The Quest for Clear Land Titles -- Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation

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THE QUEST FOR CLEAR LAND TITLES—MAKING LAND TITLE SEARCHES SHORTER AND SURER IN NORTH CAROLINA VIA MARKETABLE TITLE LEGISLATION*

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There are voices crying in the wilderness of real property law that there is a "crisis in conveyancing."[1]

In a jet age that utilizes "hot lines" in the hope of averting a nuclear "hot war," perhaps the word "crisis" as related to land transactions is a bit overdramatic. But one need only to broach the subject of land-title searches to discover that non-ivory tower lawyers of current vintage are disillusioned with the adequacy of currently existing procedures for searching and certifying land titles. In the quietude of their offices, while they are resting in easy chairs away from the heavy, often dusty, giant grantor-grantee indexes and the other bundlesome volumes necessary to be lifted and opened in doing a thorough and painstaking title search, lawyers will admit that problems so often written about by law professors concerning real property are not merely hobgoblins of their own imaginations but are real.[2] Title lawyers will admit that they

* This article is the second of a projected series of articles on the improvement of land law. While the principal area of concern and emphasis is on North Carolina law, it is the purpose of the articles to provide analyses and approaches to solutions of problems of general application in other jurisdictions. For the first article of the series, see Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807 (1964).

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[1] *E.g.*, Payne, *The Crisis in Conveyancing*, 19 Mo. L. REV. 214 (1954). A number of other excellent articles have been written in recent years which criticize present day conveyancing procedures and suggest conveyancing reform. See Aigler, *Title Problems in Land Transfers*, 24 MICH. S.B.J. 202 (1945); Aigler, *Clearance of Land Titles—A Statutory Step*, 44 MICH. L. REV. 45 (1945); Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47 (1958); Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261 (1962); Cribbet, *Conveyancing Reform*, 35 N.Y.U.L. REV. 1291 (1960); Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245 (1952).

[2] One well-known title lawyer, when asked if he ever has any worry concerning titles he has certified, admitted that it is not uncommon at all for him to awake in the middle of the night and wonder whether he should go to his office to check on a possible defect in a title certified for which he

go as far as is economically feasible in applying their labor, knowledge of the law and their skill in ascertaining the status of a land title. Many lawyers involved in title practice, however, will likewise acknowledge that there are numerous potential problems that they routinely ignore. Because of deficiencies in the existing system of land recordation, coupled with certain idiosyncrasies of land law, lawyers are forced "to make a choice between subjecting clients to prohibitively large expenses or assuming the risk that the sleeping dog will continue to lie."[3]

The emphasis in this article is on *record* title deficiencies that are not discoverable on a reasonably short title search. Every title lawyer accepts the shortcomings of the records of land transactions as positive indicia of sound titles. They know and advise their purchaser and lender clients, hopefully, on the basis that the records are no better than the subject of recordation. Though perfectly recorded, if a deed has not been delivered, it conveys no title.[4] If a deed has been delivered in blank to be filled in with the grantee's name after the delivery, it is void and passes no title even though recorded.[5] Deeds from incompetents are not given validity by registration and remain void.[6] Deeds arising out of frauds in the factum, perhaps as the result of forgeries, impersonations, or where there is a want of identity or a disparity between an instrument executed and one intended to be executed, cannot be said to be the deeds of the makers at all.[7] The marital status of a grantor may have been incorrectly set out in a recorded deed because of a negligent omission or by reason of a divorce and remarriage of a grantor in another state or because of an initial secret marriage of the grantor.[8]

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has made no allowance. He stated, however, that he had never gone to his office in such instances.

[3] From a letter to the writer concerning the problems of title lawyers, 1964.

[4] McMahan v. Hensley, 178 N.C. 587, 101 S.E. 210 (1919).

[5] Bank v. Wimbish, 192 N.C. 552, 135 S.E. 452 (1926).

[6] Thompson v. Thomas, 163 N.C. 500, 79 S.E. 896 (1913).

[7] "No title passes under such an instrument—it is void—and no rights may be acquired thereunder even by innocent parties." Nixon v. Nixon, 260 N.C. 251, 257, 132 S.E.2d 590, 594 (1963). See Medlin v. Buford, 115 N.C. 260, 20 S.E. 463 (1894). See also, Parker v. Thomas, 192 N.C. 798, 136 S.E. 118 (1926) (for indicia of fraud in the factum as distinguished from fraud in the treaty).

[8] Prior to the 1965 legislative session of the North Carolina General Assembly, North Carolina law provided that a married woman could not validly convey her real estate without the written assent of her husband. Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944). Pursuant to an

That a grantor has been impersonated at some point in the execution of a deed in the chain of title, that there has been a forgery, that the grantor was a minor, that there were undisclosed heirs of a decedent in intestacy, or that a will in the chain of title was ineffective because a testator married or had children born after the will's execution will not appear except by laborious investigation collateral to the land-title records. The existence of many easements, title in another as the result of adverse possession without color of title, and potential mechanics' and materialmen's liens may not be discovered even with the most exhaustive search. In short, land-title records are no more than "some" evidence of the status of the title to a particular tract of real property.[9]

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amendment of N.C. CONST., art. X, § 6, approved by the people of the state on January 14, 1964, the North Carolina General Assembly in 1965 passed legislation designed to allow spouses, both wives and husbands, to contract and deal with their respective real and personal property as if unmarried. See N.C. GEN. STAT. §§ 52-1 to -2 (Supp. 1965). A word of caution is in order concerning these statutes, however. While a husband's signature will no longer be necessary to give his wife's deed legal vitality as formerly required, the procuring of spouses' signatures on married grantors' deeds will continue to be necessary. N.C. GEN. STAT. § 29-30 (Supp. 1965) provides surviving spouses with a substitute for dower and curtesy. A surviving spouse, notwithstanding the fact that his deceased spouse has made a conveyance of his real property while living, may elect to take a life estate in one-third in value of the deceased spouse's real property of which deceased spouse was seized during coverture. There will be no waiver of the surviving spouse's entitlement to the elective life estate provided by N.C. GEN. STAT. § 29-30 (Supp. 1965) unless the surviving spouse has previously joined the other spouse in his conveyance.

In addition, and of special interest to title searchers, N.C. GEN. STAT. §§ 52-1 to -2 (Supp. 1965) have no retroactive effect. Deeds and conveyances which were executed by married women prior to the effective date of the new act without the written assent of their husbands have not been validated by the enactment of the new statutes. Questions relating to the marital status of female grantors and to whether their proper husbands made written assents to transfers of their lands before enactment of these statutes are potentially capable of raising title and marketability problems for many years to come.

[9] In simple truth the notion that we have anywhere in this country (apart from the Torrens statutes) any such thing as "record title" is sheer delusion. There are too many facts affecting the validity of a title which not only do not appear in the records but which often cannot be ascertained by any reasonable search outside the records . . . Among the most frequently recurring items are: adverse possession and prescriptions; forgeries and other frauds; matters of heirship, marriage and divorce; copyists' and recorders' errors; infancy, insanity, and other disabilities . . . identity of persons; invalidity of mortgage foreclosures and of judgments and decrees; want of legal delivery of instruments; violations of usury laws; unprobated wills, praetermitted heirs, and posthumous children; falsity of affidavits; revocation of powers of attorney by death or insanity; parol partitions and dedications; inchoate

Title lawyers, however, do not ordinarily purport to certify "title"; they certify instead only "record title," carefully pointing out that their certificates do not apply to any matters not appearing in the public records; that the title to the land may be affected by matters which do not appear of record and which are not covered by the certificate of title.[10] The title-searching attorney thus effectively, and perhaps necessarily, shifts the risk of loss by reason of extrinsic facts to the purchaser or lender who has procured the title search and certificate of title.

I. The Problem

But is the certificate of "record title" sufficient qua "record title"? The layman client thinks it is; too many able lawyers think it is. The lawyer who makes a routine title search establishes arbitrarily the date backward to which his search of the records will be made.[11] If the title searcher takes all reasonable precautions for the period of time for which he elects to search the title according to the custom prevailing in the area in which he practices and finds

mechanics' liens; extent of restrictive covenants; non-recordation of prior government patent; and facts about boundaries. Such are some of the hazards external to the records which may disturb the peace of the faithful searcher for an indefeasible title. Obviously, for even the most scant security he must go much beyond the official sources of information. Often he does not go far enough.

McDougal & Brabner-Smith, *Land Title Transfer: A Regression,* 48 Yale L.J. 1125, 1128 (1939).

[10] ". . . *this certificate does not apply to any matters not appearing in the public records of* Blank County . . . . that the title to this property may be affected by the following matters, among others, which do not appear of record and which are not covered by this certificate: (a) claims, if any, for labor or services performed or materials furnished in connection with any construction or repairs to the property, and for which no notice of lien has been filed in the Office of the Clerk of the Superior Court; (b) unrecorded leases or rental agreements for three years or less relating to the property; (c) rights of persons in possession of the property, if any; (d) municipal zoning ordinances affecting the use of the property; and (e) such facts as an accurate survey of the property by a registered engineer would reveal . . . .

Excerpt from a certificate of title given by a typical title lawyer in North Carolina.

[11] Perhaps it is entirely unfair to state that the establishment of the period of time that the title search is to encompass is arrived at arbitrarily by lawyers. The period of time is related, no doubt, to economic feasibility both in terms of dollars and cents and time expenditure. The routine title search made in North Carolina usually covers a period of from twenty to forty years. If the title is to be insured, minimum search of sixty years is usually required.

nothing defective in the record title for that period of time, he then wades in with an air of fatalism and certifies "good record title."[12]

After taking all due precautions in checking a chain of title for the maximum practicable period of time and applying his required comprehensive knowledge of the substantive law of real property, wills, trusts, mortgages, procedure, creditors' rights, equity, and all of his analytical ability, and a scientific approach so far as possible, the title lawyer is relegated ultimately to the position of "clairvoyant" or one who plays the "percentages," who exercises no more than a "guess" or a "hunch" that a particular land title is good, indefeasible, and marketable. On such slender assurance lifetime savings are spent for the purchase of land for homes, farms, industry, and commerce.

