

**THE MARKETABLE RECORD TITLE ACT — IS PRIVATE FORECLOSURE
BARRED TEN YEARS AFTER MATURITY, OR NOT?
By Lewis J. Soffer***

I. INTRODUCTION¹

Before 1982, owners of California real property would from time to time, to their surprise and chagrin (and that of their title insurers), receive a demand for payoff of some deed of trust hiding among documents recorded in the county many decades earlier, securing a debt owed by a former owner of the property. It might be that a title searcher had “missed” a trust deed in insuring a sale three owners “up the chain,” and that the error had been repeated in subsequent title policies. It might be that someone assumed the debt had been paid or otherwise satisfied, and that the reconveyance instrument simply had not been recorded. As the result of some anomalous legal analysis in California cases reaching back to the 1870s, the harsh reality was that such a deed of trust remained a blemish on title even after any action to collect the debt it secured was long barred by the statute of limitations. This impaired the marketability of real property in the state, and led to some arguably inequitable results.

The Marketable Record Title Act (“MRTA”)² was passed in 1982 to provide for an outside time limit to exercise a power of sale in a deed of trust, so that recorded “ancient mortgages” would at some point cease to constitute a cloud on the title to real property. An amendment to the MRTA adopted in 2006 was intended to eliminate some confusion reflected in the appellate cases interpreting the MRTA, on the subject of how that outside time limit is to be determined.

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This article describes the history and purpose of the Marketable Record Title Act, analyzes two cases decided in the months before the 2006 amendment, and provides some conclusions as to what the MRTA's time limitations on the exercise of a power of sale mean to real estate practitioners and title underwriters today. In short, a legislative drafting error committed in 1982 persists even after the 2006 amendment, and will continue to cause problems in the application of key provisions of the MRTA until it is corrected.

II. HISTORICAL CONTEXT OF THE MARKETABLE RECORD TITLE ACT ("MRTA"): TITLE THEORY VERSUS LIEN THEORY³

Before 1982, a deed of trust recorded in the public records of any county in California remained an encumbrance upon the title to the affected real property *forever*, regardless of the fact that any action to enforce the obligation secured by that deed of trust might be barred by the applicable statute of limitations. The purpose of the MRTA, enacted in that year, was to make real property more freely alienable and marketable.⁴ The Act did this by creating an outside time limitation on the exercise of a power of sale in a deed of trust. Unfortunately, the language employed by the Legislature to fix that outside time limit was far from clear, and actually employed jargon in such a way that the legal anomaly that had created the problem the statute sought to address was only compounded. The 2006 Amendment did not identify or fix this problem. To understand this issue, one must explore the historical background of the MRTA, and particularly the contrast between title theory and lien theory as the rationale behind real property security interests.

A. Civil Code Section 2911, Barring Enforcement Of A Lien Once The Statute Has Run On The Secured Obligation, Does Not Affect The Power Of Sale In A Deed Of Trust.

Like a mortgage, a deed of trust creates a lien against the real property security it identifies. In addition, deeds of trust customarily include an express provision by which the trustor grants to the beneficiary a power of sale, allowing the beneficiary to pursue nonjudicial foreclosure, subject to the detailed requirements governing the conduct of trustee's sales set forth in Civil Code sections 2924 through 2924I.⁵

In 1872, the Legislature enacted Civil Code section 2911, stating that: “A lien is extinguished by the lapse of time within which ... [a]n action can be brought upon the principal obligation.” Since the secured obligation is generally embodied in a written instrument (usually a promissory note), this meant that no foreclosure action (i.e., lawsuit to foreclose the borrower’s equity of redemption) *based upon the lien* of a mortgage or other security instrument could be commenced more than four years after the borrower’s breach.⁶ However, the State Supreme Court very soon held that the limitation created by section 2911 did *not* apply to nonjudicial foreclosure under the power of sale in a deed of trust.⁷

B. The Title v. Lien Distinction Is Central To The Continuing Viability Of The Power Of Sale.

The equitable justification enunciated in the cases for allowing the beneficiary under a deed of trust to foreclose by trustee’s sale, even after direct action on the secured obligation is barred, was that “courts will not help the debtor to recover pledged or encumbered property unless he pays his debt.”⁸ In other words, we will not allow the creditor to sue on the debt once the statute of limitations has run, but we will be damned if we will let the borrower sell the real property free and clear of that debt, no matter how long it has been outstanding.

