement? Simes & Taylor state (pp. 351-352) that the statutes vary as to the kind of interest made marketable. The Michigan type of statute quiets the title to "any interest." In general, it may be said that, in the vast majority of cases, the statute is needed to clear the title to a fee simple, and that, as a practical matter, the value of the act would not be greatly impaired if it were limited to fees simple. On the other hand, it clearly could not be limited to fees simple absolute, for the problem which it frequently seeks to solve is how to transform a fee simple, which is shown by the record not to be absolute, into a fee simple absolute. But if we try to designate what fees simple are protected by the act and what are not, we encounter no end of difficulty. It would seem that the Michigan approach is desirable, even though situations rarely involve anything but a fee simple.

Although the staff likes the simplicity of applying the marketable title act to any interest, we can see confusion arising in the case of an interest less than a fee. Assume, for example, that the person seeking to establish title is the holder of an easement on property and can trace title to the easement for the statutory marketability period.

Does this mean the holder of the fee, who conveyed the easement originally, loses the fee unless the fee is rerecorded? And if the holder of the fee does lose the interest, who then is the fee holder?

One way out of this dilema is to cut off only interests and claims adverse to the interest being given marketability by the act. But how does one determine what interests are adverse? Is a fee simple absolute adverse to an easement? The staff has drafted the statute deliberately ambiguously, so that it appears to permit only marketable record title in the fee, but would allow marketable record title in a lesser interest should the need arise. We are confident that the statute as thus drafted will work well for nearly all cases, as have similar statutes in other jurisdictions.

Forged or Other Defective Root of Title (The Two Chains of Title Problem)

One major difficulty with the marketable title acts is that they can validate an invalid title to the property and can invalidate a valid title to the property. Suppose the "owner" of property can trace title to the property for 30 years to a deed that purports to convey the property, but it can be shown that the deed is forged. For the marketable title acts to operate properly, a title searcher must be able to rely on the public records. Thus marketable title acts make the forged deed a sufficient root of title, and operate to validate the title of the "owner" 30 years later. The same result occurs if there is a wild deed or other defective root of title--the passage of the statutory period has validating effect.

When marketable title is based on a defective root of title, what happens to the interest of the true owner of the property? The interest is extinguished by the marketable title act. The staff believes this result is not acceptable.

Simes & Taylor consider this point (pp. 352-353), noting that practically the same problem may be stated in another way. If there are two independent chains of title, are they both "marketable" according to the terms of the statute? And does the statute determine their relation to each other? Some of the statutes have avoided this problem by requiring that the claimant be in possession. Obviously claimants under each of the two independent chains of title cannot both be in possession at the same time. But such a requirement means that marketability

depends upon a fact extrinsic to the record. This is undesirable if it can be avoided. And, while the alternative of having two "marketable" record titles to the same land at the same time seems anomalous, it is a situation which is inevitable unless either there is a requirement of possession, or the recorder is authorized and competent to refuse the recordation of "wild deeds." It should be noted also that this still can be true even under a marketable title act that requires merely that the land be not in the hostile possession of another, such as the Michigan statute. Practically, the case will rarely arise where there are two independent chains of title, each being "marketable" under the terms of the marketable title legislation.

Despite Simes & Taylor's position that the two chains of title problem will rarely arise, that is exactly what happened under the Illinois act in a very interesting case that went to the Illinois Supreme Court in 1968. The staff is in possession of the various papers filed with the court through the courtesy of Sheldon Rubin, a Los Angeles attorney who was involved in the case. The court states, in Exchange Nat. Bank v. Lawndale Nat. Bank, 41 Ill.2d 316, 321-322 (1968):

> We have here two independent chains of title, a situation which has been described as "theoretically worrisome, though rarely occuring." (Webster, "The Quest for Clear Land Titles" (1965) 44 N.C. L. Rev. 89, 110.) Exchange's title is derived through a chain originating in an original grant from the United States and this title was held by Von Ammon for a period in excess of 40 years, i.e., from 1899 to 1965. Lawndale through its grantors also held a record chain of title for at least 40 years prior to 1965. The pleadings set forth that the chain of Lawndale originated subsequent to the acquisition by Von Ammon in 1899 but do not further describe its origin as to time or source. Exchange and Lawndale do not have a common source of title and at least so far as Exchange's title is concerned, Lawndale's chain of title has been founded on a "wild deed."
>
> Commentators in considering marketable title acts have recognized the possibility of two record titles existing at one time because of a "wild deed" and in some states the possiblity of this occurence has been provided for by statute. (See Simes and Taylor, The Improvement of Conveyancing by Legislation, p. 353, 1960; Webster, The Quest for Clear Land Titles, (1965) 44 N.C. L. Rev. 89.) Our statute does not so provide.
>
> A consideration of our Act, including the section declaring the legislative purpose of "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title" leads us to conclude that the Act contemplated the existence

> of only one record chain of title holder. We deem that the application of the statute in a case involving two competing record chains of title as are presented here was not intended. Hence, we judge that Lawndale cannot use the Act as a defense to the action.
>
> Were we to hold otherwise it could result in a "wild deed" being enabled to serve as the foundation of a new record chain of title, so that it, as the more recent 40-year chain of title, would be entitled to the benefit of the Act. This could result in unwelcome holdings and possible constitutional complications, for it would be then possible for the grantee of a complete and even fraudulent stranger to title to divest the title of a record owner, who may have satisfied the usual responsibilities of ownership, such as paying taxes, but who did not file a statement of claim to preserve his interest, as the statute requires. (See Barnett, Marketable Title Acts--Panacea or Pandemonium? (1967) 53 Cornell L. Rev. 45, 57.) The legislature not having so provided, we believe that it was not intended that a chain could be founded on a wild deed, or as one court expressed it, "on a stray, accidental or interloping conveyance." (Cf. Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800.) Too, the legislative purpose under the Act of "simplifying and facilitating land title transactions" would hardly be furthered by a contrary holding. A purchaser, though he might trace title back to an original grant to the United States and might have examined grantor-grantee indices, could not be assured that a chain of title based on a "wild deed" did not independently exist, to the prejudice of his rights.
>
> On the record before us we cannot determine the rights of the appellant and the appellee. We, accordingly, remand the cause to the circuit court for a determination, apart from the Act, of the merits of the claims of the parties.

The Illinois case offers one solution to the problem--provide that the marketable title act does not operate to invalidate a separate chain of title.

A second solution is one mentioned in Simes & Taylor--requiring the person claiming marketable title to be in possession of the property. The Model Act and the Uniform Act, both following the Michigan statute, require only that no one be in hostile possession. The Comment to the Uniform Act states that "The provisions on use or occupancy and on tax assessment should virtually eliminate situations in which more than one person can claim marketable record title to the same property." But Professor Aigler, who drafted the Michigan statute, later stated he had come to believe it was a mistake to provide only that no one should be in hostile possession; the statute should have provided that the marketable title claimant should be in possession, even though this would mean

the act could not be used for vacant property. See Aigler, Marketable Title Acts, 8 Miami L.Q. 47 (1958).

A third solution is one incorporated in the Uniform Act--the marketable title act does not bar the rights of a person in whose name the real property or an interest in real property was carried on the tax rolls within three years of the time when marketability is to be determined. This provision derives from Florida Law.

A fourth solution is simply to require the fee-owner to rerecord every 30 years in order to be sure of preserving title as against a second chain of title. Whether this is an acceptable burden to impose on the fee-owner is questionable. Certainly if any interest is to be excepted from the requirement of rerecording, it should be the fee. Rerecording is the solution of the Model Act; the Model Act does make an exception from rerecording by the fee owner based on long-term possession:

> 4 (b). If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him or on his behalf as provided in Subsection (a), and such possession continues to the time when marketability is being determined, such period of possession shall be deemed equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in Subsection (a).

Simes & Taylor state (p. 353) that this is one rare situation for which possession is recognized instead of rerecording because of "the inherent equities involved."