Some hypothetical situations will illustrate that title searches of the chain of record title for long periods of time backward give no real assurance that a land title is clear of *record* defects, not to mention the extra-record hazards previously set out.

For instance, assume the title to a specific piece of land is being searched at the current date, 1965. Assume that the title attorney, in order to ascertain the status of the title, searches back through the grantor-grantee index books to determine the names of all persons who have owned the land for the past forty years so that he can establish the "chain of title." The title examiner will then check all grants by way of deeds, mortgages, and deeds of trust during the time that each owner in the chain of title held the land, plus all recorded judgment liens, mechanics' and materialmen's liens, tax and old-age assistance liens, assessments, the lunacy dockets, and the lis pendens dockets for the period for which the title search is made. If during the period for which he checks the land title the lawyer finds no apparent defects in conveyances, acknowledgments, contracts for the sale of land, deeds, mortgages, liens or assessments, he will certify good "record title."

But the title-searching attorney is in difficulty if he makes only a forty-year search of record in 1965 in the event of the existence of any of the following interests under the following circumstances:

[12] A *quaere* sent to a number of North Carolina title lawyers indicates an extreme uneasiness on the part of these lawyers generally in the appraisal of the length of record title sufficient to show a marketable, insurable or acceptable title. One correspondent indicated that in a particular title search he was still uneasy after searching back for one hundred years.

A. Ancient Contingent Remainders

Assume: In 1915 *O* devised the land to *X* for life with a re-remainder to *X*'s children under *O*'s will which was duly probated. Subsequent to 1915, *X* purported by a deed of conveyance to convey the land to *A* in fee simple in 1920. *A* purported to convey the land to *B* in fee simple in 1925; *B* purported to convey the land to *C* in fee simple in 1935; *C* purported to convey to *D* in 1945. In 1965, *D* wants to convey a fee simple to attorney's client.

If *X*, the life tenant, is still living, which is not improbable at all, a forty-year title search of the records will not disclose that *D* not only does not have a marketable title, but that he does not have any title at all! Nor will the statute of limitations aid the title-searching attorney or his client to create title or rectify the defective title. The adverse possession statute of limitations does not begin to run against remaindermen and reversioners until the death of the life tenant.[13]

B. Ancient Easements

Assume: In 1915 *O* created an easement by reservation in a tract of land which he conveyed to *X* in fee, such reservation of easement being duly recorded in 1915. *X* and subsequent holders of the land have conveyed the land several times without reference to the 1915 reservation of easement. The current fee holder wants to convey a fee simple title to attorney's client.

In the foregoing situation, a title search of forty years would not necessarily disclose an existing servitude on the land. If the easement has not been abandoned in fact or unless barred by prescription,[14] the easement will continue to constitute an encumbrance on the land, a "duly recorded" easement from 1915, and thus a

[13] Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952); Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950); Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919); Norcum v. Savage, 140 N.C. 472, 53 S.E. 289 (1906); Smith v. Proctor, 139 N.C. 314, 51 S.E. 889 (1905); Huneycutt v. Brooks, 116 N.C. 788, 21 S.E. 558 (1895). See generally SIMES & SMITH, FUTURE INTERESTS § 1962 (2d ed. 1956); BASYE, CLEARING LAND TITLES § 55 (1953).

[14] It must be remembered, however, that mere non-user of an easement by itself does not terminate an easement acquired under a written instrument. Nor does the fact that the servient owner uses the land render his user adverse to the easement holder. There must be an active interference with the easement holder's use of the easement for the prescriptive period. See II AMERICAN LAW OF PROPERTY, § 8.102 (Casner ed. 1952); TIFFANY, REAL PROPERTY §§ 560-61 (abr. ed. 1940).

part of the "record title" although not discoverable upon a reasonable search of the title to the land for a forty-year period.

C. *Ancient Possibilities of Reverter and Rights of Entry*

> Assume: In 1865 a possibility of reverter or right of entry for condition broken was created in a deed duly recorded at the date of its execution which provided that the determinable fee or fee simple on a condition subsequent would terminate or be terminable upon the happening of some event in the future. Successive transfers of the land have been made since the possibility of reverter or right of entry were created without reference to the terminating limitations or forefeiting conditions. The current holder of the land wants to convey a fee simple title to attorney's client.

The ancient future interests known as possibilities of reverter and rights of entry may subsist for hundreds of years under current law once they are placed on the land title records because the Rule Against Perpetuities does not apply to them.[15] Once created and placed on the land title records they become a part of the "record title" which can endure for hundreds of years.[16] If after their creation there are subsequent mesne conveyances which omit the forfeiture or fee-terminating limitations or conditions, a title searcher making even more than a routine title search for a certain number of years backward never has any way of knowing whether he has stopped "just short" of the link of title that would disclose the deed containing a serious limitation or condition. A subsequent breach of the condition by a purchaser, however innocently, *could* result in the forfeiture of his estate. In addition, the title lawyer who certifies title to his client (the purchaser) is never sure that succeeding title lawyers will not discover such condition or limitation by going backward one further link, perhaps, and inform successive prospective purchasers that there is no marketable title because of the existence of the recorded ancient limitation or condition.

D. *Ancient Mineral Rights*

If land ownership is divided horizontally by a reservation or grant of mineral rights in the land, serving the mineral estate from

[15] SIMES & SMITH, FUTURE INTERESTS, §§ 1238-39 (2d ed. 1956).
[16] Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807, 815-16 (1964).

the surface estate, the minerals become a separate estate of inheritance.[17] Thus a serious title-searching problem arises:

> Assume: *O*, in 1915, by recorded deed conveyed to *X* the mineral rights in a certain tract of land, and *X* and his successors have since that time granted the land by fee simple deeds without reference to the mineral deed. The current holder of the land wants to convey a fee simple title to attorney's client.

Where land has been divided into surface and subsurface layers of ownership in the distant past, it is obvious that this fact may not be discovered on a routine search of title to the land. Once the severance is made and duly recorded the existence of the mineral rights in the land becomes a matter of perpetual record. They are similar to possibilities of reverter and rights of entry with respect to potential title-searching problems which they can cause. Even if the outstanding mineral rights are discovered and even though initially acquired only for speculative purposes, they can constitute an effective clog on the marketability of the lands even after they have become worthless.[18] The adverse possession statutes offer little assistance in clearing land titles of old mineral deeds wherein the ownership has been divided into surface and subsurface layers. Once ownership of the minerals becomes separated from that of the surface, mere subsequent possession by the surface owner will not ripen into title to the mineral rights by adverse possession no matter how long maintained.[19]

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[17] TIFFANY, THE LAW OF REAL PROPERTY, § 585 (3d ed. 1939).

[18] While North Carolina is not generally considered a mining state, a number of title lawyers, in response to a questionnaire submitted to them, answered that old mineral rights deeds cause a good deal of trouble in certain widely dispersed areas of the state.

[19] Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943); Vance v. Pritchard, 213 N.C. 552, 197 S.E. 182 (1938); Hoilman v. Johnson, 164 N.C. 268, 80 S.E. 249 (1913); TIFFANY, THE LAW OF REAL PROPERTY, § 1158 (3d ed. 1939). See, however, N.C. GEN. STAT. § 1-42 (1953) which provides (where there has been at some previous time a separation between the surface and subsurface rights) that a possessor of the surface of the land may acquire title to the subsurface by adverse possession under limited circumstances if he files a notice in the office of the register of deeds (1) describing the property involved, (2) showing his intention to acquire the mineral rights by a statement of the intended use of the land, (3) setting forth the name and address of the claimant, (4) the date of commencement of such use and (5) the deed or other instrument under which such claim is made. While this statute could be revised in such a way as to be helpful in extinguishing existing mineral rights where there has been a prior separation of the surface and subsurface ownership and can provide record evidence of a re-merger of the surface and subsurface titles, it would seem

E. Miscellany—Ancient Options, Contracts, Defects in Execution and Recordation; Ancient Equitable Servitudes

A myriad of other interests of record, recorded at some relatively remote time may continue to be viable even though undiscoverable by a search of recent records. Such interests may arise under old options and contracts to purchase or repurchase or may simply be a technical interest reposing in the heirs of a former owner as is the case where there has been a negligent omission of a seal on a deed.[20] Or the chain of title as recorded may disclose a defective acknowledgment or probate. A defective acknowledgment or probate results in a defective recordation and will negate the record title's efficacy as constructive notice to other purchasers for value and creditors of the grantor whose instrument has been defectively acknowledged or probated.[21] Or an ancient equitable servitude in the form of a restrictive covenant may have been placed on land in a deed which was recorded at some remote time in the past.[22]

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to be of little value under current law to assist title searchers because there is no requirement for indexing under the names of grantors and grantees sufficient to make it practically discoverable under ordinary existing procedures of title search since North Carolina does not employ the tract-indexing system. [*Since this writing,* § 1-42 *has been amended.* N.C. GEN. STAT. § 1-42 (Advance Leg. Serv. 1965). *The 1965 General Assembly also adopted* § N.C. GEN. STAT. § 1-42.1 (Advance Leg. Serv. 1965), *which provides for extinguishment of ancient mineral claims.* Ed.]

[20] Strain v. Fitzgerald, 128 N.C. 396, 38 S.E. 929 (1901).

[21] The registration of an improperly acknowledged or defectively probated deed does not import constructive notice and the deed will be treated as unregistered. See, *e.g.,* New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963); Allen v. Burch, 142 N.C. 524, 55 S.E. 354 (1906).

