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The Nebraska Marketable Title Act: Another Tool in the Bag

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Comment*

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> The ordinary client has no appreciation of problems involved in title examination. He only realizes that almost every time that he sells or buys a property, some lawyer raises a question about the title and that when he can and does assert that the property has been transferred and encumbered over a long period of years and there have been many examinations in which the title has been approved, his statement has no effect and he has additional requirements that involve expense to him to satisfy the examiner. It is beyond his comprehension, and usually he concludes that the lawyers don't know when the title is good.[1]

I. INTRODUCTION

At common law, priority in time almost invariably determined priority in right.[2] If the owner (O) conveyed to A, there was no interest remaining which could be conveyed to B, even if B was a bona fide purchaser (bfp). "Notice and lack of notice were wholly immaterial."[3] Likewise, in contests between holders of equitable interests, priorities were normally determined on the basis of time. However, when the contest was between a party claiming a legal

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* Professor Lawrence Berger, of the University of Nebraska College of Law, deserves credit for many of the ideas in this Comment. Thank you.

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1. Rankin, *Defining Merchantable Title by Legislative Act*, 25 NEB. L. REV. 86, 92 (1945).
2. O. BROWDER, JR., R. CUNNINGHAM, J. JULIN & A. SMITH, BASIC PROPERTY LAW 872 (3d ed. 1979) [hereinafter cited as BROWDER].
3. *Id.* at 873.

interest and another party claiming an equitable interest, the priorities were sometimes reversed. "If the taker of the legal ownership was a purchaser for value without notice, he [was] preferred even as against an older equity."[4] These rules, along with the decline of seisin,[5] led to the advent of the registry laws and recording acts.[6] "[T]he primary object of the recording system was to rid conveyancing of livery of seisin but retain its publicital advantages."[7]

In addition to the "publicital advantages," the enactment of recording acts also served to allocate the risk of loss among innocent parties by requiring grantees to give notice.[8]

> [The] recording acts proceed upon the theory that, where one of two persons must suffer by the wrong or mistake of a third party, the one most at fault, or the one whose fault made it possible that there should be a loss, is guilty of a constructive fraud, and is the one who must suffer . . . .[9]

Thus, one of the ultimate effects of the recording acts has been to reverse the priorities as they existed at common law when a prior grantee fails to give notice to subsequent purchasers from a common grantor.[10] This certainly comports with notions of fairness and equity, and is now well-established as a sound principle of law.[11]

Yet, as with all good, there must come some bad. Because of the broad scope of the instruments and transfers affected by the recording acts,[12] and the passing of time since their original enactment,[13] the land transfer records have become unmanageable in

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4. *Id.* (footnote omitted).
5. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 90 (1962) [hereinafter cited as MOYNIHAN]; *see also* IV AMERICAN LAW OF PROPERTY § 17.5, at 537 n.17 (A.J. Casner ed. 1952).
6. IV AMERICAN LAW OF PROPERTY § 17.5, at 537 (A.J. Casner ed. 1952); *see also* Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 263 (1962) [hereinafter cited as *Trends*].
7. Philbrick, *Limits of Record Search and Therefore of Notice* (pt. 1), 93 U. PA. L. REV. 125, 139 (1944).
8. *Id.* at 147, 153.
9. 1 PATTON ON LAND TITLES § 19, at 99 (2d ed. 1957) [hereinafter cited as PATTON]; *see also* Ames v. Miller, 65 Neb. 204, 213, 91 N.W. 250, 253 (1902).
10. A. AXELROD, C. BERGER & Q. JOHNSTONE, LAND TRANSFER AND FINANCE 532 (2d ed. 1978) [hereinafter cited as AXELROD].

    There are three basic types of recording statutes: race, notice, and race-notice. *See* IV AMERICAN LAW OF PROPERTY § 17.5, at 545 (A.J. Casner ed. 1952). Nebraska has a race-notice statute. NEB. REV. STAT. § 76-238 (1981).
11. *But see* Philbrick, *supra* note 7, at 147-51 (It is the race, rather than the notice which should be important.).
12. IV AMERICAN LAW OF PROPERTY § 17.8, at 549 (A.J. Casner ed. 1952); *see also* NEB. REV. STAT. § 76-203 (1981).
13. IV AMERICAN LAW OF PROPERTY § 17.5, at 535 (A.J. Casner ed. 1952). Nebraska's recording statute was originally enacted in 1866, one year before be-

many jurisdictions simply due to their sheer volume.[14] Moreover, due to the number of "old title defects,"[15] the "basic legal framework for providing title security [has become] an albatross."[16]

> [Other major] [w]eaknesses in the recording acts include: the extensive and complex searches that must be made, both on and off record, to determine the apparent state of a title; inefficiently maintained and indexed public records; the risk of outstanding title interests that cannot be ascertained from any reasonable search; and limited effectiveness of recording due to possible errors by recorders and chain of title restrictions on search obligations.[17]

Against this backdrop, the question is what has and should be done to achieve a more efficient land transfer system.[18] The next section will discuss what has been done to remedy the difficulties associated with the transfer of land, and section three will focus on one specific remedy: the Nebraska Marketable Title Act. Section four contains some recommendations for change and a brief conclusion.

II. THE EARLY LAW

At common law, the process of transferring real property was dependent upon livery of seisin.[19]

> A and B, or their agents, would go upon the land and A would formally "give" or "deliver" the seisin to B in the presence of witnesses from the neighborhood. A would usually hand over to B a branch, twig or piece of turf as a symbol of the land itself . . . .[20]

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coming a state. REV. STAT. OF THE TERRITORY OF NEB. ch. 43, § 16, at 283 (1866); *see also* NEB. REV. STAT. § 76-238 (1981).

14. *See* AXELROD, *supra* note 10, at 534; Aigler, *Clearance of Land Titles—A Statutory Step*, 44 MICH. L. REV. 45, 48 (1945).

    Marketable title acts are designed to shorten the length of the title search. *See* UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT (USLTA) art. 3, pt. 3 introductory comment (1977); 1 SUGDEN ON VENDORS § 487, at 557 (1851) [hereinafter cited as SUGDEN] (derivation of the 60-year root of title). Due to the relative youth of Nebraska's land transfer records, it is not as difficult to search back to the patent. *See* Conine & Morgan, *The Wyoming Marketable Title Act—A Revision of Real Property Law*, 16 LAND & WATER L. REV. 181, 223 (1981) (This is an excellent article.).

15. Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 CORNELL L. REV. 45, 47 (1967) (This is the leading article on marketable title acts.).

16. *Id.* at 45.

17. AXELROD, *supra* note 10, at 534.

18. *See* P. BASYE, CLEARING LAND TITLES § 5, at 32 (2d ed. 1970) [hereinafter cited as BASYE]; Barnett, *supra* note 15, at 94; Basye, *Improvement of Conveyancing Procedure*, 36 NEB. L. REV. 81, 84 (1957) [hereinafter cited as *Conveyancing Procedure*]; Patton, *Evolution of Legislation on Proof of Title to Land*, 30 WASH. L. REV. 224, 227 (1955); Rood, *Registration of Land Titles*, 12 MICH. L. REV. 379 (1914).

19. MOYNIHAN, *supra* note 5, at 163.

20. *Id.*

It was not until the enactment of the Statute of Frauds in 1677[21] that a writing was necessary to make a feoffment valid.[22] The written conveyance served as "evidence of livery of seisin and of the nature of the estate given, as well as to set forth the covenant of warranty."[23]

Once reliance was placed on title, rather than possession, in determining real property rights, problems arose;[24] and the reform (written instruments)[25] was, itself, in need of reform.[26] Thus, came the advent of the registry and recording acts, and their concomitant problems.[27] But yet again, the law responded for, in equity, that which ought to be done was done.[28] "Recognizing the deficiencies of recordation, courts . . . formulated a purchaser-oriented doctrine of marketability designed to invalidate executory sales contracts in the event a vendor [could not] tender 'marketable title,' " and while "a finding of unmarketability [was] often necessary to reach equitable results between immediate litigants, the finding operate[d] to destroy a title's value unless and until it [could] be cleared by some remedial device."[29] Predictably, how-

21. *Id.* at 164.
22. *Id.*
23. *Id.*
24. *See* Howard, *Bills to Remove Cloud From Title—With Reference to the State of the Authorities in Virginia and West Virginia*, 25 W. VA. L.Q. 4, 5 (1917-1918); *see generally* MOYNIHAN, *supra* note 5, at 90, 164; 5 POMEROY'S EQUITY JURISPRUDENCE § 1394 (5th ed. 1941) [hereinafter cited as POMEROY]; 1 SUGDEN, *supra* note 14, § 262, at 309; Patton, *supra* note 18, at 225 n.12 (citing W. HOLDSWORTH, HISTORICAL INTRODUCTION TO LAND LAW (1927)); Comment, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245 (1959).
25. MOYNIHAN, *supra* note 5, at 90-91, 164; *see also* Howard, *supra* note 24, at 5.
26. *Conveyancing Procedure*, *supra* note 18, at 81-82.
27. *See supra* notes 12-17 and accompanying text.
28. POMEROY, *supra* note 24, at §§ 46, 363; Comment, *supra* note 24, at 1266.
29. Comment, *supra* note 24, at 1248-49 (footnotes omitted).