The staff does not believe any of these solutions is completely satisfactory. To deny application of the marketable title act to other chains of title is to gut it, since a major purpose of the act is to permit assurance of title based on an examination of the official records for a limited period. To require the marketable title claimant to be in possession of the property would mean the statute could not be applied to vacant land, which would also greatly impair the statute's usefulness. The solution offered by the Uniform Act appears to the staff to offer the most satisfactory compromise--the statute does not

operate to bar the interest of a person in possession or who has paid taxes on the property for the immediately preceding years. As the Comment to the Uniform Act points out, this will make it quite rare that someone having a legitimate interest in the property will have the interest extinguished by the operation of the statute in favor of a different chain of title.

Quitclaim Deeds

Should a quitclaim deed be a sufficient root of title on which a person can base marketable title to property? A quitclaim deed conveys only the interest of the grantor of the property; if the deed does not recite the character of that interest, it would seem that a title searcher must go beyond the quitclaim deed to the most recent grant or warranty deed to use as a root of title.

The Uniform Act attempts to validate a quitclaim deed as a root of title by defining root of title to include a conveyance "containing language sufficient to transfer the interest claimed." It is questionable whether a deed that "I release and quitclaim all my right, title, and interest in Blackacre" contains language sufficient, without more, to transfer the fee simple in Blackacre. The language is sufficent only if the deed also indicates the interest quitclaimed or if it is combined with language elsewhere in the record chain of title that indicates what interest has been quitclaimed.

The staff's conclusion is that a quitclaim deed does not and should not serve as a root of title unless the deed also indicates the interest quitclaimed. We have included language in the Comment to the definition of "root of title" to make this clear.

Estoppel by Deed

If a person who does not own property purports to convey the property by deed and at a later time becomes the owner of the property, the property passes by operation of law to the person to whom it was purportedly conveyed. The theory of passage of after-acquired title by estoppel is that the grantor, having purported to convey title, will afterwards be estopped to deny ownership of the property.

How would a marketable title act affect the doctrine of estoppel by deed? A marketable title act is intended to extinguish all interests

not of record within the statutory period. Suppose there is a 30-year marketable title statute and in 1900 "O" purports to convey Blackacre, which "O" does not own, to "A", who records the deed. In 1901 "O" receives title to Blackacre from the true owner "B", and "O" records the deed. In 1931 marketability is to be determined. Under estoppel by deed principles "A" would be the owner. Under the marketable title act "A" would appear to be the owner in 1930, and "O" in 1931, there being two chains of title to Blackacre. Whether "A" or "O" is the owner under the marketable title act depends on how the act handles the two-chains of title problem. See discussion, above.

In California the doctrine of estoppel by deed is statutory. Civil Code Section 1106 provides:

> Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors.

If the marketable title act is to prevail over the doctrine of estoppel by deed, the statutes must make this clear. The staff has added a general provision to the marketable title draft to indicate the legislative intent of supervening contrary statutes.

Interests Not of Record

Should a marketable title act extinguish only old interests of record or old interests not of record as well? Simes & Taylor state (pp. 350-351) that logically it would seem that a marketable title statute should involve only marketable record title and should be limited to what appears on the record. But most of the statutes we have considered are not in accord with that conclusion. With the exception of the Illinois act, each of these statutes has a double operation. It quiets a chain of title of a certain length; and it extinguishes defects or interests prior to the beginning of the chain. Insofar as these statutes strike down ancient defects or interests, their operation is not limited to the record. And, indeed, this is desirable. Nobody but an impractical theorist should object to wiping the slate clean as to all ancient objections to the title whether on or off the record. We would then know that all ancient objections on the record have been

extinguished; and the mere fact that we have to go outside the record to determine what else is extinguished should do no harm.

Professor Basye agrees with this analysis, stating (§ 173 at p. 373) that, "Fortunately, all of the Marketable Title Acts affect all interests, whether of record or not of record, whose origin antedates the period set for record search and for declaration of marketable title. Thereby, in respect to old interests, the legislation can be said to be title cleansing in a complete and comprehensive sense."

Despite these views, the staff believes we need to be somewhat cautious in extinguishing unrecorded interests, merely because they are more than 30 years old. There are some interests that are significant and are protected by law even though not recorded. These are interests based on use of property, such as prescriptive rights and ways of necessity. If we protect the interest of a person in possession and visible easements, as discussed below under exceptions to the marketable title act, then we can extend the act to unrecorded interests.

Exceptions

One of the most cirtical decisions in developing a marketable title act is the coverage of the act. The more kinds of interests there are extinguished by the lapse of the statutory period, the more effective the act will be in limiting the search of the records required and in limiting litigation necessary to clear obsolete interests.

Professor Basye states (§ 173 p. 376) that, "Exceptions in Marketable Title Acts should be as few as possible. The primary value of limited title searches is proportionately decreased with each exception. If the exceptions are few in number or kind, much valuable time and effort will be saved." The Introductory Comment to the Uniform Act states, "Any major exception largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception."

Simes & Taylor take a more moderate attitude toward exceptions, asking (p. 356), if the purpose of the statute is to limit the period of search or of title examination, is not this purpose defeated by any exception whatever? That is to say, if there are any exceptions then the title searcher or title examiner cannot restrict the search to an

examination of the record or of an abstract limited to the period of time stated in the statute, but must go all the way back to the origin of titles in order to find the record of one of the excepted interests. As we have already pointed out, if there are exceptions, the burden of searching the original records is not appreciably reduced. The abstractor or the title insurance company must go back of the statutory period in making up its abstract or records. But the lawyer who examines the abstract can pass over, after a quick glance, all those ancient recorded instruments which are not excepted, and the task will be definitely lightened. If, for example, forty years is the period of the statute, it is unlikely that we shall begin an era of 40-year abstracts. In the middle states, abstracts running back to the government have been made covering nearly all land, and these will continue to circulate. But the task of the title expert in approving titles will be materially lessened in spite of exceptions. This will be true, not only because some abstracts of ancient records will not need to be scrutinized with care, but also because ancient title defects will be eliminated. Thus it must be emphasized that the existence of exceptions does not destroy the function of the marketable title act in quieting titles, except to the extent of the particular exceptions. Hence we may conclude that some exceptions may be tolerated in a statute.

The common or suggested exceptions from the marketable title acts are examined individually below.

Interest of person in possession. The staff believes that in order for a marketable title act to function properly, particularly where there are two chains of title to the property, it must be made clear that marketable title does not cut off rights of a person in possession. The Model Act recognizes this by excepting from the act rights of an adverse possessor arising at any time within the marketable title period. The Uniform Act excepts "interests of a person using or occupying the real estate, whose use or occupancy is inconsistent with the marketable record title." The Uniform Act is broader and the staff believes it is clearly preferable for our purposes. We have incorporated it in our draft.

Interest of person to whom property is assessed. Because of the possibility that two chains of title may exist and the invalid chain may cut off the valid chain by operation of the marketable title laws, the Unform Act has incorporated a provision drawn from the Florida act that saves interests of persons to whom the property is assessed. The theory of this provision is that the assessment is a public record that indicates the likelihood of an interest in the property. In fact, in the case of two chains of title, there is a greater likelihood that the person to whom the property is assessed has a valid interest than the person to whom the property is not assessed.

In California, the county assessor must assess annually all taxable property in the county to the persons owning, claiming, possessing, or controlling it on the lien date. Rev. & Tax. Code § 405. Exempt property is not assessed (e.g., property owned by the state and local public entities and property used for religious, hospital, educational, and charitable purposes). Public utility property is assessed by the State Board of Equalization and the assessment roll is transmitted to the county auditor. Cal. Const. Art. XIII, § 19; Rev. & Tax. Code § 756.

Because the number of exemptions from property taxation in California is so great, an exception for the interest of a person to whom property is assessed is not perfect. Nonetheless, the staff believes such an exception will take care of the great majority of problems that could arise under the marketable title act where there are two chains of title.