[22] While rights arising under options, contracts to purchase, defective execution of instruments, improper recordation arising from faulty acknowledgments and probate, or under ancient equitable servitudes may eventuate in the vindication of a title via operation of statutes of limitation, estoppel, waiver, substantial compliance, or changed circumstances, the fact is that these defects often appear *of record.* If they are undiscovered by a prior title-searching attorney, the prior attorney will be found to have certified a title that is unmarketable in fact until the claims arising from the defects or omissions are unequivocally cleared. Lawsuits declaring the termination or nonexistence of the interests will be required, or it will be necessary to procure deeds of release from all those ascertained or thought to have interests. Usually, after passage of several years, a very large number of persons must be located, served with process, or brought into negotiations. For fear of what the *next* title searcher will discover, title lawyers are under strong pressures to find *all* record title deficiencies each time a title is searched. Paradoxically, minor impediments to marketability which might otherwise be forgotten and pass out of existence are accentuated and con-

The point of all these hypothetical situations is to jolt any lethargical thinking by title lawyers that "it can't happen to me" by illustrating that any one or more of these events and interests *could* exist in almost any title searched. After going back for a specified predetermined period of time for his title search the title lawyer speculates that "just over the horizon," just behind the last link in his chain of title, there will be no recorded possibility of reverter, right of entry for condition broken, remainder, reversion, power of termination, easement, option to purchase or repurchase, equitable servitude, notarial or probate error not erased by adverse possession. If any one of these interests exists, it can cause the lawyer's client to lose the land, result in a diminution of its value, or at best cost his client the price of a quitclaim deed or a difficult-to-explain lawsuit. Even if the defects or interests prove to be only nominal, the wheels of progress in the closing of transactions and the development of land are slowed and sometimes stopped altogether while releases are being sought and lawsuits brought for the erasure of such interests.

II. Need For Legislation

To protect lawyers and to make their title searches simpler and shorter and at the same time more secure, legislation is needed in the state of North Carolina which will make possible a complete and accurate appraisal of the record titles of real estate by an examination of only the most recent history of the recorded titles.

Antiquated claims of interests in real property, such as possibilities of reverter, rights of entry for condition broken, and other non-possessory interests such as reversions, remainders, easements, equitable servitudes, mineral rights, rights under options and contracts for the sale and purchase of land, and claims arising out of ancient clerical omissions and execution defects (such as the omission of a seal on a deed), should not be allowed to clog perpetually the marketability of land. There should be some way to bar absolutely or to extinguish all such claims and interests which have an

verted into serious impediments by increased diligence on the part of title-searching attorneys. Many interests, ancient and forgotten by everyone until discovered by some thorough attorney, may not ever become extinguished so as to render the land marketable except by payment of exorbitant prices in the form of legally sanctioned blackmail. See Webster, *The Quest For Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. Rev. 807, 822 (1964).

origin before some specified period of time prior to the time of the title examination. So long as such interests as possibilities of reverter and rights of entry for condition broken exist, no title searcher is ever completely safe until he has made a title search back to the sovereign.[23] Some method is needed whereby ancient claims and interests, however they may come into being, may be cleansed from the record books periodically to facilitate the quest for clear land titles and to promote the marketability of land in the event that certain easy steps are not taken by their owners to preserve them and keep them alive.

To solve the type problems that are set out above, in the past twenty-odd years there have evolved comprehensive statutes in a number of states[24] called "marketable title statutes" which have as their purpose the expediting and simplification of land transactions. The purpose of this article from this point will be to make some general observations and analyses with regard to marketable title statutes, their concept, and their potential for alleviating the existing

[23] Since the Rule Against Perpetuities does not apply to limit the duration of these interests, they may restrict land to uneconomic uses for hundreds of years. For a 159-year-old example, consider the classic case of a particular lot located in the heart of the Beacon Hill district on Mt. Vernon Street in Boston, Massachusetts. In a conveyance of the lot in 1806, a condition was set out that no building higher than thirteen feet could be built on the lot. The condition is still in force and at 50-56 Mt. Vernon Street, in the burgeoning metropolis that is Boston, there is still only a thirteen-foot house. See Jefferies v. Jefferies, 117 Mass. 184 (1874). It has been speculated that the purpose for the imposition of this restrictive condition was to enable the owner of a building on the opposite side of the street to keep her cattle in view as they grazed on the Boston Common. LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 58 n.24 (1961) [hereinafter cited as LEACH & LOGAN]; Leach, *Perpetuities In Real Estate: Let's Get The Rule On The Rails*, A.B.A. Sec. of Real Property, Prob. & Trust Law 20, 21 (1960). Ancient easements and mineral rights may be equally encumbering. The same situations could all exist in North Carolina today.

[24] Thirteen states now have marketable title statutes. BASYE, CLEARING LAND TITLES, §§ 172-184 (Supp. 1964). The states, in order of their adoption of the statutes are: Iowa, 1919, IOWA CODE ANN. §§ 614.17-.20 (Supp. 1962); Illinois, 1941, ILL. REV. STAT. ch. 83, §§ 12.1-.4 (Smith-Hurd, Supp. 1962); Indiana, 1941 (1941 act repealed in 1963. New act adopted in 1963), see BURNS IND. STAT. ANN. §§ 56-1101 to -1110 (Supp. 1964); Wisconsin, 1941, WIS. STAT. ANN. § 330.15 (1958); Minnesota, 1943, MINN. STAT. ANN. § 541.023 (Supp. 1962); Michigan, 1945, MICH. STAT. ANN. §§ 26-1271 to -1279 (1953); South Dakota, 1947, S.D. CODE §§ 51.16B01.-16B14 (Supp. 1960); Nebraska, 1947, NEB. REV. STAT. §§ 76-288 to -298 (1958); North Dakota, 1951, N.D. CENT. CODE §§ 47-19A-01 to -11 (1960); Ohio, 1961, OHIO REV. CODE §§ 5301.47-.56 (Supp. 1960); Oklahoma, 1961, OKLA. STAT. ANN. §§ 71-81 (Supp. 1964); Florida, 1963, FLA. STAT. ANN. §§ 712.01-.10 (Supp. 1963); Utah, 1963, UTAH CODE ANN. §§ 57-9-1 to -10 (1953).

problems in real estate conveyancing which have been previously considered. Finally, a proposed statute for North Carolina will be set out with specific comments on the purposes of its various sections.

III. General Concept of Marketable Title Legislation

The concept of the various types of marketable title legislation adopted by the several states referred to above is not complicated.

The acts in the main are based on the proposition that if a person has a clear chain of record title which goes back for a specified number of years,[25] and no one has filed a notice of a claim or interest in the land during a specified period, then it is the purpose of the acts that all conflicting and inconsistent claims or interests based upon any title transaction prior to the terminal date of such specified period shall be automatically extinguished. This purpose is sought to be accomplished by combining the collective sanctions of "curative acts," "the recording acts," and "statutes of limitations" all into one act.[26]

Many defects in marketability of land arise as a result of defects in the execution of deeds of conveyance, such as omissions of seals,[27] spouses' signatures,[28] required procedures for conveyances

[25] Basye, *Trends And Progress—The Marketable Title Acts,* 47 Iowa L. Rev. 261, 267 (1962): "When one person has a clear record title to land for a designated period (periods in the acts vary from twenty to fifty years), inconsistent claims or interests which arose before that period are extinguished unless the adverse claimant seasonably records a notice of his claim or interest."

[26] See the excellent case of Wichelman v. Messner, 250 Minn. 88, 106-07, 83 N.W.2d 800, 816 (1957) which states:

> The Marketable Title Act is a comprehensive plan for reform in conveyancing procedures and encompasses within its provisions the collective sanction of (a) a curative act, (b) a recording act, and (c) a statute of limitations. It is a curative act in that it may operate to correct certain defects which have arisen in the execution of instruments in the chain of title. It is a recording act in that it requires notice to be given to the public of the existence of conditions and restrictions, which may be vested or contingent, growing out of ancient records which fetter the marketability of title . . . . It is as well a statute of limitations in that the filing of a notice is a prerequisite to preserve a right of action to enforce any right, claim, or interest in real estate founded upon any instrument, event, or transaction which was executed or occurred more than 40 years prior to the commencement of the action, whether such claim or interest is mature or immature and whether it is vested or contingent.

[27] "A paper in form a deed is not a deed without a seal." Strain v. Fitzgerald, 128 N.C. 396, 398, 38 S.E. 929 (1901).

[28] See note 8 *supra.*

between spouses,[29] or other negligent omissions. While these defects in most cases are merely technical and are readily rectifiable if discovered promptly, they often loom larger and become serious problems with the passage of time because of the mobility of grantors or their subsequent disability, or as a result of the grantors' deaths leaving strangers to the defective transactions on the scene to be dealt with. The "curative" aspect of marketable title acts render ancient technical imperfections of no importance and erase them after passage of a specified period of time.

Other problems of marketability arise because of the existing theories of land-recordation acts. The land-recordation acts are too all-inclusive in reaching too far backward. Once interests in land are put on record, including not only fee simple ownership but also the vast array of non-possessory future interests, easements, mineral rights, equitable servitudes, leases, mortgages, and interests arising from defective execution and probate, they are preserved there in the records forever, and the interests of good faith transferees of the land are thereafter subordinated to ancient claims which might otherwise be forgotten. In other words, once an interest is placed on the books in the register's office, there is no existing method to cleanse the records periodically of the barnacles of antiquated interests, however obsolete. When the recordation statutes, which serve to preserve claims of interest for eternity once recorded, are combined with substantive real property rules that allow certain non-possessory interests to hang suspended for generations,[30] the burdens cast on the title searcher to locate such interests become increasingly impractical with the passage of time and with each transfer of the land. And if a title searcher is fortunate (or unfortunate?) enough to discover a seventy-five-year-old possibility of reverter, right of entry or easement, how is he to clear the land title if employed to do so by a prospective seller or purchaser? A

[29] See note 8 *supra*. N.C. GEN. STAT. § 52-6 (Supp. 1965), which was formerly N.C. GEN. STAT. § 52-12 (Supp. 1963), specifies that no conveyance by a married woman to her husband shall be valid unless the wife is privately examined by a justice of the Supreme Court, a judge of the superior court, a clerk, assistant clerk or deputy clerk, justice of the peace or magistrate and unless such officer certifies that the transaction is not unreasonable or injurious to the wife. See Walston v. Atlantic Christian College, 258 N.C. 130, 128 S.E.2d 134 (1962).