> ["Marketable title"] is vaguely defined as that title acceptable to a reasonably prudent man, or that free from reasonable doubt or material defect, or that providing assurance against loss or disturbance by subsequent litigation. To give content to these abstractions, the courts would ideally rule that every vendor be able either to trace a complete chain of title to an unimpeachable source, or to prove the nonexistence of any outstanding encumbrance. The former is impractical and the latter impossible. Since strict adherence to this approach could therefore result in the invalidation of all titles subjected to judicial scrutiny, "marketable" title has no meaning as a positive, juridical concept. What a court actually adjudicates is the *ad hoc* question whether, as a matter of abstract logic, a given title is commercially unmarketable.

Id. at 1249 (footnotes omitted). *See also* Panel Discussion, *Sundry Title Problems*, 34 NEB. L. REV. 311, 312 (1955).

At common law, if the vendor was not aware of defects in title at the time of the making of the contract for sale and a contract containing no conditions

ever, remedies to prevent the destruction of title's value due to unmarketability simultaneously developed.[30] With few exceptions,[31] the same system of remedies has continued to the present.[32] Unfortunately, the problem still remains: how to assure a marketable title to an interest in real property in a reasonably efficient and economic manner.[33]

The remainder of this Comment will be devoted to a discussion of one remedial device: the Nebraska Marketable Title Act.[34] Conceived as its predecessors,[35] it is designed to promote a more efficient system of land conveyancing. Whether it has achieved its purpose will be evaluated after the Act has been analyzed.

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was made, the purchaser was obligated to take the estate with all its defects. 1 SUGDEN, *supra* note 14, at 2, 7, 10. This is still the law. So, at common law, it became the practice to have the vendor's title examined. *Id.* at 10. This occurred during an executory period similar to the practice today. *Id.* at 461. Furthermore, the vendor was under a duty to furnish the purchaser a title which could be traced for at least 60 years. *Id.* at 7-8, 555. This was done by the production of the instruments comprising the chain of title or by abstract. *Id.* at 499.

When the date to perform the contract arrived, the purchaser was bound to prepare a conveyance, *i.e.*, a deed, and tender the purchase money. *Id.* at 308-10. "[Y]et if a *bad* title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance." *Id.* at 310 (emphasis added). But at law, if a *good* title was produced, the purchaser was required to accept it even though defects of title existed. *Id.* at 455, 602, 605; *see generally* BASYE, *supra* note 18, at § 4 (The distinction between *good* and *marketable* titles no longer exists.).

When the property was conveyed, the purchaser became entitled to all the title deeds. 1 SUGDEN, *supra* note 14, at 522-23; BASYE, *supra* note 18, at § 3; L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 3 (1960) [hereinafter cited as SIMES & TAYLOR].

30. *See generally* 1 POMEROY, *supra* note 24, at § 248 (quiet title actions); SIMES & TAYLOR, *supra* note 29, at 18 (curative acts); 1 G. SPENCE, EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 658 (1846); 1 SUGDEN, *supra* note 14, § 486, at 556-57 (adverse possession); 2 SUGDEN, *supra* note 14, §§ 615-16, at 54-55 (statutes of limitation).

31. Of the generally recognized means to remedy title defects, only title insurance, *see* Johnstone, *Title Insurance*, 66 YALE L.J. 492, 492 (1957) (late nineteenth century), and the marketable title acts, *see* SIMES & TAYLOR, *supra* note 29, at 306 (Iowa Act of 1919), are of relatively recent origin. *See also* Comment, *supra* note 24, at 1251. Even a form of the Torrens system has been in existence for over 500 years. McDougal & Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125, 1131 (1939).

32. *See* NEB. REV. STAT. § 25-202 (1979) (adverse possession); § 25-21,112 (1979) (quiet title); § 76-258 (1981) (curative acts); § 76-288 (1981) (marketable title act). These statutory references are illustrative of the types of remedial legislation existing in most jurisdictions. Nebraska repealed its Torrens registration act. 1943 Neb. Laws 606.

33. *See* BASYE, *supra* note 18, at § 1; SIMES & TAYLOR, *supra* note 29, at 305.

34. NEB. REV. STAT. §§ 76-288 to -298 (1981).

35. *See supra* notes 30-32 and accompanying text.

III. THE NEBRASKA MARKETABLE TITLE ACT

A. History and Purpose

> The purpose of [the Nebraska Marketable Title Act] is to define a marketable title to an interest in real estate, to require the filing of notice of claim in interest in real estate in certain cases within a definite period of time and to make invalid all claims not so filed.
>
> The act follows the Michigan and Iowa laws. In substance it clears the title to real estate of all defects. The provisions of the act are continuous so that the statutory period of [twenty-three] years continues to run, thus avoiding any subsequent re-enactments of the law. *It will serve to correct many titles to real estate in Nebraska.*[36]

This is how the Judiciary Committee of the Nebraska Unicameral characterized the Act's objectives. Little else about the legislative intent is revealed, due to the limited recordkeeping system employed in the Unicameral during the forties. However, two addresses by J. Lee Rankin to the Nebraska Bar Association in 1945 and 1946 shed light on the rationale and objectives of the Nebraska Act.[37] Indeed, it was essentially the draft of the Nebraska Bar Association which was enacted into law in 1947.[38] The draft statute was modeled after the Iowa statute[39] and a proposed statute in South Dakota, yet substantially retained the important provisions of the Michigan statute.[40] By adopting substantially the same language for the Nebraska Act as appeared in these other statutes, it was believed that "the benefit of decisions in states adjacent to us whose experience and development regarding real estate laws are more or less common with ours"[41] would derive.

With these noble objectives in mind, it is now appropriate to focus more clearly and narrowly on the practical purposes of the Act.

The Act remedies a number of problems of the modern land

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36. JUDICIARY COMM., 60th SESS., STATEMENT—L.B. 175 (1947) (emphasis added). The alteration of the statutory period to 23 years is made because the enacted statute inconsistently describes the period as 22 and 23 years. *See* NEB. REV. STAT. § 76-290 (1981); Barnett, *supra* note 15, at 89 n.125; Leahy, *The North Dakota Marketable Record Title Act*, 29 N.D.L. REV. 265, 267 (1953) (discussing a 30 and 31 year inconsistency in the North Dakota statute). Due to this, conscientious title examiners in Nebraska will consider the statutory period to be 23 years. *See* Aigler, *supra* note 14, at 55; Ballantine, *Title By Adverse Possession*, 32 HARV. L. REV. 135, 137 (1918) (40-year root of title). *See also* NEB. REV. STAT. § 76-297 (1981); SIMES & TAYLOR, *supra* note 29, at 3-6; Aigler, *supra* note 14, at 48.

37. Rankin, *Merchantable Title Legislation for Nebraska*, 26 NEB. L. REV. 219 (1947) [hereinafter cited as *Legislation*]; Rankin, *supra* note 1.

38. *Legislation*, *supra* note 37, at 220, 223.

39. *Id.* at 221 n.8. Iowa has since amended its Act. *See* IOWA CODE § 614.29 (1983).

40. *Legislation*, *supra* note 37, at 222; *see also* Barnett, *supra* note 15, at 48 n.9.

41. *Legislation*, *supra* note 37, at 222.

transfer system which are not adequately remedied by other statutes and practices.

First, although the recording act voids certain unrecorded transfers,[42] no *official* verification of either the validity or the effect of any transaction is made at the time of transfer.[43] In essence, the buyer remains at risk for all that the record reveals, or, in some cases, fails to reveal.[44] For example, a deed executed by an incapacitated person is voidable, even against a subsequent bona fide purchaser.[45] Likewise, a forged instrument in the chain of title is void and recording does not give it validity.[46] The law should probably tolerate these somewhat anomalous occurrences, if the adverse record interest is asserted in a timely manner.[47] But if a great number of years pass before asserting the rights, it becomes more difficult to justify disturbing a reposed possessor because of a defect which was not discoverable through a search of the land records.[48]

Second, statutes of limitation[49] and adverse possession[50] do not remedy all defects with the passage of time.[51] It is fundamental that before a statute of limitation or an adverse possession statute