Logically, that same equitable principle would apply equally to the exercise of a power of sale contained in a mortgage. Nevertheless, the California courts were clear that the exercise of such a power of sale was barred once actions to collect on the secured debt were barred. The technical explanation for this distinction was that, unlike all the other states in the Union, which treated a deed of trust as being identical to a mortgage with a power of sale, California’s Legislature and courts had “adopted the so-called ‘lien’ theory of mortgages, under which the mortgagee does not obtain title, but simply obtains a lien.”⁹ Contrariwise, under a deed of trust, legal title to the real property security passed to the trustee, and the exercise of the power of sale did not involve any court action to enforce “lien” rights.¹⁰ As a consequence, this state’s courts consistently held that no statute of limitation or repose ever barred the exercise of a power of sale in a deed of trust, whereas once the statute ran on the debt secured by a mortgage, no enforcement was possible, even if the mortgage contained a power of sale.¹¹ In the vernacular, it was said that a power of sale in a trust deed “never outlaws.”¹²

Code of Civil Procedure section 725a, enacted in 1933, expressly states that the beneficiary of a deed of trust has the right to bring an action for judicial foreclosure “in the manner ... of a mortgage upon such property.”¹³ This did not change the rule that the power of sale in a deed of trust could be exercised even after enforcement of the secured obligation was barred. Although the trust deed beneficiary’s right to utilize the courts, and to conduct a judicial foreclosure, was barred upon the running of the statute of limitations on the secured obligation (lien theory), that person’s right to conduct a trustee’s sale was not (title theory).

As noted above, these “ancient mortgages” were irritants that got in the way of the efficient transaction of real estate sales, including the issuance of title insurance. The statement of legislative purpose included within the MRTA¹⁴ left no doubt that this irritant was to be eliminated:

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

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

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

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

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, with respect to the property interests specified 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.

The primary mechanism for achieving these objectives was to be the fixing of time limits upon the exercise of powers of sale. Section 882.020, the statement of those time limits, read as follows when it was enacted in 1982:

(a) *Unless the lien of a mortgage, deed of trust, or other instrument that creates a security interest of record in real property to secure a debt or other obligation has earlier expired pursuant to Section 2911, the lien expires at, and is not enforceable by action for foreclosure commenced, power of sale exercised, or any other means asserted after, the later of the following times:*

- (1) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the **record**, 10 years after that date.
- (2) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is not ascertainable from the **record**, or if there is no final maturity date or last date fixed for payment of the debt or performance of the obligation, 60 years after the date the instrument that created the security interest was recorded.

Legislative history and subsequent cases leave no doubt that, as enacted in 1982, the statute was intended to bar entirely the exercise of the power of sale in a deed of trust after the expiration of the time limits set forth in that statute.¹⁵ It certainly would have been possible for the Legislature to have said, “After the time limits set forth below, the power of sale contained in a deed of trust can no longer be exercised,” but that is not what the statute says. The statute was framed in terms of a limitation on the enforcement of “*the lien of a mortgage, deed of trust or other instrument,*” when in fact the need for the statute arose precisely because the power of sale in a deed of trust was considered something *other* than a lien, and therefore “never outlawed.” By somehow losing track of the lien theory vs. title theory dichotomy that gave rise to the problem of ancient mortgages, the Legislature created an ambiguity that has yet to be cured, and that is not addressed by the 2006 amendment to the statute. As described below, this has practical consequences.¹⁶

III. THE 2006 AMENDMENT AND PRE-AMENDMENT CASES

In the year preceding the 2006 amendment, two different California courts of appeal decided two cases interpreting section 882.020, and reached completely opposite holdings, based upon the respective court’s perspective on how the section 882.020 time limit is to be calculated:

In December 2005, the California Court of Appeal, First Appellate District, in *Ung v. Koehler*, held that once section 882.020, subd. (a)(2) is triggered, and the beneficiary of a deed of trust has become entitled to commence a non-judicial foreclosure for a period of up to sixty (60) years after the recordation of a particular security instrument, that entitlement is not lost or limited when the beneficiary seeks to commence a non-judicial foreclosure by recording a Notice of Default stating the maturity date of the secured obligation.¹⁷

In May 2006, the Second District reached essentially the opposite result in *Slintak v. Buckeye Retirement Co., L.L.C.*¹⁸ In *Slintak*, the court held, among other things, that the commencement of a private foreclosure by recording of a Notice of Default that stated the maturity date of the debt secured by a deed of trust *did* trigger the 10-year limitation period under section 882.020(a)(1), even though that recording happened years after the deed of trust became a matter of public record.