[30] *E.g.*, possibilities of reverter and rights of entry for condition broken which are not subject to the Rule Against Perpetuities. See Webster, *The Quest For Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807, 815 (1964).

lawsuit to quiet title will probably serve only to prove the continued existence of such outstanding interest, assuming the difficulties of service of process for bringing the suit and binding all parties of interest can be overcome. Nor will negotiations for purchase of such nominal interests be any easier because of the likelihood of the fractionization of such ancient interests by descent over the years and the necessity for dealing with numerous heirs. The haunting question of whether the interests of *all* persons have been pre-empted always arises.

The recordation acts need to be revitalized by a provision that will cleanse record titles of ancient interests unless claims to preserve such interests are re-recorded periodically.[31] Without such cleansing, a title searcher cannot ever be sure that there is not an outstanding anciently recorded interest unless he searches the whole title to the land involved throughout its entire recorded history. The marketable title acts seek to incorporate the concept behind all recordation statutes in requiring periodic re-recordation of certain interests in land that otherwise would not be discoverable on a reasonable search backward in the land-title books. If not re-recorded within a certain time as specified in the statutes a previous recordation of such interests gives no notice to purchasers for value or lien creditors who can take free of such claims.

In addition, the marketable title statutes serve as a form of statute of limitations when they prescribe that the filing of a notice to preserve a claim within specified time limits is a prerequisite to the continued existence of rights, claims of interests in real estate founded upon instruments, and events or transactions which were executed or which occurred more than a specified number of years prior to a title search. Whether just or unjust, whether mature or immature, vested or contingent, and even though previously recorded in the land-title record books, non-possessory interests in land will be made to pass out of existence after expiration of the specified period of time unless re-recorded as provided in the statutes. With these concepts in mind, a proposed marketable title statute, with comments, is set out below for consideration by members of

[31] In a 1956 report the Judicial Council of Massachusetts observed: "Today, after 300 years the need of re-recording of evidence to bring the document within the reach of a reasonable period of search is like the original need of recording." REPORT OF JUDICIAL COUNCIL OF MASSACHUSETTS, IMPROVING OUR LAND TITLE RECORDING SYSTEM 20, 22 (32d Rep. 1956).

the North Carolina bar and by the General Assembly of North Carolina.[32]

IV. Proposed Marketable Title Act for the State of North Carolina

Section 1. *Declaration of Policy and Statement of Purpose.*— It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina:

(a) That land is the basic resource of the people of the State of North Carolina and that land should be made freely alienable and marketable so far as is practicable;
(b) That anciently created non-possessory interests in land, obsolete restrictions and technical defects in titles which have been placed on the land-title records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of land;
(c) That such interests and defects are prolific producers of suits to clear and quiet titles which necessitate delays in land transactions and fetter the marketability of real estate;
(d) That land transfers should be accomplishable with economy and expediency and that the status and security of recorded land titles should be determinable from an examination of recent records only.

Now, therefore, it is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to land under a chain of record title for thirty years, and no one else has filed a notice of his claim of interest in the land during the thirty-year period, then all conflicting claims based upon any title transaction prior to the thirty-year period shall be deemed extinguished.

While the statement of policy and purpose is not absolutely necessary to a marketable title statute, it is suggested for inclusion for what is conceived to be a salutary function. The statement of policy and purpose can reflect and announce the legislature's appraisal of the existing problems and its attempt to exercise its police power in a reasonable way for the public good.[33] If needed, the

[32] This proposed act is taken largely from the Michigan Marketable Title Act and the Model Marketable Title Act published in Simes & Taylor, The Improvement of Conveyancing by Legislation 341 (1960) [hereinafter cited as Simes & Taylor]. The late Professor Ralph W. Aigler of the University of Michigan was the chief architect and draftsman of Michigan's Marketable Title Act.

[33] See Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957):

These statutes reflect the appraisal of state legislatures of the "ac-

statement of policy and purpose can bolster judicial opinions that the legislative action taken is constitutional.[34]

A. Marketable Title Defined

Section 2. Marketable record title to interest in land; thirty-year unbroken chain of title of record; effect of hostile possession by another.—Any person having the legal capacity to own land in this state, who, alone or together with his predecessors in title, has been vested with any estate in land of record for thirty years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth in section 3. A person shall have a marketable title when the public records disclose a title transaction affecting the title to the land which has been of record for not less than thirty years purporting to create such estate either in:

The person claiming such estate; or

Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate, with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

The first mission of a marketable title statute is to make land titles more marketable. As a by-product, title lawyers should be freed from all reasonable doubts that land titles which they have searched are clear of interests which may unnecessarily clog the free alienability of land.[35] The second section of the proposed

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tual economic significance of these interests, weighed against the inconvenience and expense caused by their continued existence for unlimited periods of time without regard to altered circumstances." Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 492, 130 N.E.2d 111, 115 (1955); see 43 Ill. L. Rev. 90 (1948). 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.

Compare Leach & Logan 75 n.45.

[34] That the police power extends not only to regulations designed to promote the public health, public morals, and public safety, but also to those regulations designed to promote the public convenience or the general prosperity, see Town of Wake Forest v. Medlin, 199 N.C. 83, 154 S.E. 29 (1930); Atlantic Coast Line R.R. v. Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), *aff'd* 232 U.S. 548 (1914).

[35] Preparatory to writing this article a copy for a questionnaire prepared for the Committee on Research Projects for the Improvement of Conveyancing, Section of Real Property, Probate and Trust Law, American Bar Association, entitled "Survey of Hazards in Conveyancing Practice" was procured from Professor Paul E. Bayse, chairman of that committee and circulated to a large number of lawyers engaged to a substantial extent in land title practice in North Carolina. Seventy-five per cent of the title

statute, therefore, sets out in affirmative fashion what will constitute a marketable title in North Carolina. This section can limit the scope of "reasonable doubt" as to whether a title is marketable or not.[36] Under the existing recordation system and current practices it is not safe for a title lawyer to ignore *any* defect in title, even if it is insubstantial and not likely to be successfully sustained in court. A title lawyer has good reason to have a cautious fear that some other lawyer will raise the question of the defect and refuse to allow his client, a potential subsequent purchaser or lender, to buy or lend on the real property until every defect has been removed and corrected. There needs to be a positive definition of marketable title so as to reduce defects inherent and perpetuated in the currently existing recording system. At the same time the definition of marketability can standardize the criteria for determining whether a title is clear enough to lend money on or to buy.[37] While prudent caution and meticulousness can never be dispensed with in title practice, their necessity can be confined to the more serious and more recent defects by adequately defining what constitutes marketable title.

If the statute is enacted, a lawyer will need only search the title of a grantor and his predecessors backward for the specified period of time (thirty years). If he finds no defects, no "out" conveyances,

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lawyers who answered the questionnaire indicated that the most serious inadequacy of North Carolina's title security and title assurance methods is that owners have difficulty in selling and encumbering real property, *the title of which is sound but which is defective or imperfect of record.* For the results of this questionnaire which was sent to lawyers engaged in conveyancing practice in six states other than North Carolina, see SIMES & TAYLOR 402-405.

[36] See Aigler, *Marketable Title Acts,* 13 U. MIAMI L. REV. 47, 50 (1958) in which the principal author of Michigan's pioneering marketable title act states:

> [P]rudent examiners base their opinion and advice not upon what they feel sure would be a judgment of a court, but upon what they fear might be the advice of a later captious and capricious lawyer. In other words, the yardstick according to which the title examiner tests the title in question is not the judgment of a presumably reasonable and intelligent court, but the caprice of a later unreasonable examiner, thus making fly speckers of all of us! This accentuates the cumbersome qualities of our title system and also adds to the delays and expense.

[37] In the questionnaire sent to North Carolina title lawyers (see note 35 *supra*), 70% of the lawyers who answered stated that they regard the burden of appraising the length of record title necessary to show a marketable, insurable, or acceptable title and the lack of a uniform or generally accepted notion as to the standards of acceptable titles to be major deficiencies in the conveyancing and title system of North Carolina.

liens, encumbrances or outstanding interests which appear in the records for that period of time, the lawyer in most instances can be assured that questions concerning outstanding pre-existing interests or defects in the execution of instruments will never be raised by even the most timid subsequent title searcher.[38] The statute can effectively reduce the array of potential claims and interests that can exist after the expiration of the specified period from the time of their creation.[39] Not only will the search of land titles be expedited, but more secure titles will be obtained by the purchasing and lending public. An economy of time and risk for the lawyer can be realized with a concurrent improvement of the job done.

B. Exemptions From Act

A section setting forth exemptions from the act, situations in which interests in land are not extinguished, is provided in the act:

> Section 3. *Exemptions.*—Such marketable record title shall not affect or extinguish the following rights:
>
> (a) Estates or interests, easement and use restrictions disclosed by and defects inherent in the muniments of title of which such thirty-year chain of record title is formed, *provided, however,* that a general reference in any of such muniments to easements, use restrictions or other interests created prior to such thirty-year period shall not be sufficient to preserve them unless specific identification by reference to book and page of record be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests.
> (b) Estates or interests preserved by the filing of a proper notice in accordance with the provisions of sections 4 and 5 herein.
> (c) Rights of any person who is in present, actual and open possession of the lands so long as such person is in such possession.
> (d) Rights of any person who likewise has a marketable title as defined in section 2 hereinabove and who is listed as the owner of such lands on the tax books of the county in which the lands are located at the time that marketability is to be established.

[38] At least all title searchers, including "fly speckers," will be operating under the same standardized ground rules.

[39] A caveat should be noted, however. State legislation cannot limit the property rights of the United States Government. Therefore it will continue to be necessary to check back more than the prescribed period to discover ancient limited United States Government interests of record. Some federal legislation is also needed.

(e) Rights of any person who has an easement or interest in the nature of an easement the existence of which is clearly observable by physical evidences of its use.
(f) Rights, titles or interests of the United States.