42. NEB. REV. STAT. § 76-238 (1981).
43. Barnett, *supra* note 15, at 93; *see also* BROWDER, *supra* note 2, at 1002.
44. *See generally* AXELROD, *supra* note 10, at 615-16; BASYE, *supra* note 18, at § 279; BREWSTER ON CONVEYANCING §§ 426-31 (1904) [hereinafter cited as BREWSTER]; PATTON, *supra* note 9, at § 334; SIMES & TAYLOR, *supra* note 29, at 4, 343; Barnett, *supra* note 15, at 85, 91; McDougal & Brabner-Smith, *supra* note 31, at 1128; Rood, *supra* note 18, at 389-90; Straw, Jr., *Off-Record Risks for Bona Fide Purchasers of Interests in Real Property*, 72 DICK. L. REV. 35 (1967).
45. *See* Jones v. Jones, 183 Cal. App. 2d 468, 472, 6 Cal. Rptr. 819, 822 (1960); Dewey v. Allgire, 37 Neb. 6, 55 N.W. 276 (1893) (cited in AXELROD, *supra* note 10, at 615); Thompson v. Thomas, 163 N.C. 500, 79 S.E. 896 (1913); Jarrett v. Jarrett, 11 W. Va. 584, 622, 626 (1877).
See also BREWSTER, *supra* note 44, at § 347; PATTON, *supra* note 9, at § 334.
46. *See* King v. De Tar, 112 Neb. 535, 199 N.W. 847 (1924); *see also* PATTON, *supra* note 9, at § 62; Straw, *supra* note 44, at 44.
47. Timely assertion of the interest would be essential in the case of a forged deed because adverse possession could clear the title. But in the case of the grantor's incapacity, the statute of limitations would be tolled. *See* NEB. REV. STAT. § 25-202 (1979).
48. Although not a marketable record title statute, Wisconsin has enacted a statute dealing with this very situation. WIS. STAT. ANN. § 706.09 (West 1981).
49. Statutes of limitation bar causes of action because of the claimant's failure to sue. Marketable title acts extinguish interests which may not even be actionable. *See* SIMES & TAYLOR, *supra* note 29, at 4; Aigler, *supra* note 14, at 50 n.7.
50. Unlike most statutes of limitation, adverse possession not only *bars* an action, but it also *creates* a property right. Adverse possession generally is not recordable, so resort must be had to a suit to quiet title or the marketable title act. *See* Barnett, *supra* note 15, at 46; *Conveyancing Procedure*, *supra* note 18, at 83.
51. *See Conveyancing Procedure*, *supra* note 18, at 85-86; *Trends*, *supra* note 6, at 266.

can begin to run, a cause of action must have accrued.[52] For example, if *O* severs the surface estate from the mineral estate before the adverse possessor (*AP*) begins possession, *AP*'s possession will only be adverse against the surface estate if *AP* only lives on Blackacre, but does not mine Blackacre.[53] Therefore, the mineral deed will not be removed by adverse possession of the surface estate.[54]

Third, curative acts,[55] title insurance,[56] malpractice liability,[57] and title standards[58] do not resolve all of the residual problems.

To summarize and better illustrate the basic problem created by reliance on the recording system as a means of conveyancing and title security,[59] consider the only case to date to be decided under the Nebraska Marketable Title Act, *Smith v. Berberich*.[60] In *Smith*, the court decided this issue:

> [Whether or not the] appellees, successors in interest of a grantee of the land by quitclaim deed from a tenant in common, which had been recorded more than [twenty-three] years, who have the capacity to own real estate in Nebraska and who are in possession thereof, with nothing appearing of record which purports to divest them or their predecessors of

52. Rood, *supra* note 18, at 392. For a discussion of the elements which must be proven to establish adverse possession in Nebraska, see Foster, *Nebraska Law of Adverse Possession* (pt. 3), 23 NEB. L. REV. 105 (1944).

53. *See* III AMERICAN LAW OF PROPERTY § 15.14, at 831 nn.27-28 (A.J. Casner ed. 2d printing 1974); *see also* USLTA, *supra* note 14, art. 3, pt. 3 introductory comment (1977); NEBRASKA STATE BAR ASS'N, LAWYER'S DESK BOOK, TITLE EXAMINATION STANDARDS NO. 54 (1959 & Reissue 1976) [hereinafter cited as NEB. TITLE STANDARD] (unreleased forfeited oil and gas leases).

54. *See, e.g.*, Winslett v. Rozan, 279 F.2d 654 (10th Cir. 1960); *see also* Conine & Morgan, *supra* note 14, at 218.

55. *See* NEB. REV. STAT. § 76-258 (1981); Comment, *supra* note 24, at 1259.

56. *See* Johnstone, *supra* note 31; Straw, *supra* note 44, at 88.

57. *See* AXELROD, *supra* note 10, at 654.

58. NEB. TITLE STANDARD, *supra* note 53. The title standards which have been promulgated to assist in the interpretation of the Marketable Title Act include numbers 42-45, 52, 56-57. *Id.*

59. *See generally Trends*, *supra* note 6, at 261. At this point, it must be conceded that there are very few cases where a defect in title cannot be remedied by means other than a marketable title act. *See* SIMES & TAYLOR, *supra* note 29, at 4-5, 355; Barnett, *supra* note 15, at 89. Indeed, one may question whether Professor Rood was speaking with hyperbole when he wrote: "The fact is that the path of the searcher for a safe title to land under either of the old systems is beset by more traps, sirens, harpies, and temptations than ever plagued the wandering Ulysses, the faithful Pilgrim, or the investor in gilt edged securities." Rood, *supra* note 18, at 388.

Courts have seen fit to do what was necessary and equitable without the aid of marketable title acts. *See, e.g.*, White v. Batson, 317 So. 2d 205 (La. Ct. App. 1975), *writ denied*, 320 So. 2d 915 (La. 1975); Ruemmele, *The North Dakota Marketable Record Title Act*, 41 N.D.L. REV. 475, 477 (1965). But the marketable title acts are designed to obviate the necessity of bringing suit. *See infra* note 81 and accompanying text.

60. 168 Neb. 142, 95 N.W.2d 325 (1959); *see also* Annot., 71 A.L.R.2d 846, 851 (1960).

> such purported interest therein, have the entire title to the land to the exclusion of appellants who are the successors in interest of another tenant in common, by reason of the Marketable Title Act.[61]

The record title in *Smith* traced from a patent to the heirs of Lewis E. Smith, who were ten brothers and sisters. The patent was dated September 14, 1911.[62] One of the siblings, Francis, quitclaimed the land to his wife, Lizzie, on September 2, 1913.[63] Lizzie died intestate on December 29, 1935. A decree of heirship was rendered on May 4, 1946, as part of the administration of Lizzie's estate.[64] The decree assigned the entire tract to Lizzie's heirs, the appellees.

The appellees brought an action to quiet title.[65] "The patent, the quitclaim deed and the decree of heirship constitute[d] the entire chain of title to the land as it [was] evidenced and exhibited by the public records . . . ."[66] The appellants, heirs of one of the original patentees, were impleaded.[67] The trial court held for the appellees and the supreme court reversed.[68]

The supreme court held that the quitclaim deed did not qualify to invoke the aid of the Act because it only conveyed the interest that the grantor had in the property, which was an undivided one-tenth interest as a tenant in common, and did not purport "to create an entire title to the land in the grantee . . . ."[69] In essence, the Nebraska Supreme Court held that a quitclaim deed cannot serve as a root of title from which a marketable record title may be

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61. 168 Neb. at 144, 95 N.W.2d at 326.
62. Brief of Appellants at 5, Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325 (1959).
63. *Id.* The quitclaim deed was recorded October 8, 1913. *See also* Brief of Appellees at 13 ("The deed itself . . . contain[ed] no limitation or exception in the description of the property. There the grantor conveyed to the grantee this property together with an additional 640 acres."). The actual words of conveyance are set forth in the opinion. 168 Neb. at 145-46, 95 N.W.2d at 327 ("grant . . . and forever quit-claim . . . all *his* . . . interest . . . in . . . the . . . described real estate") (emphasis added). "[T]he deed did not purport to create in her a larger interest. It did not purport to transfer the interest in the land owned by the other tenants in common." 168 Neb. at 149, 95 N.W.2d at 329. *See infra* note 72.
64. 168 Neb. at 143, 95 N.W.2d at 326. This decree could have served as a root of title had it been entered at least 23 years prior to the commencement of the lawsuit. NEB. REV. STAT. § 76-289 (1981); *see also* Barnett, *supra* note 15, at 65.
65. 168 Neb. at 143, 95 N.W.2d at 326.
66. *Id.*
67. 168 Neb. at 142, 95 N.W.2d at 325; *see also* NEB. REV. STAT. § 25-21,113 (1981).
    It is quite likely that the quiet title action was brought in order to satisfy the oil and gas lessee. 168 Neb. at 143, 95 N.W.2d at 326; Brief of Appellants at 3.
68. 168 Neb. at 149, 95 N.W.2d at 329.
69. *Id.* For a more detailed analysis of the *Smith* opinion, *see infra* note 98 and accompanying text.

determined.[70] This being the case, the question may properly be asked as to whether any of the other remedial devices discussed in this section could have been invoked at the time the suit to quiet title was brought in order to clear the title in the heirs of Lizzie Smith.

