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Ralph W. Aigler

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MARKETABLE TITLE ACTS*

RALPH W. AIGLER**

A visitor from almost any other country, even those we are inclined to class as backward, would be amazed to find how complex and expensive it is for us to effect a change in ownership or to mortgage land. We should have to explain to him not only that the instrument of transfer must comply with all the legal requirements and be duly executed but that the transferee must be assured that the interest purported to be transferred or encumbered is really vested in the party executing such instrument and that the determination of this last fact is one commonly calling for prolonged study by highly trained, and therefore high-priced, professionals.

Further, we should have to explain that, speaking generally, one is not deemed the owner of the interest sought to be conveyed unless he can show an uninterrupted devolution of such interest from the Government down to himself. At this point the interested and acute stranger might well ask, "And do you intend to follow that procedure into the indefinite future? Have you given any thought to the obvious fact that as decades go by the burden which you now admit is onerous may well become intolerable?"

It is, of course, vitally important that a conveyee be able to feel complete assurance that in exchange for his money he receives an effective conveyance from one in position to convey the intended interest. A conveyor may convey less than he has, but except for the unusual situation in which he is estopped to assert an interest which he did not have at the time of his conveyance but which he acquired thereafter, he can convey nothing which he does not have. Unlike sales of chattels, there are no implied warranties, even of title, in conveyances of land. Covenants imported into deeds by use of a statutory form are not exceptions to this; such covenants are not implied, but expressed in a shorthand form. Express warranties and even title insurance ordinarily cannot give the conveyee the ownership that he paid for, any more than life insurance gives life or fire insurance preserves the building; and the same factors that led to the doctrine that valid contracts for the sale of land will be specifically enforced by the courts while for breach of contract for the sale of chattels the injured party is normally left to his remedy in damages, spur on the prospective conveyee to satisfy himself that the proposed conveyance will truly give him the interest bargained for.

In England, long ago, it was realized that a practicable limit had to be placed upon title searches. To take these, as to each parcel of land, the

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** Professor of Law, University of Michigan Law School.

government or some subdivision thereof, as the root of title, as we do in this country, would be obviously absurd. Under what is called an "open contract," that is, one not specifying otherwise, it is incumbent upon a vendor of English land to show a thirty year title, based upon a "root of title." Such "root" is "some document which deals with the absolute ownership, both at law and at equity, and which contains nothing to cast doubts on the title of the disposing party."¹ Starting with such "root," the seller must show what has happened to the absolute ownership of the land during at least thirty years and that it now resides in him. The sweeping reforms of the law of Property Act of 1925,² of which even a general outline is too complex to state here, tend still further to simplify English title problems.

A purchaser or mortgagee naturally wants to deal with one who has a marketable title. Contracts for the sale of land normally contain a provision to the effect that the vendor's conveyance shall be of a "marketable" or "merchantable" title. Indeed, a contract for the conveyance, in the absence of language showing a contrary meaning, will generally be construed as implicitly calling for a marketable title.

What is a "marketable title"? Over the country, authority is not lacking that unless the agreement *calls* for a marketable *record* title it need not be of record. A multitude of decisions as to whether or not on the facts presented a marketable title was present may be found. The question is one of mixed fact and law. As one writer expressed it, "the situation is not greatly exaggerated by the statement that each case is *sui generis*."

It is not essential that the title be *absolutely* safe against direct attack. A distinguished English jurist said that a mathematical certainty of a good title is impossible.³ At the same time, to rank a title as non-marketable, it is unnecessary to produce facts warranting a conclusion that the title is really bad, though, of course, proof of such fact is sufficient. The test, as frequently stated, is: Is the title holder reasonably safe from attack? The celebrated English judge said that the question was whether there was a "reasonably decent probability of litigation" and if there were any such litigation, again to borrow language from another celebrated judge, this time Chief Justice Gibson of Pennsylvania, would the purchaser be "exposed to a lawsuit with the least chance of losing it"?

As said at the outset, the examination of the title that must be made in order to answer this question of marketability calls for the services of trained persons and the material to be examined often is numerous and complex, depending on how far back one must go to get to that "root of title" and how many transactions may have affected the title. Another factor is the meticulousness of the person to be satisfied.

1. CHESHIRE, MODERN LAW OF REAL PROPERTY 644 (7th ed. 1954).

2. 15 & 16 Geo. 5, c. 20.

3. Lyddal v. Westoll, 2 Atk. 20, 26 Eng. Rep. 409 (1739).

It is an old gem, perhaps familiar to many, but it well illustrates this point.

A New Orleans lawyer sought a Reconstruction Finance Corporation loan for a client. He was told that the loan would be granted if he could prove satisfactory title to property offered as collateral. The title dated back to 1803, and he had to spend three months running it down. After sending the information to the RFC he received this reply:

We received your letter today enclosing application for loan for your client, supported by abstract of title. Let us compliment you on the able manner in which you prepared and presented the application. However, you have not cleared the title before the year 1803, and therefore, before final approval can be accorded the application, it will be necessary that the title be cleared back of that year.