One of the most critical sections of the proposed marketable title statute is the "exemptions" section. If too many exemptions are put into the statute, effective accomplishment of the purposes of the act may be curtailed. The number of exceptions from application of the act must be kept to a bare minimum if reasonably short land-title searches are to be made practicable and if land titles are to be stabilized. The proposed statute follows this principle.

Subsection (a) of the exemption section is not really an exemption or exception. It merely states that estates, interests, easements or restrictions which appear within the instruments located upon a search of title for thirty years shall not be affected or extinguished by reason of the act. In addition, since it will be rare indeed that a title search backward for the prescribed period can terminate at a transaction which occurred exactly thirty years prior to the title search, the title searcher will be compelled to go backward to the transaction next preceding the thirty-year period. In such event if a muniment of title, necessarily discovered to complete the chain of title for such thirty-year period, discloses an estate, interest, easement, or restriction, it shall not be affected or extinguished.[40] A proviso is added to eliminate uncertainties which may be caused by general references to prior instruments by muniments in the chain of title discoverable on a search for the prescribed period. The proviso requires specific identification by book and page number of the "recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests."

Subsection (b) of the exemptions section simply excepts from

[40] *E.g.*, suppose a deed recorded in 1920 would show that *A* conveyed land to *B* in fee simple "so long as the land is used for residential purposes only." A possibility of reverter was created in *A* and appears of record. If no instrument affecting the title has been subsequently recorded and in 1965 *B* wishes to sell the land, the title of *B* can only be determined by a forty-five-year title search to the next preceding title transaction which is required to make out a chain of title for at least thirty years. *A*'s possibility of reverter is an "interest inherent in the muniments of title of which such thirty-year chain of title is formed" and would not be affected or extinguished. Any interest found in a muniment of title necessarily discovered in making out the thirty-year chain of title will not be affected or extinguished by the act. See SIMES & TAYLOR 12.

extinguishment estates or interests in land that are re-recorded pursuant to section 4 of the proposed statute.[41]

Subsection (c) of the exemptions section of the proposed statute is designed to assure that the rights of persons in actual possession of land shall not be affected or extinguished by a declaration of a marketable record title in another. It will be applicable in the following types of situations:

1. Adverse Possession Situation.—Where one has obtained title to land by adverse possession and is in "present, actual and open possession" of the land, whether his title has matured before or after the maturing of the marketable record title, his title by adverse possession shall not be extinguished. So long as one is in present, actual and open possession of the land, his rights in the land, whatever they are, will not be extinguished by reason of the other provisions of the proposed act.[42] If an adverse possessor's title has matured, but subsequent to its maturity the adverse possessor shall have left possession of the land and is not in possession of the land at the time marketability is to be established, then such title by adverse possession will be wiped out just like any other title which arises from a "title transaction" which shall have occurred more than thirty years prior to the date when marketability is sought to be established.[43]

2. "Wild Deed" Situation.—In the rare instances where there are two independent chains of title, resulting from the existence of a "wild deed," there can be *two* marketable record titles at one time unless some exception is imposed.[44] A hypothetical example will illustrate this:

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[41] If a proper notice is filed to preserve any estate or interest in land in the same manner as deeds are recorded, it shall have the effect of preserving such estate or interest for a period of not longer than thirty years.

[42] This exemption should apply equally to the rights of a tenant under a short term unrecorded lease who is in possession of the land. (In North Carolina leases for three years or less are valid although oral and need not be recorded as against purchasers for value or lien creditors under the recordation statutes.) Leases which run for more than three years from the time of the making thereof must be in writing to be valid in North Carolina. Leases for more than three years must likewise be duly recorded to effect priority over purchasers for value and lien creditors. N.C. GEN. STAT. §§ 22-2, 47-18; Mauney v. Norvell, 179 N.C. 628, 103 S.E. 372 (1920).

[43] See definition of "title transaction" on page 121 *infra.*

[44] There could in fact be *several* marketable record titles if there were several independent chains!

> Assume: *O* (owner) deeded land to *A* in 1915, which deed was duly recorded in 1915. *A* took possession and remains in possession of the land in 1965. Suppose that in 1925, by a totally "wild deed" having no connection with title to the land, *X* purported to convey the same land to *Y*, which deed from *X* to *Y* was duly recorded in 1925.

A will have muniments of title of record going back for fifty years. He would therefore have a marketable record title under the second sentence of section 2 of the proposed act. *Y* will likewise have muniments of record title which date back forty years and will also have a marketable record title under the second sentence of section 2 of the proposed act unless some exception is made. Thus, under the conventional "grantor-grantee" type indexing and recordation system the paths of title searchers checking the marketability of the respective record titles offered by *A* and *Y*, which are completely independent, would not cross—neither would be able to locate the other chain of title from the indexes through an orthodox title search.[45] To obviate this problem subsection 3 of the exemptive provision preserves from extinction the rights of the holder of the marketable record title who is in possession of the land as against a holder of an otherwise marketable record title (as defined in section 2) under a "wild deed" who is not in possession.

It should be noted that in the foregoing instance the fact of possession at the time marketability is to be established will be significant. This is the one place in the proposed statute which requires that matters extrinsic to the public records be considered. Before a lawyer can certify a land title to be marketable in fact with

[45] The solution of this and other problems has been suggested by the introduction of tract indexing. Indexes relating land transaction instruments to particular tracts of land rather than to grantors and grantees are being advocated by some legal scholars. See, *e.g.*, Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 253 (1952); Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 787 (1957); Cook & Lomberdi, *American Land Law Reform: Modernization of Recording Statutes*, 13 W. RES. L. REV. 639 (1962). If a system of tract indexing were in force every transaction, however "wild," relating to a particular tract or lot of land would appear on the index to that particular tract of land, usually on one page. With modern aerial photographic methods and mapping techniques, many of which are already employed by land use planning and taxing authorities, perhaps serious consideration should be given to introduction of the tract-indexing system, at least for the purpose of accompanying the present grantor-grantee system. The proposed marketable title statute, however, is designed to be effective even without any reformation of the recording system to the tract-indexing system.

complete safety, to pre-empt the possibility of the existence of a "wild marketable record title" he will have to make inquiry as to the status of possession of the land. If one is in possession other than the person offering to sell or convey the land, his rights, if any, must be examined. While the general concept and purpose of the proposed marketable title statute is to give emphasis to "record" title, in this one instance inquiry into the present, actual and open possession of the land is necessary. This requirement will not materially diminish the utility of the proposed legislation. One who has a marketable record title to land for thirty years with nothing appearing of record purporting to divest him of his title will continue to have a marketable record title in fact, even with the presence of subsection (c) of the exemptions section of the statute, unless two relatively rare coincidences occur: (1) there must be another claimant under an independent chain of title, and (2) such other claimant under the "wild record chain of title" must be in possession of the land at the time that its marketability is to be determined. Requiring inquiry into possession to protect against the possibility of these rare circumstances which may affect marketability does not seem unduly inconvenient to title searchers.

Subsection (d) of the exemptions section is also designed to apply to the theoretically worrisome, though rarely occurring, problem of the "wild deed." This particular provision is designed to protect from extinguishment the interests of an owner of a marketable record title from a "late squatting possessor"[46] who, by reason of a "wild deed," also has a marketable record title under section 2 of the proposed statute which defines marketable record title only in terms of a record chain of title. Section 2 of the proposed statute alone does not require one to have possession to have marketable record title. A hypothetical situation will demonstrate the possible need for an exemptive provision such as the proposed subsection (d):

> Assume that *O* (owner) deeded lands to *A* in 1915, which deed was duly recorded in 1915. *A* took possession of the lands and remained there for fifty years to 1965. In 1965, *A* left possession of the lands and they are now vacant. Assume that in 1925, by a "wild deed" having no connection with the true title of the land *X* purported to convey the lands to *Y* by a deed which was duly

[46] The description "late squatting possessor" was invented by Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems,* 18 U. MIAMI L. REV. 103, 118 (1963).

recorded in 1925. When *A* left possession of the lands in 1965, *Y* went into possession and is now in possession.

Again, unless there is some provision such as subsection (d) of the exemptions section, both *A* and *Y* would have marketable record titles under section 2 of the proposed statute. Subsection (d) is designed to protect the holder of a good marketable title who leaves actual possession of his land temporarily. It prevents the extinguishment of a good marketable record title by a "late squatting possessor" under a "wild marketable record title" who may ease into possession when the true owner leaves the land vacant. If the true owner of land having marketable record title is listed as owner on the tax assessment books in the county where the land lies for tax purposes, a possessor of the land under a "wild" chain of title cannot give a marketable record title to the land. The result is that attorneys checking titles will be put on guard that a title may not be completely marketable even though the prospective seller or borrower is in possession of the land if the land is listed for taxation by some other person at the time that marketability is to be determined.[47]

Subsection (d) of the exemptions section preserves from operation of the title-extinguishing features of the statute easements and interests in the nature of easements if they are clearly observable by physical evidences of their use. The purpose of this provision is to prevent the extinguishment of interests, many of which may not be recordable but the existence of which are clearly discernible by observation. Easements actually being used—such as those created by deed, dedication, prescription, implication, condemnation, or as a result of cartway proceedings—would be excepted from any destruction under the proposed statute under this subsection if visible and apparent from their use. If an easement or interest is not "observable by physical evidences of its use," however, it will pass out of existence if not re-recorded as provided by the statute. This exception is placed in the statute because it is felt that most persons would find undesirable any attempt to extinguish easements or interests such as rights-of-way in actual observable use by ap-

[47] The necessity imposed for searching the tax books to determine the marketability of land titles is not new. See Fulton, *Title Examination In North Carolina,* Part II, 9 BAR NOTES, N.C.B.A. 3, 13 (1958).

plication of the marketable title act. This proposed provision is consciously designed *not* to except easements, rights-of-way, or other servitudes owned by governmental agencies and public utilities as the legislation of some states has done.[48] If too many interests are exempted from its application, the highly useful purpose of the statute to provide a reliable marketable title by a search of recent records only will be frustrated.