With little consideration, it is clear that curative acts would not have applied. There were no formal defects in the execution of the quitclaim deed, but there was an outstanding interest in the heirs of another of the patentees. Second, title insurance probably would have been of no avail because insurance for a defect in title revealed by the record, as a practical matter, cannot be purchased.[71] Third, there was no indication of any sort of malpractice by an attorney rendering the title opinion or of an abstractor in compiling the abstract.[72] In fact, any attorney examining the title at the time the suit to quiet title was brought would likely have concluded that marketable record title was in the heirs of Lizzie because of title standard number 52.[73] Finally, adverse possession

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70. *See* Brief of Appellees at 15.

In Wilson v. Kelley, 226 So. 2d 123 (Fla. Dist. Ct. App. 1969), after citing *Smith*, the court held that a quitclaim deed conveying *all* of the grantor's interest in Blackacre cannot serve as a root of title where the grantor does not own Blackacre in fee or does not *expressly purport* to convey a specifically defined interest in land, whether done fraudulently or not. *Id.* at 128; *see also* Conine & Morgan, *supra* note 14, at 205. This is the rule of *Smith*. For a more detailed analysis, *see infra* note 98 and accompanying text.

71. *See* Johnstone, *supra* note 31, at 494-95.

72. There was no failure to discover a defect which resulted in the appellees' loss of their property.

Originally, Francis' attorney probably advised him to convey the property to Lizzie by means of a quitclaim deed. Quitclaim deeds can be used to convey a fee without the making of warranties. Troxell v. Stevens, 57 Neb. 329, 77 N.W. 781 (1899) (cited in Foster, *The Law of Convenants For Title in Nebraska*, 1 NEB. L. BULL. 1, 50 (1922)). Francis knew that he could not warrant to Lizzie his title to the fee, because he was only a cotenant. Nevertheless, he conveyed his interest in the entire tract, rather than conveying an undivided one-tenth interest in the property. *See supra* note 63. *See* 168 Neb. at 149, 95 N.W. 2d at 329 (quitclaim is root of title if cotenants are defrauded); *infra* text accompanying note 101; *see also* Barnett, *supra* note 15, at 58; Conine & Morgan, *supra* note 14, at 205 (criticize this sort of logic).

See also Brief of Appellants at 7-8; Brief of Appellees at 4-7, 12-15 (evidence outside the deed is used to defeat it); AXELROD, *supra* note 10, at 505.

73. NEB. TITLE STANDARD No. 52, *supra* note 53. The standard stated:

> STANDARD No. 52 Marketable Title Act—Commencement of Chain.
>
> Marketable Title Act—Quitclaim Deed—An unbroken chain of title, within the meaning of the Marketable Title Act, may originate in a quitclaim deed.
>
> A quitclaim deed is a "conveyance or other title transaction" which "purports" to create an interest in the grantee within the contemplation of Sec. 76-289, R.R.S. Neb. 1943. While originally quitclaim deeds were used to release the interest or claim of the grantor to one who already had an interest in the land, in modern times they are

did not operate to vest title to the land in Lizzie's heirs presumably because they did not actually possess any part of the property in question.[74]

In sum, *Smith* illustrates the very sort of problem the Nebraska Marketable Title Act was meant to address: the problem of old interests which are awakened from a deep sleep in the public land records.[75] And despite the reluctance of the Nebraska Supreme Court to do so in *Smith*, "it is recognized that meritorious interests may occasionally be cut off by the act, [but] the benefits resulting to the people of the State from clearing land titles warrants such a

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commonly used as primary conveyances to a stranger to the title. See, H. H. Foster, "Convenants for Title," 1 Neb. Law Bull., No. 1 P. 50. A quitclaim deed has been held to be a "conveyance" protected by our recording acts. Schott v. Dosh, 49 Neb. 187, 68 N.W. 346; Bannard v. Duncan, 79 Neb. 189, 112 N. W. 353. See also: 16 Am. Jur. 447, 627, 628; 45 Am. Jur. 518; 44 A. L. R. 1266; 162 A. L. R. 556.

The 1976 reissue of title standard number 52 contains this reference to *Smith*:

> However, in Smith v. Berberich, 168 Neb. 142, 95 N. W. 2d 325, the particular Deed conveying all "my" interest, where the record showed that the Grantor owned only a 1/10 interest, was held to be insufficient within the meaning of the Act. The effect of this case is that the document must purport to convey the land itself, and not merely the Grantor's interest therein. This construction can arise by covenant, Warranty, recital in the Deed itself or even by implication.

See also Brief of Appellants at 9; Brief of Appellees at 12.

It is, nevertheless, interesting to note that the appellees' attorney was unwilling to rely on the marketable title act, and, instead, brought suit to quiet title. *See* Rankin, *supra* note 1, at 92 (commenting on the failure of attorneys to rely on the Act).

74. Neither the opinion nor the briefs in *Smith* make reference to *actual* possession of the property. An affidavit of possession was filed by the appellees on June 6, 1958. Brief of Appellants at 6; *see also* NEB. REV. STAT. § 76-294 (1981); Aigler, *supra* note 14, at 51 (application of the marketable title acts to vacant lands); Rankin, *supra* note 1, at 91 (reference to "hostile possession").

It is fundamental that in order for constructive possession to ripen into adverse possession there must be: "(1) color of title, and (2) actual possession of part of the land claimed thereunder." Foster, *supra* note 52, (pt. 2) at 6 (footnotes omitted). In *Smith*, both the quitclaim deed, *id.* (pt. 3) at 117, and the judicial decree of heirship, *id.* at 120 (analogizing the judicial decree of heirship to a purchase of property at a mortgage foreclosure sale), could have satisfied the color of title requirements. But, presumably the land was never actually possessed, which necessitated the filing of the affidavit.

See also BROWDER, *supra* note 2, at 39-42.

75. The Act may be conceptualized as permitting a statutory type of adverse possession without the necessity of complying with the normal requirements of gaining title to land by adverse possession. *See supra* note 74. Instead, the Act provides for a statutory adverse possession if an unbroken chain of title of record for 23 years can be shown to an interest in land; possession may be actual or constructive. NEB. REV. STAT. §§ 76-288, -294 (1981). *See generally* Aigler, *supra* note 14, at 51; Conine & Morgan, *supra* note 14, at 181; Ruemmele, *supra* note 59, at 481.

result just as is the case where vested rights are wiped out by operation of the recording acts."[76] It is this *positive* frame of reference, that is, looking to and protecting that which was done most recently, rather than giving priority in time of recording priority in right, which generally distinguishes marketable title acts from the recording acts.[77] Marketable title acts are intended to reverse the usual priorities as established under the recording system so as to cause individuals to diligently protect their interests in land or be subject to having them extinguished.[78]

B. The Act

Before the provisions of the Nebraska Marketable Title Act are analyzed, two basic principles underlying marketable title acts should be stated. First, marketable title acts are designed to work in conjunction with the recording acts, and not to supplant them.[79] This means that the marketable title act should be harmonized with the recording act to the greatest extent possible, but should generally be allowed to override the recording act when irreconcilable conflicts arise.[80] Second, marketable title acts are designed to avoid the necessity of bringing suits to quiet title.[81] Instead, the acts bar slumbering interests and cause an automatic cleansing of the record.[82] These two principles serve as the interpretative foundation for the Act. It is now appropriate to track the statute.

Section 76-288 states the basic rule:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by himself and his immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty-[three] years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by the application of the provisions of this act, instruments which have been recorded less than twenty-

76. Rankin, *supra* note 1, at 91; *see also* Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957); Aigler, *supra* note 14, at 50; Barnett, *supra* note 15, at 47, 90.

77. *See Conveyancing Procedure*, *supra* note 18, at 86; *Trends*, *supra* note 6, at 268. The recording acts do not extinguish rights as do the marketable title acts. The recording acts decide the rights of the parties who derive title from a common grantor; they do not apply in the case of a "wild" deed.

See also Foster, *Nebraska Law of Adverse Possession* (pt. 1), 11 NEB. L. BULL. 378, 379 (1933) (same notion applies to adverse possession).

78. *See* SIMES & TAYLOR, *supra* note 29, at 344; Barnett, *supra* note 15, at 57; Conine & Morgan, *supra* note 14, at 181, 188, 199, 211.

79. *See* Barnett, *supra* note 15, at 52.

80. *Id.* at 84; *but see infra* note 146 and accompanying text.

81. *Id.* at 85.

82. *Id.* at 54.