The 2006 amendment to section 882.020 removed the word “record” in subsections (a)(1) and (a)(2), and substituted “recorded evidence of indebtedness.” This was supposed to resolve the *Ung/Slintak* problem. It would now be clear that which statutory time limitation applied to cut off exercise of the power of sale in a deed of trust (or other instrument, though no other instrument had previously been singled out for the special treatment accorded deeds of trust) would be determined as of the date when the deed of trust was recorded, based upon whether or not a maturity date appeared in the recorded security instrument. Unfortunately, the language of section 882.020 italicized above, referring to enforcement of the lien, was left unchanged.

The Senate Judiciary Committee Report on the bill that amended section 882.020 (ABA 2624) stated: “Essentially, this codifies a recent Court of Appeal case that stated that ‘once the beneficiary of a deed of trust has become entitled to claim the 60-year time limit ..., the beneficiary does not lose that entitlement merely by filing a notice of default that specifies the “final maturity date” of the underlying debt’,” citing *Ung v. Koehler*. That same Senate Judiciary Committee comment, consistent with the language of the MRTA as enacted in 1982, used the expression “expiration date of the lien” in a manner totally inconsistent with California cases over the last one hundred years, which have held that lien theory does not apply to the

exercise of a private power of sale in a deed of trust. Finally, the Committee Report did not mention, let alone disapprove, *Slintak*.

What follows is a more detailed analysis of *Ung* and *Slintak*, leading to the conclusion that the fundamental issue raised by those cases, and the real problem with the phrasing of section 882.020, remain unresolved.

A. *Ung v. Koehler* Held That The Recordation Of An NOD Does Not Change The Limitation On Exercise Of A Power Of Sale, But Did Not Say That “The Record” As Used In Section 882.020 Means The Recorded Security Instrument Itself.

In *Ung*, the lender under a promissory note secured by a deed of trust recorded a notice of default eleven years after the note became due. The borrower filed suit to enjoin the trustee’s sale, and made two arguments: (1) Civil Code section 882.030, part of the MRTA, had the effect of rendering the power of sale unenforceable once the statute ran on the underlying obligation (i.e., four years after the note’s due date); and (2) by recording the NOD, the lender made the maturity date of the obligation part of “the record,” triggering applicability of the ten year limit under section 882.020, subd. (a)(1), and since the NOD was not recorded until eleven years after the due date, the power of sale could not be exercised. When the Judiciary Committee observed that the 2006 amendment to section 882.020 codified *Ung*, it was unquestionably referring to the court’s resolution of the second issue.

The *Ung* court noted that the term “the record,” as used in pre-amendment section 882.020, was not defined in the MRTA. The court then asserted that that phrase “does not have a commonly accepted definition, either in everyday life or in the law of real estate transactions.”¹⁹ Practitioners may react by reflecting that such an assertion ignores the entire body of law defining the concept of record notice as governing the relative priority of interests in real estate, but the *Ung* court here was being quite precise. It agreed with the parties that the term “record,” as used in section 882.020, may have been intended to refer to recorded documents, “a sensible assumption in light of the importance in real estate law of documents that have been officially recorded in the county.” However, the court balked at adopting what thus seems like a natural interpretation because it anticipated a dilemma over whether the phrase

“ascertainable from the record” in section 882.020 was coincident with the concept of constructive notice. On one hand, some recorded documents do not provide constructive notice,²⁰ yet they might be part of “the record” for purposes of section 882.020. At the other extreme, section 882.020 stated that which time limitation would apply was to depend on what could be ascertained from the *face* of the record, whereas constructive notice casts a broader net, in that it incorporates a form of inquiry notice, triggered when documents of record refer to off-record matters.²¹

Having rejected the “constructive notice” interpretation, the *Ung* court looked to the legislative history of section 882.020, and found, based upon a 1981 California Law Revision Commission Comment, that in using the phrase “ascertainable from the record” the Legislature seemed to have assumed that the instrument that embodies the obligation (promissory note) will have been recorded along with the deed of trust.²² Since (as is usual) the promissory note in the case before it had never been recorded, the *Ung* court found the Comment unhelpful, and *it abandoned the effort to ascertain what the Legislature had intended the term “recorded” to mean.*