The Uniform Act excepts interests of persons to whom the property has been assessed within the preceding three years. The reason for the three-year period is not apparent. Theoretically, only the current assessment roll should be examined. However, in practice there may be errors on the current roll or the property may have been assessed to a person in recent years but the assessment is not reflected on the current roll for some reason. The staff has drafted the statute to preserve any interest of a person to whom the property has been assessed for the preceding five years, which corresponds to the period during which taxes assessed upon property must have been paid by an adverse possessor. See Code Civ. Proc. § 325.

Mortgages. Should the mortgage be excluded from the operation of the act? Simes & Taylor state (p. 357) that, unless the period of the statute is very short, it is believed that the mortgage should not consitute an exception. To do so would leave one common basis for defective titles. And most mortgages would be shorter than the statutory period anyway.

The staff agrees with this analysis, and has drafted a 30-year marketable title period so that most mortgages will be taken care of. The need for this type of legislation is illustrated by the following excerpt from a letter to the Commission from the County Counsel of Stanislaus County:

> Although a deed of trust may be 10 or 20 years old or more, and the note or debt probably paid off, but no record of that existing, there is no way to clear title to the property. I will give you an example. The public guardian became the conservator of an elderly woman who owned several pieces of property. There were no problems concerning most of her properties and they were sold for what they were worth. However, the last property to be sold had been the home in which she had lived. The preliminary title report showed that there were two outstanding deeds of trust on that property. Both deeds of trust were quite old. In fact the statute of limitations had run years before on the notes that the deeds of trust secured. We attempted to find the beneficiaries of those notes and deeds of trust and we indeed traced them into the wilds of Idaho, but there we lost their tracks. Since the conservatee had lived in the house for many years, and had had quiet enjoyment of it, and since she had considerable funds, we were certain that the notes, which those deeds of trust had secured, had been paid off. However, the conservatee was so incompetent that she was unable to give us any information on the subject at all. Further, her papers were either lost or destroyed and we were unable to find any cancelled promissory notes among them. How can one clear title to such property? We could not, in good faith, allege that those notes had been paid off because we had no actual knowledge to that effect. We could not find the beneficiaries of those notes since they were long gone. Fortunately, some people were willing to buy the property with title as is and it was sold to them in that way.

Leaseholds. Most commercial building development projects are today constructed upon ground leased land and residential structures may increasingly be built on ground leases. Ground leases are a major financing device that has resulted from the increased cost of fee title acquisition. Since the term of a ground lease may well exceed any

marketable title period, should an exception be made to operation of the marketable title act for interests of lessors and lessees?

The Model Act, but not the Uniform Act, excepts the interest of a lessor as a reversioner of the right to possession on expiration of the lease. The Comment to the Model Act states that this exception is explainable on the ground that the lessor is unlikely to know anything about hostile claims with respect to the lessor's title, and therefore may not file the necessary notice to protect the title. Professor Blawie (p. 33) states that there is general agreement that the provision protecting the right of the landlord to get the land back after the expiration of the lease is necessary. However, both Simes & Taylor (p. 357) and Professor Basye (§ 173 at p. 376) question this exception since it would be highly unlikely that a tenant under a long term lease would ever purport to convey a fee to a third person and that the third person would have taken possession without the landlord's knowledge. The staff believes the landlord under a long-term lease is in a position similar to that of other fee owners whose interests are subject to loss through a forged deed or wild deed; the same protections are available, including the fact that the landlord's reversionary interest, even if of little value, is assessed to the landlord. For these reasons the staff recommends that no exception be made for the interest of a lessor. It should be noted, however, that Robert P. McNamee, a San Jose attorney, who sent the Commission comments on Professor Blawie's study, recommended that the lessor's interest be the only exception.

What about the interest of a lessee under a long-term lease? Mr. Denitz has spoken and written to the Commission to emphasize that today's commercial real property developments are based almost exclusively upon ground leases, always of considerable length and often involving easements over and reciprocal rights between various separate ground leased or fee parcels. He believes that long-term ground leases, regardless of their restrictive nature and effect on fee-title, must be an exception to a marketable title act if recommended by the Commission:

> Presently vested property rights, and the ability of developers such as us to make future deals could be seriously damaged by any change in the present law which would expose a ground lease or any of its collateral rights to a "catch 22" type of legislative

revision of present real property law. Equally important would be the adverse effect of any such "catch 22's" upon the thinking of eastern lenders, whose permanent financing (through leasehold deeds of trust) provides the practical backbone of our way of doing business. Thought must additionally be given to the fact that major corporations, in locating or relocating their offices to this area of the country, are more and more asking for space occupancy (office) leases, which, when taken together with options for renewal, might extend beyond some "magic date" before which title might have to be re-registered upon pain of being lost; in fact, I can accurately represent to you that last week, for the first time, I drew a space occupancy lease with a proposed term extending into the year 2016.

Consequently, we feel that leases of all types and their collateral rights should properly be excluded from any Recommendation made in connection with Study H-250, except for the impact thereon of the meritorious technical changes suggested in Professor Blawie's study.

On the other hand, the Comment to the Model Act points out that an exception need not be made as to a lessee, since the lessee is in possession and has as much opportunity to protect the interest as the owner of a present fee simple. The staff agrees with the drafters of the Model Act--rerecording once every 30 years does not seem like an undue burden to impose on a long-term lessee. And even if the lessee fails to record, the fact that the lessee is in possession and may even be assessed the possessory value of the property is sufficient protection against loss of the leasehold interest. The staff recommends against an exception for the interest of a long-term lessee.

Restrictive covenants. Many housing tract developments contain covenants, conditions, and restrictions that limit the use of the property. Tract developments rarely lose their original character in thirty years and the filing of a notice to preserve the restrictive covenants is a difficult process when left to the various owners of lots within the tract. Professor Blawie points out (pp. 55 and 80) that for this reason some of the original proponents of marketable title acts have recommended that tract housing development restrictive covenants be excepted from the operation of the acts. It is clear that otherwise the covenants would not be continued at the end of the fixed term, in that it would be an impossible effort to get all or even a majority of the title owners for the time being in a tract development to make out and record the necessary notice to preserve the covenants.

In the world of shopping centers, according to Mr. Denitz, covenants, conditions, and restrictions are essential not only for the orderly and continued operation of such a development but also are with very few exceptions a requirement imposed by the major department stores or other "anchor tenants" in order to induce such priority persons to commit themselves to tenancy in the shopping center project. In the world of condominium developments and other planned unit developments covenants, conditions and restrictions are the cornerstone of the amenity-package (e.g., tennis courts, open space, swimming pools, saunas and roadways) without which persons would not buy a unit or lease a unit for their own occupancy. The business expectation of both commercial parties and residential parties therefore is firmly grounded in reliance upon as well as enforcement of the covenants, conditions and restrictions reasonably expected, as a business matter, by such persons to remain "in place" throughout the life of their financial commitment to the project or development. The increased importance of covenants, conditions, and restrictions in shopping centers, jointly developed or otherwise planned unit developments, condominiums, and other situations requires that amenities must be protected in order to satisfy the bargained-for expectations of the land owners and land occupiers.

The staff is also concerned with restrictions that limit the use of property for public or charitable purposes, e.g., a grant to Nature Conservancy to protect environmentally sensitive areas, to a public entity so long as devoted to educational purposes, to a church on condition that the property be used as a camp for underprivileged children, etc. Such restrictions may not be obsolete, yet there may be no person having a sufficient economic motivation to rerecord the restriction to prevent it from being erased by operation of the marketable title act. This is particularly true if by statute we preclude forfeiture of the fee for violation of a condition and allow enforcement only by damages and injunctive relief, which is one commonly-suggested reform in the real property area.

Persons who sent the Commission comments on Professor Blawie's study did not agree that covenants should be excepted from the operation of a marketable title act. Professor Herbert I. Lazerow believes there should be no difference in treatment of covenants in residential and

commercial developments, and suggests that restrictive covenants be treated the same as any other interest, the beneficiary of the covenant being permitted to rerecord every 30 years to protect the beneficiary's interest. Robert P. McNamee, a San Jose attorney, states that restrictive covenants should be made subject to the provisions of the act.