> [three] years, and any encumbrances of record not barred by the statute of limitations.[83]

On its face, section 76-288 is far from clear. Therefore, a closer examination of the section is necessary to expose its true meaning and hidden traps. The basic concept of the Act derives from

> the idea that a person qualified to own land . . . [and] in possession thereof who could show a record title to such land in himself or in himself and predecessors in interest for as long as [twenty-three] years ought to be, in an overwhelming percentage of instances, a safe person from whom to take a deed or mortgage, and that a title derived from such person should be made safe, subject only to such outstanding interests as appear of record within that [twenty-three-] year period. The idea obviously has some resemblance to the "root-of-title" that has played a large part in English land title transactions.[84]

Indeed, the Model Marketable Title Act[85] operates from an application of the "root of title" concept. It defines root of title as

> that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date [twenty-three] years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.[86]

Although the Nebraska Act does not specifically define root of title, the concept is clearly embodied in sections 76-288 and 76-290,[87] as "the record title covering a period of twenty-[three] years or more subsequent to the recording of deed of conveyance as set out in section 76-288 . . . ."[88]

To illustrate the basic concept, consider this example: *O* conveys Blackacre to *A* by warranty deed in 1959. In 1960, *O* conveys Blackacre to *B* by warranty deed. Both deeds are promptly recorded. Under the recording act, *A* prevails over *B*, but, in 1983, under the Marketable Title Act, *B* will have a "marketable record title"[89] to Blackacre, and *A*'s interest will be "barred and not enforceable in law or equity . . . ."[90] It is immaterial that *B* purchased with notice or that no title transaction has occurred in

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83. NEB. REV. STAT. § 76-288 (1981).
84. Aigler, *supra* note 14, at 50-51. The alteration of the time period to 23 years is done to make the quotation conform to the Nebraska Act. This will be done throughout the Comment. *See supra* note 36. *See also* 1 SUGDEN, *supra* note 14, § 487, at 557.
85. MODEL MARKETABLE TITLE ACT (L. Simes & C. Taylor 1960) [hereinafter cited as MODEL ACT], *reprinted in* SIMES & TAYLOR, *supra* note 29, at 6.
86. MODEL ACT § 8(e).
87. *See infra* text accompanying note 156 ("deed of conveyance under which title is claimed"); *see also* NEB. REV. STAT. § 76-297 (1981); Barnett, *supra* note 15, at 52.
88. NEB. REV. STAT. § 76-297 (1981). *See also* SIMES & TAYLOR, *supra* note 29, at 11; Barnett, *supra* note 15, at 533; Conine & Morgan, *supra* note 14, at 191.
89. NEB. REV. STAT. § 76-288 (1981).
90. NEB. REV. STAT. § 76-290 (1981).

1983.[91] There are, however, certain other requirements of, and exceptions to the Act which may affect the outcome of this hypothetical case. These will be discussed and developed in the remainder of this subsection.

Subject to the claims and defects of title excepted from the operation of the Act, persons who satisfy the four requirements for invoking the aid of the Act are deemed to have marketable record title. In order to invoke the aid of the Act, persons must: (1) have the legal capacity to own real estate in Nebraska; (2) have an unbroken chain of title to any interest in real estate by the person and the person's immediate or remote grantors; (3) have the unbroken chain of title trace through a deed of conveyance which has been of record for twenty-three years or longer; and (4) be in possession of such real estate.

The first requirment of section 76-288 is that the person invoking the aid of the Act must have the legal capacity to own real estate in Nebraska.[92] The Act contains no definition of "person," but presumably corporations, partnerships, estates, and trusts, as well as natural persons, are encompassed within the term. The legal capacity to own any interest in real estate in Nebraska is defined by state property law.[93]

The second requirement of section 76-288 is that the person and the person's immediate and remote grantors must have (1) an unbroken chain of title, (2) to any interest in real estate. Section 76-289 defines these two elements:

> A person shall be deemed to have the unbroken chain of title to an interest in real estate as such terms are used in this act when the official public records of the county wherein such land is situated disclose a conveyance or other title transaction dated and recorded twenty-[three] years or more prior thereto, which conveyance or other title transaction purports to create such interest in such person or his immediate or remote grantors, with nothing appearing of record purporting to divest such person and his immediate or remote grantors of such purported interest.[94]

The requirement that there be an unbroken chain of title is quite clear. "[U]ntil all gaps in the post-root chain are filled by recorded quitclaim deeds or other recorded curative instruments or proceedings, the extinguishment feature of the [Act] will not

91. *See* Barnett, *supra* note 15, at 53; Conine & Morgan, *supra* note 14, at 199.

92. *See, e.g.*, Graf v. State, 118 Neb. 485, 487-88, 225 N.W. 466, 467 (1929); Chapman v. Brewer, 43 Neb. 890, 898-99, 62 N.W. 320, 322 (1895); Conine & Morgan, *supra* note 14, at 189; *infra* note 93.

93. *See, e.g.*, NEB. CONST. art. II, § 18 (minors; persons under disability); NEB. REV. STAT. § 4-107 (1977) (aliens); § 21-2004 (1977) (corporations); § 42-202 (1978) (married women); § 67-308 (1981) (partnerships); § 76-202 (1981) ("purchaser" defined).

94. NEB. REV. STAT. § 76-289 (1981); *see also* SIMES & TAYLOR, *supra* note 29, at 11.

operate."[95] But to the extent that the requirement that there be an unbroken chain of title is clear, the interests which the Act protects are equally unclear. Simes and Taylor recognized this in discussing the Model Act:

> The statutes vary as to the kind of interest made marketable. The Michigan type of statute quiets the title to "any interest." . . . In general, it may be said that, in the vast majority of cases, the statute is needed to clear the title to a fee simple, and that, as a practical matter, the value of the act would not be greatly impaired if it were limited to fees simple. On the other hand, it clearly could not be limited to fees simple absolute, for the problem which it frequently seeks to solve is how to transform a fee simple, which is shown by the record not to be absolute, into a fee simple absolute. But if we try to designate what fees simple are protected by the act and what are not, we encounter no end of difficulty. It would seem that the Michigan approach is desirable, even though situations rarely involve anything but a fee simple.[96]

The third requirement of section 76-288 is that the unbroken chain of title trace through a deed of conveyance which has been of record[97] for twenty-three years or longer. Because this requirement has been interpreted by the Nebraska Supreme Court, it is necessary to return to *Smith*.

In *Smith*, the court held that a quitclaim deed could not serve as the root of title in order to invoke the aid of the Act.[98] The court reasoned that because a quitclaim deed only conveys "any interest or title of the grantor in and to the land described rather than the land itself,"[99] the "weakness and defect of the claim of appellees [was] that they assert[ed] an interest in the land more extensive than that which the quitclaim deed purported to create in the grantee named in that deed."[100] The court went on to say:

> If the conveyance from Francis L. Smith to Lizzie M. Smith had purported to create an entire title to the land in the grantee, it would have satisfied the provision of the Marketable Title Act and appellees would have been qualified to have invoked the aid of that act to sustain their claim of title to the land. The conveyance on which they rely was not of that character.[101]

At first blush, the *Smith* opinion seems to make sense. At the date of the quitclaim conveyance, Lizzie became a tenant in com-

95. Barnett, *supra* note 15, at 65 (footnote omitted); *see also* Conine & Morgan, *supra* note 14, at 192.

96. SIMES & TAYLOR, *supra* note 29, at 351-52 (footnote omitted); *see also* Barnett, *supra* note 15, at 64-65; Conine & Morgan, *supra* note 14, at 193.

97. *See* NEB. REV. STAT. § 76-289 (1981) ("official public records of the county wherein such land is situated"); Conine & Morgan, *supra* note 14, at 192-93.

98. *See supra* notes 69 & 87 and accompanying text. For a case in which a quitclaim deed served as the root of title, see Lane v. Travelers Ins. Co. of Hartford, Conn., 230 Iowa 973, 299 N.W. 553 (1941).

99. 168 Neb. at 146, 95 N.W.2d at 327.

100. 168 Neb. at 149, 95 N.W.2d at 329; *see also* Conine & Morgan, *supra* note 14, at 219 n.117.

101. 168 Neb. at 149, 95 N.W.2d at 329.

mon with her husband's nine siblings. Lizzie could have used the entire tract without prejudicing the rights of the other joint owners. Only if she had excluded her cotenants would a cause of action have arisen against Lizzie.[102] So even if Lizzie had used the entire property, the rights of the other tenants in common would not be prejudiced by the quitclaim deed in the absence of the applicability of the Act. Should the Act have applied? It seems so, despite the rather sound reasoning of the court.[103]

Most importantly, the *Smith* court failed to clearly distinguish between the effect of a conveyance of a fee simple interest by warranty deed and by quitclaim deed. It is well-settled that a fee simple absolute can be conveyed by either a warranty deed or quitclaim deed.[104] Moreover, either type of deed only conveys that interest which the grantor owns; neither grants the land itself if the grantor does not have fee simple absolute title to the property. The words of conveyance in the two types of deeds are equally effective or ineffective to *actually* convey the fee, and both types of deeds can *purport* to convey the fee without being effective to actually convey the fee.[105]

The warranties which distinguish the warranty deed from the quitclaim deed serve to preserve certain causes of action against the grantor which would otherwise be lost upon the acceptance of the deed by the grantee. The warranties are only promises given by the grantor to the grantee respecting the title conveyed. They in no way increase or decrease the interest which the deed purports to convey.[106] So the court's reliance on the fact that the quit-

102. *See* BROWDER, *supra* note 2, at 316.