Annoyed, the lawyer replied:

Your letter regarding titles in Case No. 189156 received. I note that you wish titles extended further back than I have presented them. I was unaware that any educated man in the world failed to know that Louisiana was purchased from France in 1803. The title to the land was acquired by France by right of conquest from Spain. The land came into possession of Spain by right of discovery made in 1492 by a sailor named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the then reigning monarch, Isabella. The good queen, being a pious woman, and careful about titles, almost, I might say, as the RFC, took the precaution of securing the blessing of the Pope upon the voyage before she sold her jewels to help Columbus. Now the Pope, as you know, is the emissary of Jesus Christ, The Son of God, who, it is commonly accepted, made the world. Therefore, I believe it is safe to presume that he also made that part of the United States called Louisiana, and I hope to hell you are satisfied.

It does not require any superlative skill on the part of a title examiner to find possible weaknesses or defects in almost any title, if at all complex. Because judgment is involved, it requires perhaps a higher degree of skill to separate the serious defects from those that should be disregarded.

In performing this second function the examiner, as is true of any lawyer in giving an opinion to a client, will, consciously or subconsciously, speculate as best he can as to how the courts would decide if the problem were shaped up for litigation. The test he applies is, as stated above, whether the noted defect is such that there is a "reasonably decent probability of litigation" and if so, is there any probability that the attack will be successful.

Unfortunately, however, the title examiner cannot stop at that point, even though he is definitely of the opinion that there can be no successful attack. He must remind himself that if his client goes through with his purchase, sometime later on, possibly within months, he in turn may want to sell and the then prospective purchaser (or mortgagee) will likewise

consult *his* title examiner. That examiner may be one of those who views every defect as serious and every doubt as reasonable. Indeed he may be one of those to whom evidence left upon a title instrument by a transient fly are grounds for grave doubts! That later examiner may refuse to approve the offered title unless steps or proceedings, perhaps extensive and long drawn out, are taken to clear the title.

Every lawyer can readily understand the chagrin and embarrassment of a title examiner who, in the exercise of his best judgment as to what a court would decide, declares a title acceptable and then later on has his client come back to him demanding an explanation as to why, when he wanted to sell, the then purchaser's title examiner rejects the title as unmarketable. It should be noted, at this point, that not infrequently the opinion that the title is unacceptable is rendered by one who represents a purchaser seeking to get out of a contract of purchase.

The result is that prudent examiners base their opinion and advice not upon what they feel sure would be the judgment of a court, but upon what they fear might be the advice of a later capricious 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. Our hypothetical foreign visitor, to whom we referred at the outset, thus finds more and more difficulty in understanding the willingness of American landowners to endure.

Some remedial devices have been suggested and in some instances put into operation.

- (1) A tightening up of statutes of limitation.
- (2) Enactment of curative acts.
- (3) Legislation barring old claims and interests.

This latter type of legislation falls into two general classes. Statutes in Wisconsin⁴ and Minnesota,⁵ dating from the early nineteen forties, along with somewhat similar legislation enacted earlier in Illinois⁶ and Iowa,⁷ are representative of the first class. The character of this type of legislation is clearly shown by the following language of the Minnesota act:

As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced by a person . . . after January 1, 1948, to enforce any right, claim, interest or lien founded upon any instrument, event or transaction which

4. WIS. STAT. § 330.15 (1949).

5. MINN. STAT. ANN. § 541.023 (1947).

6. ILL. REV. STAT., c. 83 § 10a (1951).

7. IOWA CODE, § 11024 (1950).

was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the register of deeds [a preserving notice].

Subdivision 2 of the act states:

This section shall apply to every right, claim, interest, incumbrance or lien founded upon any instrument, event or transaction 40 years old at the date hereof or which will be 40 years old prior to January 1, 1948, except those under which the claimant thereunder shall file a notice as herein provided prior to January 1, 1948.

At this point it looks as if the Minnesota act is merely a statute of limitation — “no action . . . shall be commenced,” etc. In subdivision 5, however, it is stated that any claimant under any instrument, event or transaction barred by the provisions of

. . . this section shall be conclusively presumed to have abandoned all right, claim, interest, incumbrance or lien based upon such instrument, event, or transaction; and the estate which would otherwise be affected thereby shall not be deemed unmarketable by reason of the existence of such instrument, event or transaction;

Looking at it from this distance it would seem that the Minnesota legislation started as a rather special type of limitation statute and ended as a marketable title act!

In the summer of 1944, I received a request from the officers of the Michigan State Bar to present at the then forthcoming annual meeting a paper on some phase of real property law. My address was entitled “Title Problems in Land Transfers.”

In it, after calling attention to the conditions and problems which I have sketchily outlined, I urged that a select committee be appointed charged with the task of making a thorough study of the situation and the possible remedies. I visualized a study of at least a year or two.