The staff sees no clear answers in this area. The competing policies are the desirability and commercial necessity of enabling long-term use of restrictions on property versus the need for expeditious removal of obsolete restrictions, eliminating restraints on alienation, and increasing the marketability and commercial usefulness of property. In weighing these conflicting policies, we must take into account the relatively modest burden of rerecording once every 30 years under the marketable title act.

On balance the staff suggests that restrictive covenants generally be subject to the marketable title act, but that any interested person be entitled to record a notice of intent to preserve the restriction. Thus for example in the housing tract situation, any homeowner would be able to preserve the restriction from operation of the marketable title act for all houses in the tract. In the case of a restriction for environmental, charitable, or other public uses, any member of the public could record a notice of intent to preserve. The recordation would only save the restriction from operation of the marketable title act; it would not necessarily save the restriction from a court determination under general principles of law that the restriction is obsolete and unenforceable due to changed circumstances. But if no person has sufficient motivation to rerecord, it is safe to assume that the restriction is obsolete.

The major drawback to this resolution, in the staff's opinion, is that there might be a substantial burden on the person seeking to preserve the restriction in the case of a large housing tract. This is particularly true if the notice of intent to preserve the interest is required to give a legal description and specify the current owner of each parcel, as the staff recommends below under indexing the notice. The effort required to describe each affected parcel and to conduct a large number of searches could be very burdensome. The only answer to

this problem the staff can see is establishment of a general tract index, also suggested below.

Easements. Professor Blawie points out (p. 55) that exceptions as to easements appear in augmented form in virtually all the state statutes, despite expert advice to the contrary. Both the Model and Uniform Acts except easements the existence of which is clearly observable by physical evidence of its use. Simes & Taylor comment (p. 15) that the exception as to easements is not difficult to handle since it is limited to those easements that are apparent. "Doubtless many would feel it is undesirable to restrict these interests by a marketable title act."

The staff believes that visible easements are properly excepted from the operation of the act. It is not burdensome to physically observe the property, and in fact under the recording acts a person is put on notice of an adverse interest indicated by a visible easement.

The staff is concerned about easements that are not visible, however. These would include such easements as underground water, sewage, and gas pipes, and underground electrical, telephone, and cable wiring. Requiring periodic rerecording of such easements by a public utility would be an incredible expense, since utility easements cover many hundreds of thousands of parcels. The staff draft excepts utility easements from operation of the marketable title act.

These exceptions would also satisfy somewhat the concern previously expressed to the Commission by Mr. Denitz that the economic life of commercial projects or developments requires that such items as parking covenants, utility easements, and rights of ingress and egress last as long as the project does, without the possibility of being affected by the operation of a marketable title act and without the necessity of someone having to monitor the calendar in order to file a continuation notice at any point in the life of the project.

The exceptions would not accomodate nonvisible easements, however, that are not owned by a public utility. These would include underground private utility easements, underground drainage easements, and other nonvisible easements such as light, air, and solar. These types of easements are a sort that a person might neglect to rerecord, yet they are still in use and relied upon. It is arguable that they too should be

excepted from the operation of the marketable title law, in reliance on general rules governing abandonment of easements. Nonetheless, abandonment requires a court determination and the staff prefers the automatic features of the marketable title laws. Owners of such easements will simply have to rerecord if they wish to preserve 30-year old easements. The staff believes people will be able to adjust to this manner of thinking and to act accordingly.

Mineral rights. According to the drafters of the Uniform Act, the most controversial issue with respect to marketable title legislation is whether or not an exception should be made for mineral rights. The Uniform Act makes no such exception, but does include language that could be used by a jurisdiction that cannot avoid the exception in the legislative process where mineral rights are an important element in the state's economy and law.

Professor Blawie states (p. 51) that the exception for mineral rights is obviously suited to California's needs. The Michigan Act and the Model Act were subject to change in the legislative process of states in which mining and oil and gas production was of great importance. The pros and cons of the subject were set out in the legal periodical literature of the past thirty years or more. In brief, the more exceptions, the less a marketable title act serves its purpose. If the number of exceptions goes beyond a handful, the act might as well not be adopted. On the other hand, mining and extraction processes are so important to the economies of many states that anything which impedes those processes is inadvisable. Yet, the large-scale reservation of mineral rights, a common pattern in Western and California conveyancing, leaves many titles clogged as previous owners play the roulette wheel of mineral strike chances.

The staff sees no reason to except mineral rights from the operation of a marketable title act. As Professor Blawie points out, reservation of mineral rights is a common, almost thoughtless occurence in California conveyancing. Old mineral rights are thus, like ancient mortgages, a common title-clearing problem. In the example given above by the Stanislaus County Counsel of an ancient mortgage problem, there is also a mineral rights problem:

> Another problem, and one that arose in the same matter referred to above, concerns the conflict between persons who own the surface right to property, and others who own the mineral rights. In the example above, one of the missing beneficiaries of the note and deed of trust, had also reserved to himself, in his original grant deed, the mineral rights to the property. He is long gone. How is anyone ever going to determine who owns the mineral rights? For all we know, this person is now dead. Since no property taxes are paid on the mineral rights, there really being no minerals to have a right to, one cannot obtain title to the mineral rights by adverse possession. Since there is no use of the mineral rights, there can be no taking adverse to the "owner". They can't be purchased because the owner can't be located. Once the owner is dead, who then becomes the owner? Further, since the owner of the mineral rights need not do anything, such as pay taxes, he has no interest in disposing of this property. The surface owner can then never complete his ownership of the property if he so chooses, and must always sell it that way.

If there is a current oil and gas or mining operation on the property of if there is a reasonable possibility of a find, it is no overwhelming burden for the owner of the mineral interest to rerecord every thirty years. Otherwise, the old interests should be extinguished and title to the property cleared.

Water rights. Unlike mineral rights, water rights ordinarily arise only where there is water available and where there is a need therefor. Moreover, water rights frequently arise by physical location of property, prescription, appropriation, and means other than a recorded transfer. For these reasons, and because of the critical importance of water rights in California, the staff has written an exception for water rights in the marketable title draft.

Interests in public entities. Both the Model Act and the Uniform Act except claims of the United States. Simes & Taylor point out (p. 357) that probably the interest of the United States could not be destroyed by a marketable title statute, and this is true whether the act makes an exception of that sort or not. Professor Blawie states (p. 33) that "it has been objected that the state has no right to legislate in relation to federal law anyway, and where the federal govenment has chosen to subject itself to state land law, the provision might somehow confuse things. However, the provision has not caused any difficulty in any state which has such a provision, to date." A related matter is

claims of private persons under federal law, such as aboriginal Indian rights or rights created by treaty. The staff draft includes a provision excepting interests of the United States or pursuant to federal law.

The more serious question, in the staff's opinion, is whether to except interests of the state and local public entities. Simes & Taylor believe (p. 357) that to except interests of the state or of municipalities would seem undesirable, since it would too greatly impair the value of the act, and since there is no good reason why the state or a municipality should not file a notice just as other owners of remote interests are required to do. Professor Basye is of the same opinion, noting (§ 173 at p. 376) that there is an ever increasing trend on the part of public entities to submit themselves to the operation of marketable title legislation.

The staff's concern is two-fold. First is the possibility that a person will record a deed to public land and by the passage of time acquire title to the land through operation of the marketable title act. We have tried to cure the two chains of title problem in our draft by providing that marketable title does not extinguish the interest of a person in possession or a person who pays property taxes. But public lands are exempt from taxation and may be unoccupied, such as park and open space lands. Should a person be able to acquire title to desirable pieces of scenic property simply by recording a deed? The staff believes placing the burden of rerecording a fee interest on public entities is unwarranted.