Instead, the court resolved the issue at hand by applying some common sense. It held that 882.020 could not mean that by recording a Notice of Default containing all the information required under Civil Code section 2924 the beneficiary of a deed of trust, whose purpose was to exercise the power of sale, would unintentionally deprive itself of the right to conduct that very non-judicial foreclosure. Such an interpretation would read into the statute an absurd Catch-22.²³ *Ung* did not hold that the term “the record” as used in the original version of section 882.020 meant the recorded deed of trust (or other security document) itself, and in fact the court found that it could not reach any conclusion as to the intended meaning of that term. Thus, the 2006 amendment of section 882.020 did not actually codify the holding of the *Ung* case.

In light of the legislative history of section 882.020 discussed in *Ung*, it would have been logical to have interpreted “ascertainable from the record” as used in that statute to mean “ascertainable from documents of record as of the date of recordation of the deed of trust.” With the 2006 amendment, a narrower rule has been adopted, such that for the ten-year cutoff to apply, the “evidence of indebtedness” must itself recite the maturity date. Note that the term

“evidence of indebtedness” must here mean the deed of trust itself, despite consistent past usage within the Civil Code and case law of exactly such language to describe *not* the deed of trust, but rather the secured promissory note.²⁴ The 2006 amendment neither codified *Ung* nor cured the problem with the statute as enacted in 1982. Rather, it added a new ambiguity to the statutory language. Nonetheless, the amendment will almost certainly enhance predictability, since most courts will understand what the Legislature meant to say.

B. *Slintak* Held That The Recordation Of An NOD Does Change The Time Limitation On Exercise Of A Power Of Sale.

This may be an opportune time to again mention *Slintak*, in which the Second District expressly held that documents recorded well after the loan closing, including a Notice of Default, could trigger the 10-year limitation of section 882.020, subd. (a)(1). The *Slintak* court based that conclusion upon what it considered a very strict construction of the language of section 882.020 as enacted in 1982, namely that the statute’s reference to “the record” was not time limited.²⁵ Given that the 2006 amendment clearly rejects the holding of *Slintak*, the comment on this portion of AB 2624 might better have said that it overturned *Slintak* than that it codified *Ung*.

Slintak also tackled a number of other issues relating to the application of section 882.020, subd. (a), including holding that the recording of a lis pendens within the 10-year window of subdivision (a)(1) resets the 10-year clock,²⁶ but that such an extension can only occur once, and that regardless how long the litigation may be pending, the extension only lasts for one additional 10-year period.²⁷ *Slintak* then held that if more than one lis pendens is recorded within the first 10-year period, the 10-year extension runs from the last such recording.²⁸ As opposed to the strict construction that guided the *Slintak* court’s reasoning on the key issue before it, all these holdings were extrapolations made without reference to any statutory language at all. The lien theory v. title theory issue was not mentioned in *Slintak*, but the facts of that case are the equivalent of a bar exam question for spotting issues raised but not resolved by the MRTA.

C. *Ung v. Koehler's Observations On Title v. Lien Theory As Applied To Civil Code Section 882.030 Highlight The Legislature's Mistake In Section 882.020.*

The other issue addressed in *Ung* (identified above as the first issue in the case) does highlight the title v. lien analysis. Before ever reaching the effect of the lender's having recorded a notice of default, the *Ung* court rejected the borrower's contention that Civil Code section 882.030 overrides the time limitations in section 882.020, so that the power of sale cannot be exercised after the underlying obligation is barred. If that sounds like a backhanded way to use Civil Code section 2911 to bar the exercise of a power of sale in a deed of trust, that is because it is.

Ung's discussion of this issue begins with the text of section 882.030:

Expiration of the lien of a mortgage, deed of trust, or other security interest pursuant to this chapter or any other statute renders the lien unenforceable by any means commenced or asserted thereafter *and is equivalent for all purposes to a certificate of satisfaction, reconveyance, release, or other discharge of the security interest,* and execution and recording of a certificate of satisfaction, reconveyance, release, or other discharge is not necessary to terminate or evidence the termination of the security interest. Nothing in this section precludes execution and recording at any time of a certificate of satisfaction, reconveyance, release, or other discharge. (Italics added.)