Subsection (f) of the exemptions section exempts rights, titles, or interests of the United States from the proposed statute's application since such interests cannot be affected by state legislation, whether expressly exempted or not.[49]

It should be noted, however, that it is the intent of the proposed statute that *state* interests should *not* be exempted from the legislation. If the purpose of the statute to make land more easily marketable is meritorious, then the state, of all persons and legal entities, should not wish to frustrate the purposes and policy of the statute. Exceptions in a marketable title statute are generally un-

[48] See, *e.g.*, Michigan's statute, MICH. STAT. ANN. § 26.1274 (1953) which states: "Nor shall this act be deemed to affect any right, title or interest in land owned by the United States, nor any right, title or interest in any land owned by the State of Michigan, or by any department, commission or political subdivision thereof." Florida's statute, FLA. STAT. ANN. § 712.03(5) (Supp. 1963) provides:

> Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.

Ohio's statute, OHIO REV. CODE § 5301.53 (Supp. 1964), excepts

> (B) . . . any easement or interest in the nature of an easement created or held for any railroad or public utility purpose;
>
> . . . .
>
> (D) . . . any easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is *evidenced* by the location *beneath*, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and *whether or not the existence of such facility is observable.*
>
> (E) . . . any right, title, estate, or interest in and to minerals, and any mining or other rights appurtenant thereto or exerciseable in connection therewith.

(Emphasis added.)

[49] It has been suggested that it may be possible to obtain desirable federal legislation which will subject the United States government interests to state marketable title legislation. See, *e.g.*, Payne, *The Crisis in Conveyancing*, 19 Mo. L. REV. 214, 231 (1954); 47 IOWA L. REV. 389, 395 (1962).

desirable and should be eliminated or at least kept to a minimum if the proposed act is to accomplish its objectives.

C. *Preserving Interests Worth Keeping—Re-recordation*

Section 4. *Interests extinguished by marketable record title unless written notice to preserve claim is filed within thirty-year period; who may file notice to preserve claim.*—Subject to the matters stated in section 3, such marketable record title shall be free and clear of all estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such thirty-year period. All such estates, interests, claims or charges, however denominated, whether such estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void; *provided, however,* that any person claiming any such interest in land may preserve and protect the same from extinguishment by the operation of this act by filing for record within such thirty-year period a notice in writing, duly acknowledged, in the office of the register of deeds for the county in which the land is situated, setting forth the nature of such claim of interest, which notice shall have the effect of preserving such claim of interest for a period of not longer than thirty years after filing the same unless again filed as required herein. No disability or lack of knowledge of any kind on the part of any person shall delay the commencement of or suspend the running of said thirty-year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is

(a) Under a disability;

(b) Unable to assert a claim on his behalf; or

(c) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

Section 4 of the proposed statute contains perhaps the most interesting innovation of the entire proposed act. While marketability and relatively easy and accurate title searches are much to be desired, it is not the intention of the act to legislate out of existence automatically all existing ancient non-possessory interests in real property. Such legislation might not be held constitutional by the

courts.[50] To insure an interpretation by the courts which will prevent the proposed statute from running into constitutional problems, its design is that there shall be no necessity that any interest in real property *must* expire or be destroyed. While substantive ancient future interests and interests derived from defective execution and errors in instruments will be extinguished if they do not appear in the chain of record of title within the specified period of thirty years preceding the title search (when marketability is to be determined), the proposed statute provides for the re-recordation of all such interests in order to preserve them and keep them alive. Those interests which are re-recorded periodically will continue in effect, but by requiring their re-recordation to keep them alive they will always be discoverable upon a reasonably short and routine title search. If they are not re-recorded, they will cease to exist and the land will be freed of their encumbrance. The theory of the re-recordation provision is comparable to the theories of statutes of limitations and recordation statutes generally. If one does not assert his claim or interest within a specified time by re-recording or re-filing such claim within a time which the legislature specifies, the interest can never thereafter be asserted. The proposed statute does not itself arbitrarily wipe out any interest; it affords a means whereby real and substantial interests in realty can be preserved by simply re-filing a notice of any claim of interest in order that every claim of interest of record may be discovered by a title search thirty years backward.[51] If an owner of an interest fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished.[52] The proposed statute, in promoting the public interest that land should be made more freely marketable and that the status of land titles should be more easily ascertainable, seeks to "let the dilatoriness of human nature take its toll"[53] in extinguishing interests not seasonably re-recorded.[54]

[50] Such legislation might be held to be an unconstitutional deprivation of rights under pre-existing contracts or as *ex post facto* on retroactive legislation which deprives or extinguishes owners' vested property interests without due process of law. Compare Biltmore Village v. Rotolante, 71 So. 2d 727 (Fla. 1954). *But see* Trustees of Schools v. Batdorf, 6 Ill. App. 2d 486, 130 N.E.2d 111 (1955).

[51] *Caveat:* ancient interests of the United States. See note 39 *supra.*

[52] Wichelman v. Messner, 250 Minn. 88, 109, 83 N.W.2d 800, 817 (1957).

[53] LEACH & LOGAN 77.

[54] The theory of extinguishing ancient instruments which may hamper real estate transactions is not new. See, *e.g.,* N.C. GEN. STAT. § 45-37(5)

A reading of section 4 of the proposed statute will disclose another unconventional innovation in a limitation-type statute. The proposed statute provides that "no disability or lack of knowledge shall delay the commencement or suspend the running of said 30 year period" within which a notice to preserve a claim of interest must be filed to prevent its extinguishment. This provision is in keeping with the previously stated idea that exceptions should not be permitted in the statute which will emasculate its potential for bringing about clearer titles.[55] While "no disability or lack of knowledge" will toll the running of the period, provision is made in the proposed statute that a notice to preserve an interest may be filed by any person acting on behalf of any claimant who is under disability, unable to assert a claim on his own behalf or who is a member of a class whose identity is uncertain and cannot be established. This proposed bar of the statute, made applicable to disabled persons as well as to persons *sui juris* in the absence of timely re-recordation of outstanding interests, is based on the belief that the desirable effects of quieting titles and making their marketability

(Supp. 1963) which provides that as against purchasers for value and creditors, mortgages, deeds of trust, and other instruments securing the payment of money are conclusively presumed paid after the expiration of fifteen years from the date of maturity of such instrument *unless* the holder of such instrument files an affidavit with the register of deeds or makes a marginal entry on the record in accordance with the statute that payment has not been made. Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957). For examples of other statutes which absolutely bar the enforcement of mortgages and deeds of trust as against *everyone* after the expiration of a specified period of time unless an extension memorandum has been filed to preserve them, see COLO. REV. STAT. §§ 118-5-1 to -2 (1953); FLA. STAT. ANN. §§ 95.28-.29 (1960); GA. CODE ANN. § 67-1308 (1957); ILL. ANN. STAT. ch. 83, § 11(b) (1956); BURNS IND. STAT. ANN. §§ 2-623 to -624 (1946); IOWA CODE ANN. § 614.21 (1950); KAN. STAT. ANN. §§ 58-2332 to -2333 (1964); MASS. LAWS ANN. ch. 260, § 33-35 (Supp. 1964); MICH. STAT. ANN. §§ 26.691-.692 (1953); MINN. STAT. ANN. § 541.03 (1947); NEB. REV. STAT. § 25-202 (1956); S.C. CODE § 45-1 (1962); TENN. CODE ANN. §§ 28-212, -214 (1955); VA. CODE ANN. § 8-11 to -12 (1957).

[55] This is the shortcoming of conventional statutes of limitations. Title searchers cannot rely on the mere passage of time as curative of defects or as extinguishing existing interests because ordinary statutes of limitations do not run against persons under the disabilities of minority, insanity, incarceration or against remaindermen until the death of a life tenant. Likewise, as to such interests as possibilities of reverter and rights of entry for condition broken, an ordinary statute of limitations can never start to run under current law until the event or condition happens which will terminate a pre-existing fee determinable estate or fee simple estate subject to a condition subsequent. RESTATEMENT, PROPERTY § 222, comments *f* & *g* (1936).

more easily ascertainable will far outweigh the occasional losses to persons under legal disability who do not have their claims of interest re-recorded within the specified time.[56] As a matter of fact, it is likely that most of the interests that will be extinguished by failure to preserve them by recordation will be those which arise out of technical, nonsubstantial defects which deserve an early demise in all events.

D. Mechanics of Filing Notice to Preserve Claims

> Section 5. *Contents of notice; recording; indexing.*—To be effective and to be entitled to record, such notice shall contain an accurate and full description of all land affected by such notice, which description shall be set forth in particular terms and not be by general reference; but if such claim of interest is founded upon a recorded instrument, then the description in such notice may be the same as that contained in the recorded instrument. Such notice shall also contain the name of any record owner of the land at the time the notice is filed and a statement of the claim of interest in the land showing the nature, description and extent of such claim. The register of deeds of each county shall accept all such notices presented to him which are duly acknowledged and certified for recordation and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded, and each register of deeds shall be entitled to charge the same fees for the recording thereof as are charged for the recording of deeds. In indexing such notices in his office each register of deeds shall enter such notices under the grantee indexes of deeds under the names of persons on whose behalf such notices are executed and filed and under the grantor indexes of deeds under the names of the record owners of the possessory estates in the land to be affected against whom the claim is to be preserved at the time of the filing.

Section 5 of the proposed act simply sets out the mechanics of filing the notice to preserve a claim of interest in realty. The notice must be recorded as deeds and other transactions relating to real property are recorded in the office of the register of deeds and must be indexed under the name of the claimant as "grantee" and under

[56] Compare BASYE, CLEARING LAND TITLES, §§ 54, 172 (1953) with reference to the theory of statutes of limitations which bar claims of all persons whether or not under disability. ". . . [S]ome 25 states place a maximum period for the bringing of actions by anyone, in the belief that marketability of land titles should not be forever fettered by exceptions in favor of the legally disabled." *Id.* at 263.

the name of the record owner of the possessory estate as "grantor."[57] If re-recorded periodically in the designated place, the claim of interest will always be discoverable upon a routine title search of thirty years; if not discoverable on such routine title search because not re-recorded, the interest will be erased. Section 5 dictates that the claim of interest be set out with clarity in the re-recordation in order to be effective.