A more serious concern is the less than fee interest held by public entities. Typical of such interests would be easements for streets, alleys, and other rights of way. The burden of rerecording periodically by a public entity of any size could be overwhelming. A general exception for visible easements would help. However, the staff believes interests of public entities in property should be exempted completely, and has included such an exemption in the draft statute.

Grace Period for Recording Notice of Intent to Preserve Interest

When the marketable title act goes into effect, there will be interests that will be cut off because they are more than 30 years old

and the interest owners never have had a chance to record a notice of intent to preserve. For this reason all the marketable title acts allow a grace period after the act goes into effect, typically two years, within which a person may record notice of intent to preserve.

Such a grace period is plainly essential if the marketable title act is to be constitutional. The staff's only concern is whether two years is adequate time. News of changes in the law travel slowly, and even lawyers may not be aware of the changes for some time. The staff would feel more comfortable with a longer period, and we have inserted five years in the statute.

What about a publicity campaign? The staff is wary of such an idea because of the likelihood people will panic and, in ignorance of the actual operation of the law, record millions of unnecessary notices of intent to preserve. If we assume there are very few valid interests over 30 years old that are not excepted from the operation of the marketable title act, which appears to be the case in other jurisdictions that have enacted such legislation, then there is no reason for a massive publicity campaign.

Reimbursement Fund

Professor Blawie states (p. 56) that it has been suggested that persons whose interests are cut off by the operation of a marketable title act, and who are concerned about it and suffer substantial loss, should be able to make a claim for compensation against a fund provided for the purpose. The suggestion is made by analogy to the funds commonly provided by statutes establishing Torrens title registration systems, to compensate persons who suffer loss in title thereby. Since California has provided for such funds as to brokers, lawyers, and notaries public, the idea may appeal to California legislators. Such a fund would remove the last bit of potential inequity in the operation of a marketable title act.

Robert P. McNamee, a San Jose attorney who commented on Professor Blawie's study, states, "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 application 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 in the first 20 years, I think their rights should be cut off."

The problem raised by Mr. McNamee of persons who have rights cut off through ignorance of the adoption of a marketable title act we handle in our draft through an initial rerecording grace period. See discussion above. For interests later cut off, the staff agrees with the thrust of Mr. McNamee's position: a person can and should rerecord in order to save an interest from being extinguished, and therefore a reimbursement fund is not necessary or desirable. In addition, the legislature would be unlikely to enact legislation that creates a reimbursement fund either by appropriation of state funds or by imposing an additional recording fee.

A related matter is whether a person who loses a valid interest may recover damages from the person who caused the interest to become invalid--e.g., the forger of a false deed, the grantor of a wild deed, a non-BFP, etc. Because of the long period of the marketable title act, a person who loses an interest may be unaware of the loss until many years after the events that gave rise to the loss occurred. For this reason, it is possible that the person who caused the loss cannot be located, and even if located, may not be solvent. Moreover, the relatively short statutes of limitation may preclude suit, unless the cause of action is based on fraud or mistake, in which case the injured person may have three years after the discovery of the fraud or mistake in which to bring an action. See Code Civ. Proc. § 338.

The staff believes it is sufficient to leave a person deprived of a valid property interest to common law remedies for fraud, slander of title, etc. However, since the marketable title acts make interests that are not rerecorded during the statutory period "null and void," it is necessary to make clear that extinguishment of an interest by the act does not preclude suit on the interest. The staff has included language to this effect in the draft.

Indexing Notice of Preservation of Interest

Professor Basye points out (§ 174 at p. 376-377) that in specifying requirments for recording or rerecording notices of earlier interests it is important for the statute at the same time to specify a method of indexing such notices that will insure their coming readily to the attention of anyone having occasion to look for them. In states where tract indexing is already in operation indexing of these notices presents no problem, because each notice is noted under the description of the real estate affected and so is inescapably in view without cumbersome search. In states where grantor-grantee indexing is used a heavy burden will be placed upon the title searcher if the notice is indexed under the name of the original grantor of the instrument, because extended searches of the index will then be necessary to locate the prior owner-grantor who gave or executed the instrument with respect to which the notice of continuing interest is sought to be given. Two alternative indexing procedures have been tested and are available to avoid most of this difficulty. The first is to require a special tract index for these preserving notices. The second is to require the person who records such a notice to designate the name of the present owner, indexing of the notice then to be made under this name.

Neither recording the notice under the name of the present owner nor establishing a special tract indexing for notices is completely satisfactory. Recording under the name of the current owner imposes an additional burden on the person trying to preserve an interest to search title, and the recording may be ineffective if the current owner revealed by the title search is in a chain of title that will be extinguished by some other chain of title under the marketable title act. A special tract index, on the other hand, will impose costs on the county recorder to establish and maintain such an index. Moreover, the index will only be effective if there is a simple and uniform means of identifying the property, and in California there is presently available no such means.

The staff has drafted a requirement that the notice of intent to preserve an interest in real property be indexed both under the name of the current owner and under a special tract index by assessor's parcel

number, if any, otherwise by street address, or if none by legal description. However, the staff's inclination is that indexing by tract adds little to indexing under the current owner alone, and that in light of the added expense and complications of a tract index, indexing only under the current owner is probably preferable. The Commission's time could be spent more productively in attempting to develop a general tract indexing system, not just for notices to preserve an interest but for all purposes. The staff suggests we commence work on this matter.

Slander of Title

The Michigan statute and some others that follow it include a provision imposing a penalty for slander of title to land by wrongfully recording a notice of intent to preserve under the marketable title act. Simes & Taylor (p. 15) believe that such a statute is unnecessary, since common law doctrines would be adequate to deal with the problem, and since such a statute is not very closely related to the objective of a marketable title act. Nevertheless, such a section in an act would do no harm, and if desired, could be inserted in the act.

The staff believes that a specific provision for slander of title by recordation of a notice of intent to preserve is desirable. Otherwise it could be argued that the statute expressly permitting recordation of notice of intent to preserve makes the recordation privileged. Moreover, it would be useful to award attorney's fees where title is slandered by recordation of a notice--this will help limit recordation where the claimant knows the interest to be invalid and will increase the effectiveness of the marketable title act. The staff has included such a provision in the draft.

Standard Forms

E.T. O'Farrell, a Riverside attorney who wrote to the Commission concerning Professor Blawie's study, suggested that any marketable title act drafted or proposed should "also provide for possible standard deed forms and information to be included therein."

The staff is sympathetic to this suggestion--standard forms would certainly simplify conveyancing and land title law. However, the marketable title act does not appear to be a particularly appropriate place to start. The staff suggests that we draft standard forms where relevant as we proceed through the real property law study. Thus if we

reduce the number of possible future interests, for example, we could at the same time draft forms for creating the available future interests.

In this connection, we have added a form for the "Notice of Intent to Preserve Interest" to the draft of the marketable title law.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Civil Code §§ 890.010-890.370 (added)

SECTION 1. Title 5 (commencing with Section 890.010) is added to Part 2 of Division 2 of the Civil Code, to read:

TITLE 5. MARKETABLE RECORD TITLE LAW

Chapter 1. Preliminary Provisions and Definitions

§ 890.010. Short title

890.010. This title may be known and shall be cited as the Marketable Record Title Law.

Comment. Sections 890.010 through 890.370 constitute the California Marketable Record Title Law. The Law is drawn from the Model Marketable Title Act and from Part 3 (Marketable Record Title) of the Uniform Simplification of Land Transfers Act (1977). The Uniform Act derives from the Model Act, which traces its history to legislation earlier adopted in Michigan, Wisconsin, and Ontario. The Model Act was prepared by Professor Lewis M. Simes and Clarence B. Taylor for the Section of Real Property, Probate and Trust Law of the American Bar Association and for the University of Michigan Law School. It is discussed in L.M. Simes & C.B. Taylor, The Improvement of Conveyancing by Legislation (Ann Arbor: University of Michigan Law School, 1960), pp. 6-16. Legislation based upon the Michigan Act or the Model Act exists in Indiana, South Dakota, Nebraska, North Dakota, Ohio, Oklahoma, Utah, Connecticut, Iowa, Florida, Vermont, Kansas, North Carolina, and Wyoming. Marketable title legislation on somewhat different patterns is found in a number of other states. The Comments that follow the sections of this title note the derivation of the sections and the respects in which they differ from the Model and Uniform Acts.