103. The result reached by the court may be fair. It allowed all the known heirs of the patentees to share equally in the value of the mineral rights. Apparently no one had actually been in possession, yet when the decree of heirship was entered in 1946, the world was on notice that Lizzie's heirs apparently had paramount rights.

104. *See supra* notes 72-73. A quitclaim deed can also be used "to release the interest or claim of the grantor to one who already has an interest in the land . . . ." NEB. TITLE STANDARD NO. 52 comment. *See, e.g.*, Brief of Appellees at 13, *Smith*.

105. *See* AXELROD, *supra* note 10, at 1154; BROWDER, *supra* note 2, at 995-96, 1000 (citing Marshall v. Hollywood, Inc., 224 So. 2d 743 (Fla. Dist. Ct. App. 1969), *aff'd*, 236 So. 2d 114 (Fla. 1970)). The Act focuses on the interest "which [the] conveyance . . . purports to create . . . ." NEB. REV. STAT. § 76-289 (1981). It makes no reference to what is warranted. But applying the *Smith* court's rationale, if Francis had conveyed by warranty deed, presumably the result in the case would have been different. Yet, in fact, the warranty deed would have been no more effective to convey the fee than the quitclaim *actually* was.

106. *See* AXELROD, *supra* note 10, at 504-06 ("The [warranties] generally guarantee that grantor owns what he *purports* to grant . . . .") (emphasis added).

claim deed lacked warranties[107] is clearly misplaced, and its tacit assertion that any type of deed could be used to convey more than a grantor owns is clearly erroneous.[108]

It makes no difference that Francis did not have the power to convey a fee simple interest to Lizzie or that Lizzie was not a bona fide purchaser.[109]

> [S]ince the purpose of the marketable title statutes is to eliminate the need for searching back to the sovereign, such statutes are not concerned with the quality of the title conveyed by the root. So long as the instrument serving as the root of title *purports* to convey an interest, it is effective to extinguish prior claims and interests.[110]

In *Smith*, the quitclaim deed purported to convey the entire tract[111] and should have been effective to extinguish the claims of the "slumbering" cotenants. The decision by the Nebraska Supreme Court would require that quitclaim deeds *actually*, rather than *purportedly*, convey the interest claimed because, otherwise, the interest asserted would be "more extensive than that which the quitclaim deed" actually conveyed.[112] This the Act does not command.[113]

Of course, only interests which are inconsistent with the root of title are extinguished by the operation of the Act.[114] In this case, Francis quitclaimed the entire tract to Lizzie.[115] This grant is purportedly inconsistent with the rights of the other cotenants. This is all the Act requires.

Although not uniformly rejected,[116] the rationale underlying *Smith* has been questioned by some authorities.[117] Professor Barnett stated:

> [A] bare quitclaim of "all grantor's right, title, and interest in and to Blackacre" probably could not serve as a root of title to Blackacre, because under Model Act § 8(e) the root of title must "purport to create the interest claimed" by the marketable record title holder. A bare quitclaim

107. 168 Neb. at 145, 95 N.W.2d at 327.
108. *Id.* at 149, 95 N.W.2d at 329.
109. *See supra* note 91 and accompanying text.
110. Barnett, *supra* note 15, at 57; *but see* Wilson v. Kelley, 226 So. 2d 123 (Fla. Dist. Ct. App. 1969); Conine & Morgan, *supra* note 14, at 203-05.
111. *See supra* notes 63 & 72 and accompanying text.
112. 168 Neb. at 149, 95 N.W.2d at 329. By its nature, the Act will *always* operate to vest more in the person invoking the Act than the person had before its application; this is because the Act bars certain interests of record.
113. NEB. REV. STAT. § 76-289 (1981).
114. *See* SIMES & TAYLOR, *supra* note 29, at 295; Barnett, *supra* note 15, at 64; Conine & Morgan, *supra* note 14, at 191.
115. *See supra* notes 63, 72 & 103-04.
116. *See* Conine & Morgan, *supra* note 14, at 201-02; Ruemmele, *supra* note 59, at 479-80.
117. SIMES & TAYLOR, *supra* note 29, at 349; Conine & Morgan, *supra* note 14, at 191-92, 205.

does not purport to create any specific interest in the grantee. Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325 (1959). The mere absence of warranty covenants, however, should not prevent a quitclaim deed from serving as a root of title when it evidences an intent to convey the land.[118]

Similarly, the Uniform Simplification of Land Transfers Act,[119] and, recently, the Iowa,[120] Kansas,[121] and Wyoming[122] marketable title acts have specifically provided that a quitclaim deed may serve as a root of title.

In sum, the third requirement of section 76-288 has been given a rigid interpretation by the Nebraska Supreme Court. In *Smith*, the court held that a quitclaim deed could not be a root of title because it purported to grant only the grantor's interest in the land, and not the land itself. This conclusion is not consistent with the purposes of the Act[123] and has been called into question by later authority.

The fourth requirement of section 76-288 is that the person be in possession of such real estate. Such possession may be actual or constructive.[124] "[P]ossession of real estate referred to in section 76-288 may be shown of record by one or more affidavits which shall contain the legal description of the real estate referred to and show that the record titleholder is upon the date thereof in possession of such real estate."[125]

After delineating the four requirements which must be satisfied in order for a person to be deemed to have a marketable record title, section 76-288 excepts certain claims and defects of title from the operation of the Act. A marketable record title is "subject *only* to such claims thereto and defects of title as are not extinguished or barred by the application of the provisions of this act, instruments which have been recorded less than twenty-[three] years, and any encumbrances of record not barred by the statute of limitations."[126]

The first class of exceptions specified in section 76-288 are those

118. Barnett, *supra* note 15, at 58 n.40, 79; Conine & Morgan, *supra* note 14, at 207-08.

The pertinent language from MODEL ACT § 8(e) should be contrasted with the language of NEB. REV. STAT. § 76-289 (1981) ("purports to create such interest in such person," rather than "purport to create the interest claimed"). Also, did Francis *intend* to convey the entire tract? *See supra* notes 70 & 72.

119. USLTA, *supra* note 14, § 3-301(5) (1977).

120. IOWA CODE § 614.29 (1983).

121. KAN. STAT. ANN. § 58-3402(g) (1976).

122. WYO. STAT. § 34-10-101(vi) (1977).

123. *See* SIMES & TAYLOR, *supra* note 29, at 347; Rankin, *supra* note 1, at 91.

124. Ruemmele, *supra* note 59, at 480.

125. NEB. REV. STAT. § 76-294 (1981); *but cf.* MICH. COMP. LAWS ANN. § 565.101 (1967) (no hostile possession); *see also* Aigler, *supra* note 14, at 51; Barnett, *supra* note 15, at 53 n.31; *Legislation*, *supra* note 37, at 220, 223; Rankin, *supra* note 1, at 91.

126. NEB. REV. STAT. § 76-288 (1981) (emphasis added).

claims and defects of title which are not extinguished or barred by the application of the provisions of the Act. These excepted interests are listed in section 76-298.

The first exception specified in section 76-298 prevents application of the Act to bar "the rights of any lessor or his successor as reversionary of his right to possession on the expiration of any lease by reason of failure to file the notice herein required."[127] Professor Barnett stated that "[w]ithout such an exception, a long-term lessee might, without the knowledge of his lessor, give an absolute deed to his transferee rather than merely an assignment of the leasehold estate and, after the deed had been of record [twenty-three] years, thereby cut off the lessor's title."[128]

The second exception in section 76-298 protects the rights of remaindermen upon the expiration of any life estate or trust created before the root of title. This exception found its way into a number of marketable title acts[129] after the Iowa Supreme Court interpreted the Iowa Act to extinguish the rights of contingent remaindermen who were not even born at the time the root of title was created.[130]

The third exception in section 76-298 protects rights founded upon any mortgage, trust deed, or contract for the sale of lands (installment land contracts)[131] which are not barred by the statute of limitations. "Removing mortgages, trust deeds, and contracts of sale from the purview of the act was based upon the thought that separate statutes should be applied to these."[132] In Nebraska, mortgages must be foreclosed within ten years after the cause of action accrued.[133] "The trustee's sale of property under a trust

127. NEB. REV. STAT. § 76-298 (1)(a) (1981). For a discussion of the notice requirement, *see infra* note 165 and accompanying text.
128. Barnett, *supra* note 15, at 78.
129. *See* N.D. CENT. CODE § 47-19.1-11(b) (1978); S.D. CODIFIED LAWS ANN. § 43-30-12 (1967).
130. Lane v. Travelers Ins. Co. of Hartford, Conn., 230 Iowa 973, 299 N.W. 553 (1941). It is interesting to note that when Iowa amended its marketable title act in 1969, it did not create such an exception. *See* IOWA CODE § 614.36 (1983); *see also* SIMES & TAYLOR, *supra* note 29, at 357; Barnett, *supra* note 15, at 78; Ruemmele, *supra* note 59, at 485.
131. "Contracts for the sale of land" is a term generally used to describe the contract executed between a buyer and seller of real estate which conditionally binds the parties to deliver and accept a deed at some later date. Presumably, the drafters of section 76-298 were not referring to such contracts which by their nature and terms are short-lived. Rather, the term which probably should have been used was "installment land contract." An installment land contract is a financing and security device.