Prior to *Ung*, another court had rejected the direct argument that because the power of sale in a trust deed is a "lien" that expires under section 2911 once the statute has run, section 882.030 prohibits nonjudicial foreclosure when the secured obligation is barred.²⁹ In *Ung*, the borrower therefore made a more circuitous assault, arguing in effect, "I recognize that the 'lien' referred to in section 882.030 cannot be the power of sale, but must be the lien of the right to judicial foreclosure. Section 882.030 tells us that the expiration of *that* lien 'is equivalent for all purposes to a certificate of satisfaction, reconveyance, release, or other discharge of the security interest.' The beneficiary certainly cannot conduct a private foreclosure once the debt is deemed satisfied and the trustee's interest is reconveyed. Therefore, section 882.030 extends 2911, which previously barred only judicial foreclosure once action on the underlying debt was barred,

to include termination of the right of private foreclosure under the power of sale in a deed of trust.”

The *Ung* court recognized this as an end run around all pre-existing law, and pointed out that it would result in extinguishing the power of sale four years after maturity of the obligation, rendering the time limits in section 882.020, subd. (a)(1) and (2) “largely pointless.”³⁰ As this article concludes, that is a rational critique of section 882.020.

Quite logically, the *Ung* court observed that the impact of section 882.030 turns on the meaning of the word “lien.” The court then referred to the “unbroken line of cases” since 1880 holding that section 2911 bars enforcement of “only the security interest enforceable through judicial foreclosure,” while continuing to allow private enforcement of the power of sale in a deed of trust. It even explored the historical “title v. lien theory” dichotomy that led to this result.³¹ Applying this solidly-established rationale to the interpretation of section 882.030, the *Ung* court stated:

.... Section 882.030 does not state that when “the lien” of an instrument creating a security instrument expires, “the security instrument” itself becomes unenforceable; rather, it states that when “the lien” of the instrument expires, “the lien” becomes unenforceable. In other words, section 882.030 precludes enforcement of the security interest that has been statutorily extinguished, not necessarily the entire instrument creating the security interest. As discussed ante, the reference to a “lien” in section 2911 has invariably been construed not to include the power of sale, which was deemed to create its security interest through passing title rather than imposing a lien. Giving effect to this long-standing judicial understanding of the term “lien” in section 2911, section 882.030 must be construed as making unenforceable only the right of judicial enforcement under Code of Civil Procedure section 725a, the only interest that is extinguished by section 2911.

The *Ung* court seems to have sidestepped the reference in section 882.030 to expiration of the lien being “equivalent for all purposes to a certificate of satisfaction” etc., but at least we know from this quoted language that the lien theory v. title theory distinction is still to be respected. Circling back to the main point of this article, one might expect this to have led the *Ung* court to concede that the expiration of the “lien” aspect of a deed of trust does not affect the

power of sale, and that when section 882.020(a) sets new time limitations for enforcement of the “lien” of a deed of trust, it leaves completely unaffected the power of sale. If so, one would be disappointed.

In a footnote, *Ung* says: “Plaintiff argues that we should not construe the term ‘lien’ in section 882.030 to refer solely to the type of security interest enforceable by judicial foreclosure [i.e., the borrower wanted to say that “lien” as used in section 882.030 must include *both* the lien of the deed of trust and the power of sale] because such a limitation is inconsistent with the use of the same term in section 882.020, subd. (a), in which ‘lien’ is used more broadly [i.e., to include the power of sale?]. We decline to adopt plaintiff’s argument merely to avoid an inconsistency because, as explained above, the remaining language of section 882.030 indicates no intent to overturn the long-standing interpretation of ‘lien’ as that term is used in section 2911 and, as explained below, adoption of plaintiff’s argument would render section 882.020 virtual surplusage.”³² Translation: “We see the inconsistency in referring to the power of sale as a ‘lien’ in one statute, and rejecting that definition of the word as used in the succeeding statute (with an identical legislative history), but we do not know what to do about it.” Although this nearly express criticism of the phrasing of section 882.020 appears in the very case that the 2006 legislative history indicates was “codified” by the 2006 amendment, it does not seem to have affected the drafting of the amendment.