E. Extension of Time to Prevent Destruction of Interests Already Thirty Years Old Which Would Otherwise Be Extinguished by the Statute

> Section 6. *Extension of time for filing notice of claims which act would otherwise bar.*—If the thirty-year period specified in this act shall have expired prior to (insert date three years after the effective date of this act), no interest, claim or charge shall be barred by section 4 until (insert date three years after the effective date of this act) and any interest, claim or charge that would otherwise be barred by section 4 may be preserved and kept effective by the filing of a notice of claim of interest as set forth in sections 4 and 5 of this act prior to (insert date three years after the effective date of this act).

Section 6 of the proposed statute is designed to make its terms "prospective" as to all claims of interest in lands—to prevent the proposed statute from automatically "legislating out of existence" any interest in lands. For instance, the terms of section 4 of the proposed legislation, if unaccompanied by the saving features of section 6, would result in the immediate extinguishment of all existing non-possessory interests over thirty years old which did not appear in the muniments of title during a title search thirty years backward. Holders of non-possessory possibilities of reverter, rights of entry for condition broken, mineral rights, easements or restrictive covenants recorded more than thirty years before a title search might have their interests extinguished without the holders or owners of such interests having any opportunity to preserve

[57] This is a deviation from the Model Marketable Title Act of Simes and Taylor. The model act contemplates the existence of a separate book in the recorder's office to be known as the "Notice Index." See SIMES & TAYLOR 9. The statutory provision here proposed is to subserve the requirements of providing notice under a grantor-grantee form of indexing and at the same time is designed to prevent the need for the addition of different kinds of books to which title searchers must refer. It seeks to work the statute into the present system of land title searches.

them. If an act automatically destroys an existing vested property right, it may be held unconstitutional.[58] On the other hand legislation which does not itself extinguish interests in land, but merely requires notice of their existence to be re-recorded for their preservation, should not be held violative of due process or impairment of contracts clauses of constitutions.[59] As in the case of the familiar

[58] Compare Lowe v. Harris, 112 N.C. 472, 482, 17 S.E. 539, 540 (1893) (quoting 1 KENT, COMMENTARIES 455 (14th ed. 1896)): "A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void." In the *Lowe* case the North Carolina court quoted approvingly from the Pennsylvania case of Eakin v. Raub, 12 Serg. & R. 330, 340 (1825):

> While acknowledging the right of the law-making power to pass remedial laws and especially statutes of limitations operating prospectively, the Supreme Court of Pennsylvania said, "It would be contrary to the spirit of legislation in Pennsylvania, from the date of its charter to the statute in question, to deprive a man of his land instantaneously under the pretense of limiting the period within which he should bring his action."

Booth v. Hairston, 193 N.C. 278, 284, 136 S.E. 879, 882 (1927) states

> The Legislature of North Carolina is restrained by Article I, section 10, of the Constitution of the United States, and Article I, section 17, of the Constitution of North Carolina, not only from passing any law that will divest land out of one person and vest it in another (except where it is taken for public purposes after giving just compensation to the owner), but from enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory . . . .

See Biltmore Village v. Rotolante, 71 So. 2d 727 (Fla. 1954) in which marketable title legislation was held unconstitutional because it arbitrarily cut off interests without due process of law since it did not afford interest holders an opportunity to preserve their interests (possibilities of reverter) from extinction. *But see* Trustees of Schools v. Batdorf, 6 Ill. App. 2d 486, 130 N.E.2d 111 (1955) which held that possibilities of reverter are not *estates* and are not protected against abolishment or change by legislative enactment under any constitutional limitation.

[59] See Aigler, *Constitutionality of Marketable Title Acts,* 50 MICH. L. REV. 185, 198 (1951):

> It is now much too late to inquire whether or not the public interest served by the recording acts was sufficient to warrant the provisions contained therein . . . . Suffice it to say that our earlier legislators' objective of enabling people to rely upon the ownership as thus indicated by the record, with a reasonable measure of safety, justified it in their minds and in the minds of our later eminent students of Constitutional Law. The device is now one of the key foundation stones of our property law. The objective of present day legislatures in attempting to clarify the mass of record title built up by the recording acts is based upon the same public interest that motivated earlier legislators. When the size and complexity of the record has grown to a point which defeats the original purpose of clarity and certainty in land ownership then a resort to the same device of devestiture may be similarly justified.

Professor Aigler stated that so far as he knew the constitutionality of the recording acts has never been seriously questioned, although they of neces-

recording acts, these statutes do not destroy interests and claims directly; it is the failure on the part of their owners to take the simple and inexpensive step of preserving them by recording a notice of their existence that effects the destruction.[60] If a reasonable time is given for compliance, a recording statute which shortens or limits the time during which a recorded instrument shall continue to be effective and which provides for renewal of such instrument by re-recording or re-filing is constitutional as to existing recorded instruments.[61] To meet the requirement of due process that police regulations must be reasonable and in order that existing property interests shall not be automatically extinguished without affording their owners with opportunity to take the necessary steps

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sity operate to destroy property interests. The Supreme Court of the United States upheld the constitutionality of recordation statutes in Jackson v. Lamphire, 28 U.S. (3 Pet.) 280, 289 (1830):

> It is within the undoubted power of the state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment.

[60] See, *e.g.*, Gregg v. Williamson, 246 N.C. 356, 361, 98 S.E.2d 481, 486 (1957), which held that a 1945 amendment to N.C. GEN. STAT. § 45-37(5) (Supp. 1963) was constitutional. The court said: "The power of the legislature to require recordation or re-recordation of mortgages to protect the mortgagor's right against claim of purchasers for value has been consistently recognized." That statute, applicable to pre-existing mortgages as well as to subsequent mortgages, provided that every existing mortgage would be conclusively presumed paid after the expiration of fifteen years from the date of maturity unless a marginal entry or affidavit was filed in the office of the register of deeds to the effect that the mortgage debt was, in fact, unpaid. See Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185, 199 (1951).

[61] The authorities in support of this view are ample. See the excellent discussions in Vance v. Vance, 108 U.S. 514 (1883), and Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957). See also Conley v. Barton, 260 U.S. 677 (1923); Turner v. New York, 168 U.S. 90 (1897); Hill v. Gregory, 64 Ark. 317, 42 S.W. 408 (1897); Rombotis v. Fink, 89 Cal. App. 378, 201 P.2d 588 (1948); Realty Corp. v. Kirtley, 74 So. 2d 876 (Fla. 1954); Tesdale v. Hanes, 284 Iowa 742, 82 N.W.2d 119 (1957); Board of Educ. v. Miles, 18 App. Div. 2d 87, 238 N.Y.S.2d 766 (1963); Evans v. Finley, 166 Ore. 227, 111 P.2d 833 (1941). See generally 133 A.L.R. 1318 (1941).

to preserve them, the proposed statute provides that all persons with existing interests shall have three years (after the effective date of the statute) within which they can become acquainted with the law, its purposes and operation, and take the re-recordation steps necessary to preserve their interests which would otherwise be barred by the other provisions of the proposed act.[62] After the initial three-year saving period, application of the statute will be completely prospective and there should be no recurring constitutional problem on any theory.

F. Remedy Against Persons Who File False or Fictitious Claims to Land

> Section 7. *Filing false claim.*—No person shall use the privilege of filing notices hereunder for the purpose of asserting false or fictitious claims to land; and in any action relating thereto if the court shall find that any person has intentionally filed a false or fictitious claim, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party all damages that he may have sustained as a result of the filing of such notice of claim.

Section 7 of the proposed statute seeks to provide a remedy against persons who may abuse the privilege of filing notice under the statute for the purpose of asserting false or fictitious claims to

[62] The result of this provision will be that land-title searchers will not be able to rely on the salutary title-cleansing features of the statute until the expiration of at least three years after its effective date. A shorter period may be deemed desirable by the legislature. The model act in SIMES & TAYLOR 10 provides for a two year extension of the time for re-recordation where the prescribed period shall have already elapsed at the time the statute becomes effective. The United States Supreme Court has indicated that shorter saving periods within which recordation or re-recordation must be effected will be upheld as constitutionally safe. See Turner v. New York, 168 U.S. 90 (1897) (requiring assertion of rights within six months); Terry v. Anderson, 95 U.S. (5 Otto) 628 (1877) (requiring suit within nine months and seventeen days). In the latter case the Court said:

> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them as nearly as possible; for what is reasonable in a particular case depends upon its particular facts.

Id. at 633.

the land. The purpose of the statutory provision is to deter the filing of false claims by allowing a person against whom such claim is filed to recover of the false filer all costs incurred in an action relating to such false claim, reasonable attorneys' fees, and other damages resultant from the false filing.[63] The potential sanctions provided should afford sufficient protection to landowners against abuses of the act by recordation of unfounded or capricious and spiteful claims of interest; at the same time the intent of the section is not to be so harsh as to deter re-recordation of claims by bona fide claimants.

G. Other Provisions

Section 8. *Limitations of actions and recording acts.*—Nothing contained in this act shall be construed to extend the period for the bringing of an action or for the doing of any other required act under any statutes of limitations, nor, except as herein specifically provided, to affect the operation of any statutes governing the effect of the recording or the failure to record any instrument affecting land.

Section 9. *Definitions.*—As used in this act

(a) The term "person" denotes singular or plural, natural or corporate, private or governmental, including the state and any political subdivision or agency thereof.
(b) The term "title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, referee's, guardian's, executor's, administrator's, or sheriff's deed, contract, lease or reservation, or decree of any court, as well as warranty deed, quitclaim deed, or mortgage.

Section 10. *Act to be liberally construed.*—This act shall be liberally construed to effect the legislative purpose of simplifying and facilitating land-title transactions by allowing persons to rely on a record chain of title of thirty years as described in section 2 of this act, subject only to such limitations as appear in section 3 of this act.