The basic idea of the marketable title act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Marketable Record Title Law is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that the title searcher need search no further back in the record.

Provisions for rerecording and for protection of persons using or occupying land are designed to prevent the possibility of fraudulent use of the marketable record title rules to oust true owners of property.

The most controversial issue with respect to marketable title legislation is whether or not an exception should be made for mineral rights. This title follows the Model and Uniform Acts in making no such exception. Any major exception largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception.

§ 890.020. Declaration of policy and purpose

890.020. (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 to the extent practicable.

(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.

(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 marketable 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 890.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1. The declaration of public policy is intended to demonstrate the significance of the state interest served by the Marketable Record Title Law 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, ____, 128 Cal. Rptr. 427, ___ (1976) (holding changes in the community property laws constitutional as retroactively applied).

Statutes requiring recordation of previously executed instruments are constitutional 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). In the case of the Marketable Record Title Law, the burden on holders of old interests of recording a notice of intent to preserve is outweighed by the public good of more secure land transactions. All similar marketable title acts have been held constitutional. See discussion in Basye, Clearing Land Titles § 175 at 384-85

(2d ed. 1970) (constitutionality of marketable title acts). See also Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957) (holding Minnesota marketable title legislation constitutional):

> 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 the Marketable Record Title Law, the Marketable Record Title Law governs. Thus, for example, the doctrine of estoppel by deed (Section 1106) is subject to any supervening requirements of the Marketable Record Title Law as applied to particular title transactions.

3119

§ 890.030. Effect on other law

890.030. Nothing in this title shall be construed to:

(a) Affect any cause of action for damages arising out of a title transaction.

(b) Extend the period for bringing an action or doing any other required act under a statute of limitatons.

(c) 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 890.030 makes clear that the Marketable Record Title Law affects only title to property and is not intended to extinguish any cause of action for damages a person may have for slander of title, loss of an interest in property through fraud, or other cause.

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). Subdivision (c) is drawn from Section 7 of the Model Act.

§ 890.110
3120

§ 890.110. Application of definitions

890.110. Unless the context otherwise requires, the definitions in this chapter govern the construction of this title.

Comment. Section 890.110 makes clear that the words and phrases, as defined in this chapter, are intended to apply only to the Marketable Record Title Law. Other definitions and rules of construction may be found in the preliminary provisions of this code.

3121

§ 890.120. Person

890.120. "Person" includes an individual, public entity, association, organization, partnership, trust, joint venture, or other legal or commercial entity.

Comment. Section 890.120 supplements Section 14 ("person" defined).

39290

§ 890.130. Person dealing with real property

890.130. "Person dealing with real property" includes a purchaser, the taker of a security interest, a levying creditor, or other person seeking to acquire a lien or other interest in real property.

Comment. Section 890.130 is drawn from Section 8(f) of the Model Marketable Title Act and Section 3-301(3) of the Uniform Simplification of Land Transfers Act (1977).

3122

§ 890.140. Real property

890.140. "Real property" includes an interest in real property.

Comment. Section 890.140 supplements Section 14 ("real property" defined). See also Section 658 (real or immovable property).

§ 890.150. Record chain of title

890.150. "Record chain of title" means the series of recorded documents that create or evidence rights of the successive owners of title to real property.

Comment. Section 890.150 is drawn from Section 1-201(18) of the Uniform Simplification of Land Transfers Act (1977).

3124

§ 890.160 Restriction

890.160. "Restriction" means covenant, condition, easement, or other limitation created by agreement, grant, or implication that affects the use or enjoyment of real property, but does not include a security interest or lien.

Comment. Section 890.160 is drawn from Section 1-201(24) of the Uniform Simplification of Land Transfers Act (1977).

3125

§ 890.170. Root of title

890.170. "Root of title" to real property means the most recent conveyance or other title transaction of record for 30 years or more, whether or not it is a nullity, that purports to create or that contains language sufficient to transfer title to the real property. The effective date of the root of title is the date it is recorded.

Comment. Section 890.170 is drawn from Section 8(e) of the Model Marketable Title Act and Section 3-301(4) of the Uniform Simplification of Land Transfers Act (1977). It omits substantive provisions of the Model and Uniform Acts that are found in Section 890.210 (marketable record title).

The Comment to Section 3-301 of the Uniform Act states:

> The definition of root of title has been expanded to make it clear that a quitclaim deed or a forgery can be a root of title.

A quitclaim deed cannot be a root of title unless the interest conveyed is referred to in the deed. Otherwise it is not possible to ascertain from the record the title to the property, and another document must serve as the root of title.

§ 890.180. Title

890.180. "Title" means the right to an interest in real property, including but not limited to the interest of an owner, a lessee, a person in possession, a lienholder, a holder of a security interest, and a beneficiary of a restriction including an owner of an easement.

Comment. Section 890.180 is drawn from Section 1-201(29) of the Uniform Simplification of Land Transfers Act.

3127

§ 890.190. Title transaction

890.190. "Title transaction" means a transaction that purports to affect title to real property, including but not limited to:

(a) Quitclaim, grant, or warranty deed.

(b) Will, descent, right of survivorship, or operation of law.

(c) Tax deed.

(d) Trustee's, referee's, guardian's, conservator's, executor's, administrator's, or levying officer's deed.

(e) Decree of court.

Comment. Section 890.190 is drawn from Section 8(f) of the Model Marketable Title Act and from Section 3-301(5) of the Uniform Simplification of Land Transfers Act (1977).

3128

Chapter 2. Marketable Record Title

§ 890.210. Marketable record title

890.210. A person who has an unbroken record chain of title to real property for 30 years or more has marketable record title to the real property. The person has an unbroken record chain of title to the real property for 30 years or more if it appears from the records of the county recorder of the county in which the real property is situated that the root of title vests title to the real property in the person or in another person from whom, by one or more conveyances or other title transactions of record, title to the real property appears to have

become vested in the person, and no title transaction appears of record after the effective date of root of title that purports to divest the person of title to the real property.

Comment. Section 890.210 is drawn from Section 1 of the Model Marketable Title Act and Section 3-302 of the Uniform Simplification of Land Transfers Act (1977). Revisions in the language of the Model and Uniform Acts have been made for clarity.

Section 890.210 is definitional in character. The operative effect of a marketable record title is provided in Sections 890.220 (interests extinguished by marketable record title) and 890.230 (interests to which marketable record title is subject). Marketable record title to real property is not necessarily "marketable title" to the property. The Comment (edited) to the Model Act states:

> It should be noted at this point that the term marketable record title as used in the [Law], and as defined in [this section], does not mean a title which a vendee under a land contract can be compelled to accept. It means simply that the [thirty]-year title extinguishes all prior interests, subject to a very few exceptions. It is true, if these prior interests are extinguished, the title will generally be marketable in every sense of the word, but that does not necessarily follow. All the statute says is that, subject to the exceptions and qualifications stated in Section [890.230], all interests prior to the beginning of the [thirty]-year period are extinguished. The qualifications stated in Section [890.230] may sometimes mean that the title is not really marketable from a commercial standpoint.
>
> One further general observation as to the operation of the statute should be made. If at any given time there is a dealing with the title of the record owner, the chain of title which he must show, in order that it be marketable under the terms of the [Law], will generally be somewhat over [thirty] years in length, for it will only be by an unusual coincidence that there will be a recorded title transaction exactly [thirty] years back. Hence he will go back of [thirty] years to the last recorded title transaction prior to [thirty] years. That recorded title transaction is described in the [Law] as the root of title. Thus suppose, in 1959, A wishes to sell a certain piece of land. Assume that the last instrument on record concerning the land is a conveyance from X to A in fee simple, recorded in 1900. The record of this instrument constitutes A's chain of title as defined in the Act, and the instrument is his root of title. Hence, in order to show a marketable title, he must show the record of that instrument. Of course, if we are looking at the [Law], not from the standpoint of dealing with the title at any given time, but from the standpoint of its operation in extinguishing ancient claims, we must conclude that such claims were extinguished exactly [thirty] years after the

effective date of the root of title. That is to say, in the example suggested, in [1930] the [Law] operated to extinguish interests based solely on title transactions prior to 1900, the effective date of the root of title.