As is argued above, these judicial contortions could have been avoided if in 1982 the MRTA had not unnecessarily employed nomenclature in a manner completely at odds with the title v. lien distinction it was enacted to address. This problem will only fester until the Legislature recognizes and deals with it.

IV. CURRENT STATE OF THE LAW

As things now stand, three things are clear:

(1) The power of sale in a deed of trust will be extinguished 10 years after maturity if the recorded deed of trust recites a maturity date, and 60 years after recording if it does not. Lenders generally control the documentation of loans secured by real property. Lenders do not

like losing their remedies. In the past, trust deeds rarely recited a maturity date. That will not change.

(2) Defaulting borrowers do not enjoy foreclosure. Nor do their successors in interest. Borrowers' counsel (and counsel representing successor owners) will continue to probe for a way to shorten the 60-year limit of section 882.020, subd. (a)(2). Ambiguity in statutes invites creative lawyering. Because section 882.020 refers to a time limit upon enforcement of the lien of a deed of trust, it constitutes such an invitation.

(3) Either California should abandon the title v. lien distinction, in which case section 2911 would govern powers of sale in deeds of trust, or the Legislature should clarify the MRTA. The statutory references to "the lien of a deed of trust" will continue to create headaches for the legal profession until section 882.020 is reworded.

V. CONCLUSION

The problems discussed in this article could have been avoided, and the judicial resources expended in weaving the reasoning that creates cases like *Ung* and *Slintak* could have been saved, if in 1982 the Legislature had recognized that the historical quagmire created by the courts' insistence on maintaining the lien theory v. title theory distinction needed to be rectified by one decisive stroke. The Legislature could have stated that whenever the statute of limitation that applies to a secured obligation bars enforcement of the underlying debt, this also bars enforcement of the security instrument, regardless of the form of the instrument, including the private exercise of a power of sale in a deed of trust. Alternatively, and assuming that it wanted to maintain the distinction and to allow extended exercise of the power of sale in a deed of trust, the Legislature could have set up a single, easily discernable limitation upon commencement of foreclosure by recording of a notice of default, say ten years from the maturity of the secured debt. Either way, a date for expungement of ancient deeds of trust would have been established. Half measures have not solved the problem, and the unfortunate phrasing of section 882.020 has not helped. A straightforward and effective solution is still possible, but it would require political motivation to undertake decisive action, and that may not exist.

¹ An article addressing similar themes was first published in the *Real Property Journal*, a quarterly publication of the “Real Property Law Section of the State Bar” [Spring 2007, Vol. 25, No. 2].

² Civ. Code § 882.020, et seq.

³ 4 Miller & Starr, *Cal. Real Estate* (3d ed. 2003) §§ 10:130-10:132, pp. 401-410, § 11:62, pp. 163-169.

⁴ Civ. Code, § 882.020, subd. (a); *Slintak v. Buckeye Retirement Co., L.L.C., Inc.* 139 Cal.App.4th 575, 584 (2d Dist. 2006).

⁵ *Ung v. Koehler*, 135 Cal.App.4th 186, 192 (1st Dist. 2006). Most mortgages now also contain power of sale provisions.

⁶ Code Civ. Proc., § 337. *Puckhaber v. Henry*, 152 Cal.419, 422-423 (1907).

⁷ *Grant v. Burr*, 54 Cal. 298, 301 (1880).

⁸ *Carson Redevelopment Agency v. Adam*, 136 Cal.App.3d 608, 612 (2d Dist. 1982). See *Miller v. Provost*, 26 Cal.App.4th 1703, 1707 (1st Dist. 1994); *Booth v. Hoskins*, 75 Cal. 271, 276 (1888); *Mix v. Sodd*, 126 Cal.App.3d 386, 390 (4th Dist. 1981).

⁹ *Bank of Italy Nat’l Trust and Sav. Ass’n v. Bentley*, 217 Cal. 644, 654 (1933), citing *Duston v. Warshauer*, 21 Cal. 609 (1863) and *McMillan v. Richards*, 9 Cal. 365 (1859).

¹⁰ *Bank of Italy Nat’l Trust and Sav. Ass’n v. Bentley*, *supra*, 217 Cal. 217 Cal. at p. 655, citing *Koch v. Briggs*, 14 Cal. 256 (1859); *Hodgkins v. Wright*, 127 Cal. 688 (1900); *Sacramento Bank v. Alcorn*, 121 Cal. 379 (1898); *Kinard v. Kaelin*, 22 Cal.App. 383 (1st Dist. 1913).