The same ambiguity exists in section 76-239, where the term "real estate sale contract" is used.
132. Ruemmele, *supra* note 59, at 485.
133. NEB. REV. STAT. § 25-202 (1979).

deed shall be made within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed,"[134] which is usually five years.[135] The statute of limitations for installment land contracts is five years.[136]

The fourth exception in section 76-298 prevents conditions subsequent contained in any deed from being barred. However, in Nebraska, possibilities of reverter, and rights of entry or reentry for breach of a condition subsequent are valid for only thirty years.[137]

The final exception in section 76-298 states that the Act shall not be "deemed to affect the right, title or interest of the State of Nebraska, or the United States, in any real estate in Nebraska."[138] While such an exception is consistent with the general statutory treatment of governmental interests,[139] Simes and Taylor believed that even this exception unnecessarily undermines the ultimate effectiveness of the marketable title acts:

> The exception of government interests found in a number of the statutes is believed to be undesirable. Probably the interest of the United States could not be destroyed by a marketable title statute, and this is true whether the act makes an exception of that sort or not. Hence such an exception does no harm. But to except interests of the state or of municipalities would seem undesirable, since it would too greatly impair the value of the act, and since there is no good reason why the state or a municipality should not file a notice just as other owners of remote interests are required to do.[140]

The second class of exceptions specified in section 76-288 are those instruments which have been recorded less than twenty-three years. On its face this exception seems quite innocuous, for, by definition, the Act only operates to extinguish interests which are at least twenty-three years old.[141] But below the surface, a potential trap for the unwary exists.

Professor Barnett illustrated the situation as follows:[142] In 1959, *O* conveys Blackacre to *A*, who immediately records. In 1960, *O* conveys to *X*, who immediately records. In 1972, *A* conveys to *B*, who immediately records. The issue is whether in 1983 the conveyance from *A* to *B* prevents extinguishment of the *A-B* chain in favor of *X* because there is a competing interest of record which is less than twenty-three years old. The answer is unclear.

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134. NEB. REV. STAT. § 76-1015 (1981).
135. NEB. REV. STAT. § 25-205 (1979).
136. *Id. See supra* note 131.
137. NEB. REV. STAT. § 76-2,102 (1981); *see also* SIMES & TAYLOR, *supra* note 29, at 357; Leahy, *supra* note 36, at 273; Ruemmele, *supra* note 59, at 485.
138. NEB. REV. STAT. § 76-298(2) (1981).
139. *See, e.g.*, NEB. REV. STAT. § 25-202 (1979).
140. SIMES & TAYLOR, *supra* note 29, at 357.
141. NEB. REV. STAT. § 76-290 (1981); *see supra* note 36.
142. Barnett, *supra* note 15, at 54-55.

First, absent the conveyance from *A* to *B*, *X* would have a marketable record title in 1983; *A*'s interest would be extinguished.[143] But *A* conveyed to *B* in 1972 and the instrument has been recorded less than twenty-three years. Clearly, in 1972, *A*'s interest would have been given priority under the recording act, and *B* would have prevailed over *X*. The issue is what effect, if any, the Act has on the *B v. X* lawsuit in 1983.

In 1983, it could be argued that the Act operates to vest *X* with a marketable record title because *X* has had an unbroken chain of title for twenty-three years. Therefore, because *B* derives title from *A*, and *A*'s interest in the property has been extinguished by operation of the Act, *X* should prevail over *B*. Notwithstanding, the precise issue under the Act is whether *B*'s instrument has been recorded less than twenty-three years.[144] If so, then the Act is not applicable to *B*'s interest; *X* will not be deemed to have a marketable record title, and *B* should prevail over *X* in the lawsuit in 1983 because of the recording act priorities.[145] This seems to be the proper result in this hypothetical case.

This result is also supported by the mandate of section 76-295. Section 76-295 states: "Nothing contained in this act shall be construed . . . to affect the operation of any existing acts governing the effect of the recording or the failure to record any instrument affecting lands."[146] The sweeping language of this section seems irreconcilable with the basic principle that marketable title acts reverse the priorities as they exist under the recording act.[147] In order to harmonize section 76-295 with the broader principles and purposes of the Act, a limiting interpretation must be found. Unfortunately, in the research conducted herein no cases on point were discovered. However, in the seminal work on marketable title acts, Professor Aigler said that the section "makes it clear that [the Act] works no changes in the application and operation of legal principles as to *recording*, adverse possession, prescription, etc., insofar as events and transactions *during the [twenty-three]-year period are concerned*."[148] So in the *B v. X* lawsuit in 1983, the recording act, and not the marketable title act, should provide the basis for the decision.

The third class of exceptions specified in section 76-288 are any

143. NEB. REV. STAT. § 76-290 (1981).
144. NEB. REV. STAT. § 76-288 (1981) ("subject . . . to . . . instruments which have been recorded less than twenty-[three] years").
145. For a discussion of the proper analysis under the Model Marketable Title Act, see Barnett, *supra* note 15, at 55 (The language of the comparable exception in the Model Act is substantially different than in section 76-288.).
146. NEB. REV. STAT. § 76-295 (1981); *but cf.* MODEL ACT § 7.
147. *See supra* note 80 and accompanying text.
148. Aigler, *supra* note 14, at 54 (emphasis added).

encumbrances of record not barred by the statute of limitations. Like much of the other language in the Act, this phrase is sweeping and is in need of a principled interpretation.[149] Professor Barnett believed that the phrase operated to protect all recorded easements from extinguishment.[150] This interpretation does account for the language of the statute and serves to protect certain encumbrances of record which have social utility in excess of their burden on the land.[151] Nevertheless, this interpretation represents nothing more than an ad hoc policy determination since there is no principled way to limit the statutory language only to recorded easements.[152] For just as surely as a recorded easement is an encumbrance of record not barred by the statute of limitations, so, too, is a grant or reservation of mineral rights, which antedates the root of title purporting to convey the fee, an encumbrance of record not barred by the statute of limitations;[153] and it is contemplated that the mineral interest would be barred by the Act.[154]

Despite its unprincipled and overinclusive nature, Professor Barnett's interpretation of this ambiguous phrase is best and should be followed in order to protect certain socially useful encumbrances from extinguishment. This interpretation comports with the purpose of the Act which seeks to extinguish ancient defects which have lost their social utility.[155]

In sum, section 76-288 sets forth the criteria which must be sat-

149. This is also an unusual provision. In the research conducted herein only two states were discovered which have a similar provision. *See* N.D. CENT. CODE § 47-19.1-01 (1978); S.D. CODIFIED LAW ANN. § 43-30-1 (1967). Besides the Barnett article, *see infra* note 150, the only other reference to the phrase is oblique. *See Legislation*, *supra* note 37, at 220; *see generally* 2 PATTON, *supra* note 9, at § 561.

150. Barnett, *supra* note 15, at 73.

151. *See generally* SIMES & TAYLOR, *supra* note 29, at 218, 224 (discussion of why these interests generally should be excepted from the operation of the acts); *see also* MICH. COMP. LAW ANN. § 565.104 (1967) (In 1946, the Michigan Act was amended to provide an exception for easements.); MODEL ACT § 6; Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167 (1970).

152. In fact, it could be argued with equal force that the phrase means that all easements are barred by the Act. *See* NEB. REV. STAT. § 76-290 (1981) (*all* such interests are barred). Indeed, the phrase could be interpreted to mean that only those encumbrances of record which are expressly limited by statute are not extinguished if the specific statute of limitations has not run. For example, since easements are not limited in duration by statute, they necessarily come within the class of defects of record barred by the Act.

For a discussion of the ramifications of barring all easements, see SIMES & TAYLOR, *supra* note 29, at 218, 224.

153. *See* 2 PATTON, *supra* note 9, at § 596.

154. *See* Conine & Morgan, *supra* note 14, at 219; *but see* USLTA, *supra* note 14, art. 3, pt. 3 introductory comment (1977).

155. This is an implication drawn from the Act itself. *See* NEB. REV. STAT. §§ 76-

isfied in order for a person to be deemed to have a marketable record title; it also declares certain exceptions to the general rule. Section 76-288 does not, however, expressly define which interests are barred by the operation of the Act. To determine this, reference must be made to section 76-290.