2996

§ 890.220. Interests extinguished by marketable record title

890.220. (a) Except as provided in Section 890.230, marketable record title to real property extinguishes all claims and interests in the real property whatsoever and however denominated, that depend upon an act, transaction, event, or omission that occurred before the effective date of the root of title, whether the claims and interests are legal or equitable, present or future, vested or contingent, and whether asserted by a person within or without the state, whether or not under a disability.

(b) All claims and interests in real property extinguished by marketable record title are null and void, and the interest of a person who has marketable record title to the real property or of a person dealing with the real property is not subject to the claims or interests.

Comment. Section 890.220 is drawn from Section 3 of the Model Marketable Title Act and Section 3-304 of the Uniform Simplification of Land Transfers Act (1977). Revisions in the language of the Model and Uniform Acts have been made for clarity. The Commment (edited) to the Model Act states:

> Section [890.220] declares the extent to which all interests prior to the effective date of the root of title are extinguished. It is clear that this extinguishment is absolute and not relative, and that the interests are not revived. The same proposition is stated in [Section 890.310(b)].

It should also be noted that Section 890.220 operates to extinguish claims and interests regardless of general tolling statutes and regardless of the knowledge and bona fide status of the person having marketable record title or a person dealing with real property.

§ 890.230. Interests not extinguished by marketable record title

890.230. Marketable record title to real property does not extinguish any of the following interests in the real property that depend upon an act, transaction, event, or omission that occurred before the effective date of the root of title:

(a) An interest that is apparent in the root of title or inherent in the other documents in the record chain of title. A reference in a document to a restriction or other interest is not sufficient to preserve the restriction or other interest unless the document makes specific identification by record location of the recorded title transaction that creates the restriction or other interest.

(b) An interest preserved by recordation of a notice of intent to preserve the interest pursuant to Chapter 3 (commencing with Section 890.310).

(c) An interest excepted by Section 890.240.

Comment. Section 890.230 is drawn from Section 2 of the Model Marketable Title Act and Section 3-303 of the Uniform Simplification of Land Transfers Act (1977). Section 890.230 omits the provisions of clauses (b) and (c) of the Model Act, relating to rights of the owner in possession or arising from a period of adverse possession or user, in reliance on Section 890.240(b), relating to interests of a person using or occupying real property. Section 890.230 omits clause (d) of the Model Act and paragraph (3) of the Uniform Act, relating to an interest in an independent chain of title, in reliance on Section 890.240(b) and (c), relating to interests of a person using or occupying real property and rights of a person in whose name the real property is carried on the real property tax rolls.

The Comment (edited) to the Model Act states:

> [Subdivision] (a) expresses an idea embodied in the Michigan Act and in other marketable title acts. It simply says you cannot rely on a [thirty]-year chain of title to extinguish defects and interests which are recognized in that same chain of title. For example, suppose a deed recorded in 1910 shows that A conveyed to B in fee simple "so long as the land is used for residence purposes." Thus, a determinable fee was created in B and a possibility of reverter reserved in A. No subsequent instruments affecting the title are on record. In 1959 B wishes to sell the property in fee simple absolute, and claims that the [Marketable Record Title Law] has extinguished A's possibility of reverter. A's possibility of reverter has not been extinguished, because B must show the deed recorded in 1910 as his chain of title, and the possibility of reverter is an interest "[apparent in the root of title]."

On the other hand, suppose as before, in 1910 a deed was recorded in which A conveys to B in fee simple "so long as the land is used for residence purposes." Then assume also that in 1912 B conveys to C in fee simple absolute and C at once records. There being nothing else on the record in 1959 with respect to the tract of land involved, C has a fee simple absolute under the [Marketable Record Title Law]. C's root of title is the 1912 deed, which conveys in fee simple absolute. Hence, [thirty] years thereafter, or in [1942], A's possibility of reverter was extinguished.

The proviso concerning a general reference is designed to avoid any necessity for a search of the entire record back of the [thirty]-year period, and to eliminate the uncertainties caused by general references.

[Subdivision] (b) refers to the filing of the notice to prevent the extinguishment of interests arising prior to the effective date of the root of title. Thus, in the example last given, if A who originally had a possibility of reverter, had filed a notice after 1912 and prior to [1942] his possibility of reverter would have been preserved. It should be noted also that the [thirty]-year period within which the claimant must file is not [thirty] years from the time the claimant acquired his interest. It is [thirty] years after the effective date of the root of title of the person claiming marketable title. This is expressly stated in [890.310]. Of course, the claimant will never have less than [thirty] years, but he may have much more than that period after his interest was created. Thus, in the case suggested, A's possibility of reverter arose in 1910, but he has until [thirty] years after 1912, the effective date of C's root of title, within which to file his notice of claim. This is because the Act is quieting a [thirty]-year title, and because it is not in any real sense a statute of limitations on adverse claims.

35072

§ 890.240. Interests excepted from title

890.240. The following interests are not subject to extinguishment pursuant to this title:

(a) An easement or other restriction either (1) owned of record by a public utility or (2) the existence of which is clearly observable by physical evidence of its use.

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

(c) The interest of a person to whom real property is assessed on the current assessment roll or on the assessment roll for any of the four immediately preceding assessment years.

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

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

(f) Water rights.

Comment. Section 890.240 is drawn from Section 6 of the Model Marketable Title Act and Section 3-306 of the Uniform Simplification of Land Transfers Act (1977). The Comment to the Uniform Act states:

> This list of exceptions is designed to be as limited as possible, given the restrictions imposed by federal law and the need to avoid use of marketable record title for fraudulent purposes.

Subdivision (a) is drawn from Section 6 of the Model Act and Section 3-306(1) of the Uniform Act, with the added exception of public utility easements of record. The Comment to the Model Act states:

> The exception as to easements is not difficult to handle since it is limited to those easements which are apparent. Doubtless many would feel that it is undesirable to restrict these interests by a marketable title act.

Subdivisions (b) and (c) are drawn from Section 3-306(2)-(3) of the Uniform Act. The Comment (edited) to the Uniform Act states:

> The provisions on use or occupancy and on tax assessment should virtually eliminate situations in which more than one person can claim marketable record title to the same property. [Subdivision (c)] derives from the Florida Marketable Record Title Act, F.S.A. Sec. 712.03(6).

Subdivision (b) makes clear that if a person in possession claims under another person, whether by lease, license, or otherwise, the interest of the other person is not extinguished.

Subdivision (d) is drawn from Section 6 of the Model 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 (e) is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation.

Subdivision (f) recognizes that water rights are not necessarily recorded as a matter of law or practice.

§ 890.250. Effect of extinguishment on contractual liability

890.250. Extinguishment of an interest in real property pursuant to this title does not extinguish the contractual liability of a person with respect to the interest if the person agreed by deed or contract to be subject to the interest, but the contractual liability does not affect marketable record title to the real property or extend to a person dealing with the real property.

Comment. Section 890.250 is drawn from Section 3-307 of the Uniform Simplification of Land Transfers Act (1977). Revisions in the language of the Uniform Act have been made for clarity. The Comment to the Uniform Act states:

> This section is meant to overcome a possible constitutional problem of impairment of the obligations of contracts. Its application is limited so that it should pose no problem for the title examiner.