Section 8 of the proposed statute simply provides that nothing in the statute shall change any of the various statutes of limitations

[63] This proposed section creates a statutory right comparable to the common law action called "slander of title." Compare Cardon v. McConnell, 120 N.C. 461, 27 S.E. 109 (1897). This provision is not advocated in Simes and Taylor's model act but has been adopted in Michigan, MICH. STAT. ANN. § 26.1278 (1953), and Florida, FLA. STAT. ANN. § 712.08 (Supp. 1964).

establishing periods for bringing actions nor affect the recordation statutes except as explicitly provided in the proposed statute. In other words, the proposed act is designed to supplement, not do away with, currently existing statutes of limitation and recordation statutes to promote land-title marketability.

Section 9 of the proposed statute sets out the definitions of the terms used in the act. The definitions of the terms "persons" and "title transactions" are again designed to forward the idea that the proposed act is to clear land titles from all types of interests as against all persons or entities not expressly excepted from its application under section 3. The definition of "person" encompasses not only individuals and corporate entities, but also governmental, quasi-governmental, and eleemosynary entities; this is for the purpose of making the statutes reliable. The term "title transaction" is intended to include every legally significant act or transaction by which rights in land can be acquired.[64]

Section 10 sets forth the tenor for construing the proposed act if adopted: a liberal construction to effect the legislative purpose of simplifying and facilitating land-title transactions and to increase the effectiveness of the public records. Coupled with the statement of purpose of the statute in section 1, this section can be of value in implementing the statute by lending guidance to interpreting courts.

V. Conclusions and Prospects

There is a growing consensus that title searches required for the guaranty and certification of clear and marketable land titles are beset with too many unnecessary uncertainties and difficulties. The presently existing "chain of title" system of recordation, designed to facilitate land transfers and to make title appraisals simple, so salutary at its inception, is today at least a contributing factor in the causation of the complexities, delays, and expenses incident to effective assurance of clear land titles. The recordation statutes

[64] This includes adverse possession. *But see* section 3, subsection (c), of the proposed statute, page 106 *supra*, that a "title transaction" such as adverse possession will not be extinguished although there is no recordation of the adverse possessor's claim if the title holder by adverse possession is in actual possession of the land at the time marketability of the record title-holder's title is to be determined. *Contra* if the title holder by adverse possession is not in actual possession at the time marketability of the record title is to be determined.

provide for the preservation and perpetuation of notice of interests in land forever—once recorded they continue to exist. When this basic function of the recordation system is combined with substantive rules of real property law which permit the creation and shifting of certain interests in real property without time limitations beyond which they cannot endure or shift,[65] the shortcomings of the present system of conveyancing become apparent. In order to be absolutely sure that evidences of such interests do not exist in the records, title lawyers would be required to check back to the date land was originally received from the sovereign which is totally impractical. The adverse possession statutes do not aid title lawyers in their quest for marketable titles. Where adverse possession is required to complete a chain of title, it is necessary to produce factual evidence which is outside of and independent of the land-title records in order to prove all the elements that are requisite for obtaining title by adverse possession. Titles by adverse possession will not become marketable until they have been effectively litigated and judicially declared to be indefeasible. A title that requires a quiet title suit to determine its validity is not a marketable title. In addition, the rules that statutes of limitations do not bar persons under disability and claimants of future interests impair the effectiveness of statutes of limitations as title-cleansing devices. Omissions and errors in the execution and recordation of land-title instruments are preserved under the current recordation system and afford the basis for subsequent questions concerning the validity of titles and their marketability. Quitclaim deeds and waivers of rights in land must often be sought to eradicate insubstantial interests in land which serve only to impair their marketability. Suits to quiet title may have to be instituted. If land deals are not completely frustrated there are, nevertheless, unwholesome delays and expenses incident to such title-clearing proceedings. The foregoing illustrations show the problems inherent in the presently existing recordation system. There are many other interests in land outside the ambit of recordation coverage which can also affect the marketability of title.[66] With each successive transfer of land and the

[65] For instance, easements, mineral rights and rights to profits à prendre may endure forever once created. Future interests such as possibilities of reverter and rights of entry for condition broken may be operable to defeat land titles for generations after their creation in instruments recorded at a remote time in the past.

[66] See notes 4-9 *supra* and accompanying text.

passage of time the problems of potential existing interests and claims of interest, both recorded and unrecorded, are compounded. With every transfer, the chain of record title is lengthened and the scope of title search must be increased to assure good, indefeasible, and marketable titles. The alternative to making such lengthened complete title searches is to guess; title lawyers must either assume the risk that there are no outstanding recorded ancient interests or shift the risk to their purchaser-lender clients.[67]

The proposed statute is designed to effect the accomplishment of surer, more certain land titles by shorter title searches. By making a title search of the chain of title backward for the specified number of years (thirty), the title lawyer and his client can know that all interests in land not appearing in the records (either by recordation or re-recordation) during the period for which the title is searched shall be deemed automatically extinquished.[68] Economy and expediency can be accomplished and at the same time greater security can be achieved. All interests in land, including ancient intentionally created interests, non-intentionally created interests which arise by technical errors in the execution and recordation of instruments, and interests which arise by operation of law may be extinguished. Non-possessory future interests, easements, liens, claims arising from omission of spouses' signatures on deeds, defective deliveries or acknowledgments, and claims arising from undiscovered heirships, marriage, and numerous other interests will pass out of existence if their preservation is not effected in accordance with the statutory provisions.

[67] While title insurance may be procured to provide indemnity for losses resulting from many land-title hazards, this is often inadequate. A grantee of land, for example, usually wants the land itself and not money which an insurance company will pay if his title turns out to be defective. The risk of losing his *land* is on the lawyer's client. Furthermore, "marketability" is not adequately insured by the typical title insurance policy. A non-substantial defect may not actually defeat a title in whole or in part but its very existence, often long forgotten, can chill a sale of the land and require a law suit to remove it as an impediment to marketability. The attendant delays in clearing the title may not be fully compensable. A typical title insurance policy of a large title insurance company doing business throughout the United States provides: "No claim for damages shall arise or be maintainable under this policy . . . in the event the title is rejected as unmarketable because of a defect, lien or encumbrance not excepted or excluded in this policy, *until there has been a final determination by a court of competent jurisdiction sustaining such rejection.*"

[68] The title searcher must, however, take cognizance of the limited number of exemptive provisions of the proposed statute. *E.g.*, interests of the United States are excluded from operation of the statute.

The statute will provide for an updating and cleansing of the land-title records and can accomplish a housecleaning function in the offices of land-title registries everywhere if adopted. In addition to the legal incidents, the statute can make practicable the periodic retirement of old land records to points requiring little accessibility because of their diminished legal significance.[69]

By reason of the interest-extinguishing features of the proposed statute the number of quiet title suits can logically be expected to diminish.[70] Potential interests which now require the procurement of quitclaim deeds and waivers or which necessitate quiet title actions with attendant problems of delay, service of process, and frequently appointment of guardians will be automatically extinguished by the terms of the statute if their vitality is not preserved by re-recordation as prescribed. These interests will no longer require judicial action or quitclaim deeds for their extinguishment. The statute can thus serve to reduce the number of annoying, time-consuming, and essentially unproductive pro forma but expensive quiet-title suits so often necessary to remove supposed clouds on title arising from errors or omissions in the execution of instruments or in their recordation. At the same time it can rid titles of the barnacles on marketability resulting from the continued existence of antiquated interests, perhaps long forgotten, which are of small positive value except as deterrents to commerce in land and its development.

The real estate bar of every state is a conservative and cautious branch of the legal profession and there is a natural and justifiable reluctance on their part to lend their support to hasty changes in the laws relating to property. This proposed statute will not effect any radical change in the law of real property in any state where it is adopted. But to effect the salutary results sought to make land

[69] Ancient records can at least be retired to easily stored microfilm or other less current, less accessible record books. They cannot, however, be completely abandoned or destroyed because their retention will be necessary to evidence claims and interests of the United States not affected by the statute and as sources of reference as to claims which are to be preserved by re-recordation under the terms of the statute. In addition, where lands have not been conveyed for long periods of time they will evidence title no matter how old they are.

[70] In Michigan where a marketable title act has been in effect since 1945, it is reported that fewer suits to quiet title are a consequence of their marketable title legislation. See Jossman, *The Forty Year Marketable Title Act: A Reappraisal,* 37 U. DET. L.J. 422, 424 (1960).

more easily marketable, existing substantive law of real property need not be changed substantially. In effect the statute is only an addendum to the existing recording, limitations, and curative statutes, the theories of which have been employed successfully everywhere. Little new law will have to be learned by members of the real estate bar. Their interests will be subserved by making possible shorter and surer title searches.

The public will also benefit in that land will be made more readily marketable with potential savings in time and money for the completion of title transactions. While some interests will definitely pass out of existence by reason of the operation of the statute—this is necessary if it is to accomplish its purpose—persons who own these interests need not have them extinguished; they can protect their interests by merely taking advantage of the statute's re-recordation provisions.

The proposed statute is believed to be a beneficial and remedial statute. Its adoption can render a service not only to the real estate bar, but also to the public, which wants its land to be freely and conveniently alienable.[71]

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[71] That marketable title legislation works in Michigan, see Jossman, *op. cit. supra* note 70, at 431:

> The act is both a remedial and beneficial statute. It has rendered a service to the bar and to the public by freeing land titles from ancient interests which might otherwise be cluttering up attorneys' opinions and holding up real estate deals. The great majority of Michigan lawyers are pleased with the statute and are endeavoring to make use of it when instances arise which call for doing so.

The case of Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) is a landmark case on marketable title acts setting out their potential for clearing land titles. In that case in which sixty attorneys and law firms filed briefs as amici curiae, the Supreme Court of Minnesota upheld that state's marketable title act. The court stated:

> 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.

Id. at 121, 83 N.W.2d at 825.