Section 76-290 provides:

> Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of all interest, claims, and charges whatever, the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred twenty-[three] years or more prior thereto, whether such claim or charge be evidenced by a recorded instrument or otherwise, and all such interests, claims, and charges affecting such interest in real estate shall be *barred* and not enforceable at law or equity, *unless* any person making such claim or asserting such interest or charge shall, on or before twenty-three years from the date of recording of *deed of conveyance under which title is claimed*, or within one year from April 8, 1947, whichever event is the latest in point of time, file for record a *notice* in writing, duly verified by oath, setting forth the nature of his claim, interest or charge; and no disability nor lack of knowledge of any kind on the part of anyone shall operate to extend the time for filing such claims after the expiration of twenty-three years from the recording of such deed of conveyance or one year after April 8, 1947, whichever is the latest in point of time.[156]

Section 76-290 is quite clear. It declares that a marketable record title is held "free and clear of *all* interest[s] . . . the existence of which depends *in whole or in part* upon any act . . . or omission that occurred twenty-[three] years or more prior to thereto . . . ."[157] The most difficult question raised by this general rule is whether the interests inherent in the muniments of the chain of record title are extinguished. Although the Model Act specifically provides for the preservation of such interests,[158] no similar provision is found in the Nebraska Act. In fact, the language of section 76-290 is quite to the contrary: it operates to extinguish *all* interests the existence of which depends *in whole or in part* upon any act or omission that occurred prior to the root of title.

To illustrate the problem, consider this example: *O* leases Blackacre to *A* for ninety-nine years in 1959. *A* records, but does not go into possession. In 1960, *O* conveys Blackacre to *B* in fee, subject to the lease; *B* records. In 1983, may *B* declare that he possesses a marketable record title to Blackacre and that *A*'s leasehold is barred? The result under the Nebraska Act is uncertain. However, it appears that *A*'s interest exists, at least *in part*, upon

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288, -290 (1981). *See also* Barnett, *supra* note 15, at 75, 87; Conine & Morgan, *supra* note 14, at 185-86.

156. NEB. REV. STAT. § 76-290 (1981) (emphasis added).

157. *Id.* (emphasis added).

158. MODEL ACT § 2(a); *see also* SIMES & TAYLOR, *supra* note 29, at 11; Conine & Morgan, *supra* note 14, at 202.

an act before the root of title. This interpretation leads to a somewhat questionable result which, when compared to the Model Act and the Michigan Act,[159] may not have been contemplated by the drafters.[160]

Section 76-290 goes on to provide that "*all such interests . . . shall be barred* and not enforceable at law or *equity, unless . . . on or before* twenty-three years from the date of recording of deed of conveyance under which title is claimed . . . *notice* in writing . . . [is filed]."[161] In essence, the Act is more than a statute of limitations because it *bars* all interests not expressly preserved by the Act.[162] So, even in equity, a court could not enforce an interest in real estate prior to the root of title,[163] unless it falls within the exceptions to the Act[164] or notice has been filed.[165] Disabilities do not toll the operation of the Act.[166]

IV. RECOMMENDATIONS AND CONCLUSIONS

The history of the recording acts has been traced and the problems resulting from reliance on the recording system as the principal means of securing titles have been developed.[167] The history and purposes of the Nebraska Marketable Title Act, as a remedial device, have been discussed, and the Act has been analyzed.

159. MICH. COMP. LAWS ANN. § 565.101 (1967); *but see* Aigler, *supra* note 14, at 53.

160. On the other hand, it could be argued that the requirement that a person claiming a marketable record title have an unbroken chain of title under a deed of conveyance which has been of record at least 23 years, NEB. REV. STAT. § 76-288 (1981), contemplates that all that is revealed in the root of title is preserved. But apparently the drafters of the Michigan Act thought otherwise or they would not have included a specific reference to muniments of title. *See supra* note 159.

NEB. REV. STAT. §§ 76-275.04 through -275.05 (1981) may affect the analysis, too. Generally, these sections create rebuttable presumptions that references or recitals in certain recorded instruments are valid only for 20 years.

161. NEB. REV. STAT. § 76-290 (1981) (emphasis added).

162. *See* Rankin, *supra* note 1, at 91; *Legislation*, *supra* note 37, at 221.

What effect the Occupants and Claimants Act may have on persons whose interests are barred is unclear. *See* NEB. REV. STAT. § 76-301 (1982). No provision for remuneration of persons whose interests are extinguished is provided in the Marketable Title Act. *See* BROWDER, *supra* note 2, at 1004 (citing Barnett, *supra* note 15, at 85).

163. Even a title by adverse possession *prior* to the root of title would be barred by the Act because both recorded and unrecorded interests are barred. NEB. REV. STAT. § 76-290 (1981); *see also* SIMES & TAYLOR, *supra* note 29, at 13; Ruemmele, *supra* note 59, at 482.

164. NEB. REV. STAT. §§ 76-288, -298 (1981).

165. For specific requirements regarding notice, see NEB. REV. STAT. §§ 76-291, -292, -296 (1981); *see also* SIMES & TAYLOR, *supra* note 29, at 15.

166. NEB. REV. STAT. § 76-290 (1981).

167. *See generally* Rood, *supra* note 18, at 380, 387-88, 392.

It is now time to take stock of what has been presented, make recommendations for change, and briefly conclude.

A close evaluation of the Nebraska Marketable Title Act reveals several matters which warrant consideration by the Nebraska Unicameral. First, the Act should be amended to remove the twenty-two year and twenty-three year inconsistency. North Dakota recognized this anomaly early and corrected the mistake.[168] Nebraska should do the same. Second, the "encumbrances of record" clause in section 76-288 should be amended or deleted. No principled manner of interpreting the phrase seems to exist. Presumably, the phrase is designed to protect certain socially useful encumbrances, like easements and restrictive covenants. If that is what was intended, language similar to that used in the Model Act should be employed. Finally, section 76-288 should be amended to clarify whether interests revealed in the muniments of title are to be extinguished by the Act. If these amendments are made, the Nebraska Act should be better able to accomplish its stated objectives. While it will never be a panacea, the Act should be a handy tool in the bag of the lawyer who assists clients in closing real estate transactions. Despite its billing,[169] this is all the Act was ever meant to accomplish.[170]

Summarily, the major benefits resulting from the enactment of marketable title acts are:[171] (1) the extinguishment of most pre-root defects, and (2) the general simplification of title examination. On the negative side, marketable title acts (1) "have destroyed the assurance of a grantee by conveyance from the record owner that his interest is indefeasible";[172] and (2) extinguish some interests in real estate that have continuing social utility. Consequently, the Nebraska experience seems to be that the Act has been largely ignored by attorneys.[173] This may, in large part, also be due to the hostility shown the Act by the Nebraska Supreme Court in

168. N.D. CENT. CODE § 47-19.1-03 (1978); *see also* Leahy, *supra* note 36.
Language similar to that used in MICH. COMP. LAWS ANN. § 565.103 (1967) should be used rather than simply copying the North Dakota Act. *See* N.D. CENT. CODE § 47-19.1-03 (1978) ("twenty years or more" and "on or before twenty years").

169. *See generally* SIMES & TAYLOR, *supra* note 29, at 3; Conine & Morgan, *supra* note 14, at 181; Rankin, *supra* note 1.

170. *See* Aigler, *supra* note 14, at 58.
More recent developments in the area of title protection and security include automation of land title records and federal government intervention. *See* AXELROD, *supra* note 10.

171. *See* BROWDER, *supra* note 2, at 1002 (citing Barnett, *supra* note 15).

172. BROWDER, *supra* note 2, at 1002.

173. *See* Rankin, *supra* note 1, at 92. This conclusion is reached on the basis that there has only been one case reported which interprets the Act, and no scholarly writing concerning the Act has been published since 1947. Notwithstand-

Smith.[174]

Recognizing these limitations, what then should be done to simplify and facilitate real estate transactions in Nebraska? Many commentators have suggested resort to the Torrens system,[175] and Nebraska has had some experience with this system.[176] Yet, from this vantage point, it seems that resort to the Torrens system would be destined to the same fate that its ancestors experienced:[177] It would soon be discovered that the Torrens system does not solve all of the problems either. In fact, the Torrens system may be the least satisfactory of all solutions because it requires the establishment of government machinery to do the work and the government is notoriously inefficient.[178] It would seem that the best solution to the problem is also the one that no one seems willing to place faith in: honest and intelligent lawyering.[179] Within the problem,[180] lies the solution. It is not a simple solution. But, therein lies the challenge: "to keep the whole present absurd system from collapsing under its own weight."[181]

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ing, this may also lead to the conclusion that the Act is so well understood that litigation and commentary are unnecessary.

174. *Smith* should be reconsidered by the Nebraska Supreme Court at the earliest convenient time.

175. *See, e.g.*, Barnett, *supra* note 15, at 92; McDougal & Brabner-Smith, *supra* note 31, at 1151; Rood, *supra* note 18, at 393; *Trends*, *supra* note 6, at 262.

176. *See supra* note 32.

177. *See Conveyancing Procedure*, *supra* note 18, at 81.

178. *But see* McDougal & Brabner-Smith, *supra* note 31, at 1132-33. *See also* Comment, *supra* note 24, at 1253.

179. *See* Barnett, *supra* note 15, at 92.

180. *See supra* text accompanying note 1.

181. Barnett, *supra* note 15, at 94.