¹¹ *Bank of Italy Nat’l Trust and Sav. Ass’n v. Bentley*, *supra*, 217 Cal. 217 Cal. at p. 655.

¹² *Carson Redevelopment Agency v. Adam*, *supra*, 136 Cal.App.3d at p. 610; *Hohn v. Riverside County Flood Control Dist.*, 228 Cal.App.2d 605, 614 (4th Dist. 1964); *Welch v. Security First National Bank of Los Angeles*, 61 Cal.App.2d 632, 635 (1943); *Miller v. Provost*, *supra*, 26 Cal.App.4th at p. 1707.

¹³ *Ung v. Koehler*, *supra*, 135 Cal.App.4th at p. 192; *Field v. Acros* 9 Cal.2d 110, 112 (1937).

¹⁴ Code Civ. Proc., § 880.020.

¹⁵ *Ung v. Koehler*, *supra*, 135 Cal.App.4th at pp. 193-194; *Nicolopolulos v. Superior Court*, 106 Cal.App.4th 304, 310 (2d Dist. 2003); *Miller v. Provost* 26 Cal.App.4th 1703, 1709 (1994).

¹⁶ There is no question that in enacting Civ. Code, § 882.010, the Legislature intended to eliminate the different rules governing enforcement of mortgages and deeds of trust. This article suggests that by virtue of its wording, the section may not have accomplished that goal.

¹⁷ *Ung v. Koehler*, *supra*, 135 Cal.App.4th at p. 186.

¹⁸ *Slintak v. Buckeye Retirement Co., L.L.C.*, *supra*, 139 Cal.App.4th at p. 575.

¹⁹ *Ung v. Koehler*, *supra*, 135 Cal.App.4th at p. 201.

²⁰ *Ibid*, citing *Stearns v. Title Ins. & Trust Co.*, 18 Cal.App.3d 162, 169 (1971). *Stearns* holds that because a recorded private notice of survey does not impart constructive notice, a boundary dispute involving such surveys does not trigger coverage under a title insurance policy. How an instrument reflecting the maturity date of a secured obligation could be recorded without imparting constructive notice is not clear.

²¹ *Miller v. Provost*, 26 Cal.App.4th 1703, 1709 (1st Dist. 1994).

²² *Ung v. Koehler*, *supra*, 135 Cal.App.4th at pp. 201-202.

²³ *Ibid*.

²⁴ See, e.g., Civ. Code, §§ 731.14, subd. (b); 891, subd. (a); 1689.10, subd. (a); 1689.22, subd. (a); 2924, subd. (a) (requirement of recording notice of default subject to exception for mortgage or transfer in trust “to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations”); 2924c, subd. (a)(1); 2937, subd. (a) (“The Legislature hereby finds and declares that borrowers or subsequent obligors have the right to know when a person holding a promissory note, bond, or other instrument transfers servicing of the indebtedness secured by a mortgage or deed of trust”); 2953 (exception for “deed of trust, mortgage, or other liens given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations”); 2954.9 (where original principal obligation is loan for residential property of four units or less, “the borrower under any note or evidence of indebtedness secured by a deed of trust or mortgage or any other lien on real property shall be entitled to prepay”); see also *Markowitz v. Fidelity Nat. Title Co.*, 142 Cal.App.4th 508, 514 (2d Dist. 2006); *Radian Guaranty, Inc. v. Garamendi*, 127 Cal.App.4th 1280, 1291 (1st Dist. 2005) (quoting Ins. Code, § 12640.02, subd. (a)(1)).

²⁵ *Slintak v. Buckeye Retirement Co., L.L.C.*, *supra*, 139 Cal.App.4th at pp. 584-585.

²⁶ *Id.* at pp. 585-587.

²⁷ *Id.* at p. 587.

²⁸ *Id.* at p. 587.

²⁹ *Miller v. Provost, supra*, 26 Cal.App.4th at p. 1708; *Ung v. Koehler, supra*, 135 Cal.App.4th at p. 194.

³⁰ *Ung v. Koehler, supra*, 135 Cal.App.4th at p. 195.

³¹ *Id.* at p. 195.

³² *Id.* at p. 201, n. 5.

** Cartoon at the beginning of this article drawn by Doug Regalia (dougr@mrcpa.com).