35074

Chapter 3. Preservation of Interests

§ 890.310. Notice of intent to preserve interest

890.310. (a) An interest in real property may be preserved from extinguishment pursuant to this title by recordation of a notice of intent to preserve the interest during the 30-year period immediately following the effective date of the root of title. The running of the 30-year period is not suspended by the disability or lack of knowledge of any person or tolled for any other reason.

(b) Recordation of a notice of intent to preserve an interest in real property after the 30-year period does not preserve an interest previously extinguished pursuant to this title.

(c) 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 abondoned or is otherwise unenforceable, 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.

Comment. Subdivision (a) of Section 890.310 is drawn from the first two sentences of Section 4(a) of the Model Marketable Title Act and Section 3-305 of the Uniform Simplification of Land Transfers Act (1977). The Comment to the Uniform Act states:

> A simple method is provided for persons whose title depends solely upon documents which have been of record for more than 30 years to prevent a later recorded document from cutting off the effect of the documents upon which they rely. Suppose real estate was owned by A in 1930 and that he conveyed to B in 1940, to C in 1950, and to D in 1960. If this Act became effective in 1977, then in 1981 C has a marketable record title free of all claims of A and B and superior to that of D. If C does not record a notice of intent to preserve his interest by 1990, D will obtain a marketable record title and C's interest will be extinguished.

Subdivision (b) is comparable to Section 2(d) of the Model Act and Section 3-303(3) of the Uniform Act.

Subdivision (c) 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.

35075

§ 890.320. Who may record notice

890.320. (a) A notice of intent to preserve an interest in real property may be recorded by any of the following persons:

(1) A person who claims the interest.

(2) If the interest is a restriction, a person who claims the benefit of the restriction. If the restriction affects the use or enjoyment of more than one parcel of real property, the person may record a notice of intent to preserve the restriction for any or all of the parcels.

(b) A notice of intent to preserve an interest in real property may be recorded by another person acting on behalf of a claimant if the claimant is under a disability, unable to assert a claim on his or her own behalf, or 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 890.320 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), with the addition of the provision for recording notice by a person who claims the benefit of a restriction.

35076

§ 890.330. Contents of notice

890.330. 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.

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

(1) The name and mailing address of the claimant.

(2) A description of the interest claimed. If the interest is created or evidenced by a recorded document, the description shall include a reference by record location to the document.

(3) A legal description of the real property in which the interest is claimed. If the interest is created or evidenced by a recorded document, the description may be the same as that contained in the document.

(4) The name of the record owner of the real property and the assessor's parcel number, if any, and street address, if any.

Comment. Section 890.330 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 recorded document containing a general description of all of the parcels, the legal description required may be the same as the general description. Paragraph (b)(4) is added for purposes of indexing by the county recorder. The introductory portion of Section 890.330 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).

§ 890.340. Form of notice

890.340. 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:

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--record owner is grantor and claimant is grantee.
Marketable Record Title Law index--by assessor's parcel number, or if none by street address, or if none by legal description.

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to the California Marketable Record Title Law, Title 5 (commencing with Section 890.010) of Part 2 of Division 2 of the Civil Code.

Claimant	Name: Mailing address:
Interest	Description (e.g., security interest, easement): Record location of document creating or evidencing interest:
Real Property	Legal description (may be same as in recorded document creating or evidencing interest): Assessor's parcel number: Street address:
Record Owner	Name of current record owner of real property:

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.

Signed:_____ Date:_____

_____
(claimant)

_____
(person acting
behalf of claimant)

Acknowledgment or Proof and Certification

Comment. Section 890.340 incorporates the requirements of Section 890.330 (contents of notice). The introductory portion of Section 890.330 makes clear that all other statutory requirements must be complied with. See, e.g., Gov't Code § 27361.6 (printed forms).

65190

§ 890.350. Recording and indexing notice

890.350. (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 both of the following indices:

(1) The index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the record owner of the real property shall be deemed to be the grantor and the claimant under the notice shall be deemed to be the grantee.

(2) The Marketable Record Title Law index. The index entry shall be for the real property and shall be by assessor's parcel number, or if none by street address, or if none by legal description.

Comment. Section 890.350 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. The provision for indexing under the name of the record owner as a grantor is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation and is intended to increase the likelihood that a title examiner will find the notice. For the Marketable Record Title Law index, see Gov't Code § 27255. The Comment (edited) to the Model Act states:

It should be noted that [subdivision (b)(2)] provides for a ["Marketable Record Title Law index."] This is because, in jurisdictions where no tract index is available, it would be difficult to find such notices in grantor-grantee indexes or in miscellaneous indexes.

65191

§ 890.360. Slander of title by recording notice

890.360. 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 890.360 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 the Marketable Record Title Law is not privileged. Section 890.360 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).

31436

§ 890.370. Grace period for recording notice

890.370. If the 30-year period during which a notice of intent to preserve an interest in real property must be recorded to preserve the interest from extinguishment expires before December 31, 1987, the period is extended until December 31, 1987.

Comment. Section 890.370 is drawn from Section 10 of the Model Marketable Title Act and Section 7-701(d) of the Uniform Simplification of Land Transfers Act (1977), except that a 5-year grace period is substituted for the 2-year period.

CONFORMING CHANGES

Government Code § 27255 (added)

SEC. 2. Section 27255 is added to the Government Code to read:

27255. Notwithstanding Section 27257, the recorder shall keep a separate index of notices of intent to preserve an interest in real property, labeled "Marketable Record Title Law index," showing assessor's parcel number, street address, or legal description of the real property and when and where the notice is recorded.

Comment. Section 27255 implements Civil Code Section 890.350, providing for indexing of notices of intent to preserve an interest in real property under the Marketable Record Title Law. A separate index must be kept pursuant to this section notwithstanding the provision for a general index in Section 27257.

30684

Government Code § 27296 (amended)

SEC. 3. Section 27296 of the Government Code is amended to read:

27296. The county recorder in each county shall complete a monthly statistical report of documents filed and recorded on the form herein described. Such a report shall be submitted to the office of the Insurance Commissioner. The county recorder may either charge for copies of this report or may disburse the report without fee for public information. Certified and noncertified copies of any records issued by the county recorder shall not be included in this report.

The statistical report form shall be substantially as follows:

Documents Recorded and Filed

Month/Year

Abstracts of Judgment. . . . . .
Affidavits . . . . . .
Agreements . . . . . .
Assignments. . . . . .
Court Decrees. . . . . .
Deeds. . . . . .
Deeds of Trust and Mortgages . . . . . .
Executions and Attachments . . . . . .
Leases . . . . . .

Maps (Assessment) (Parcel) (Survey). . . . . .
Mechanics Liens. . . . . .
Military Discharges. . . . . .
Miscellaneous Documents. . . . . .
Notices of Mining Location . . . . . .
Notices of Completion. . . . . .
Notices of Default . . . . . .
Notices of Intent to Preserve an Interest. . . . . .
Notices (Miscellaneous) (Bulk Transfers) (Nonresponsibility) (Power of Attorney) . . . . . .
Proofs of Labor of Annual Assessment Work--Mining Claims . . .
Reconveyances. . . . . .
Releases . . . . . .
Subdivision Maps . . . . . .
Trustee's Deeds. . . . . .
Tax Liens (Federal). . . . . .
Tax Liens (State) (County) (City) (All Others) . . . . . .
U.C.C. Filings . . . . . .
Financing Statements Assignments, Amendments, Continuations, Others. . . . . .
Releases and Terminations . . . . . .

Vital Statistics

Month/Year

Births . . . . . .
Deaths . . . . . .
Marriages. . . . . .

Comment. Section 27296 is amended to enable monitoring of the Marketable Record Title Law. See Civil Code § 890.310 (notice of intent to preserve an interest in real property).

10013

Uncodified Section (added)

SEC. 4. 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 4 recognizes that any costs of recording and indexing documents under the Marketable Record Title Law are offset by the fees for recording and indexing pursuant to Government Code Section 27361 et seq.