The address was given in September. In late October, the Bar’s Real Property Committee was directed by the officers to prepare a bill for submission to the legislature at its meeting beginning early in January! You can imagine the staggering task thus imposed upon us who made up that Committee and the small sub-committee on which the drafting burden was placed!

We started out with the thought that if one saw a tract of land and wanted to buy it and learned who was in possession, acting like an owner, and who had for a long time the record title thereto in himself, or in himself and predecessors in a connected chain, it would, or should, be safe to purchase from such party. So our tentative first section declared in substance that one who has forty years of record title behind him and is in possession shall be deemed to have a marketable title to the interest the instruments in that title chain purported to convey.

Then to make that marketable title really amount to something, we went on to state that at the end of a forty year period of such record title it should be held by him and shall be taken by his successors in interest free and clear of "any and all interests, claims, and charges whatsoever the existence of which depends in whole or in part upon any act, transaction, event or omission that occurred prior to such 40 year period, and all such interests, claims, and charges are hereby declared null and void and of no effect whatever at law or in equity."

There in simple outline was the essence of what was to become the Michigan Marketable Title Act⁹ — on the concurrence of two facts a marketable title was declared and then it was made good by stripping it of interests and claims that arose more than forty years in the past.

It will be observed that the proposed legislation had no resemblance to a statute of limitations, a feature that characterized the acts in some other states, laws that aim at the same end, the simplification and expediting of sales and conveyances of land.

Out of the welter of opinions and factors that occupied the attention of the committee as a whole, sec. 1 emerged in form a bit different from the simple one to which references has just been made. As proposed by the committee and as enacted by the legislature, sec. 1 reads as follows:

Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period 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 application of the provisions of succeeding sections of this act and subject also to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed and which have been recorded during such 40 year period: Provided, however, that no one shall be deemed to have such a marketable record title by reason of the terms of this act, if the land in which such interests exists is in the hostile possession of another.

It will be noted that this section in declaring who shall have the statutory marketable titles does not require possession as an element. The switch from the affirmative requirement of possession to the negative one of "no one in hostile possession" was made so as to make it possible to have the resulting marketable title apply to vacant lands, of which there are many in our state, particularly in the northern part.

It will also be noted that the language of this first section makes marketable only the interest or estate that is the subject-matter of the title transactions that make up the forty year period. The section also clearly leaves the "marketable title" subject to the "interests and defects as are inherent in the provisions and limitations contained in the muniments of which such

chain of record title is formed and which have been recorded during such 40 year period."

To find out what claims and interests are extinguished in the process of protecting the marketable title declared in section 1, one must look to sections 3, 4, and 5. The first of these is as follows:

Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all interests, claims, and charges whatsoever the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred prior to such 40 year period, and all such interests, claims, and charges are hereby declared to be null and void and of no effect whatever at law or in equity; Provided, however, that any such interest, claim or charge may be preserved and kept effective by filing for record during such 40 year period, a notice in writing, duly verified by oath, setting forth the nature of the claims. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said 40 year period. For the purpose of recording notices of claim for homestead interests the date from which the 40 year period shall run shall be the date of recording of the instrument, non-joinder in which is the basis for such claim. 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 own behalf,
- (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 as it went to the legislature in 1945 and enacted into law was short and simple. It simply stated that:

This act shall not be applied to bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease, by reason of failure to file the notice herein required. Nor shall this act be deemed to affect any right, title or interest in land owned by the United States.

Within a year or two after the original enactment, the first sentence of this section was amended by adding, after the word 'lease', "or to bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidences of its use."¹² This amendment was proposed by the committee that had prepared the original bill. It was prompted by the plight in which the owners of multitudinous easements, such as rights of way for telephone and telegraph lines, pipelines, railroads, etc., would be left if in order to save such easements it were necessary to record preserving notices in respect to every parcel of land over which they could be used. Two more amendments have been made a part of section 4. The first one, which is enclosed by brackets, I am relieved to say was not prepared or sponsored by the original drafting committee. The section as it now reads is as follows:

This act shall not be applied to bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease or any lessee or his successor of his rights in and to any lease; [or to bar any interest of a mortgagor or a mortgagee or interest in the nature of that of a mortgagor or mortgagee until after such instrument under which such interests are claimed shall have become due and payable, except where such instrument has no due date expressed, where such instrument has been executed by a railroad, railroad bridge, tunnel or union depot company, or any public utility or public service company,] or to bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidences of its use, by reason of failure to file the notice herein required. 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 and used by the State of Michigan, or by any department, commission or political subdivision thereof.]

The second one of these most recent amendments added the bracketed language at the end regarding interests owned by the State.

Section 5 deals with the nature, content and recording of the preserving notice provided for in section 3.

Section 6 as an expression of the legislative intent in the construction of the act is significant enough to warrant quoting. It is:

This act shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined herein, to rely on the record title covering a period of not more than 40 years prior to the date of such dealing and to that end to extinguish all claims that affect or may affect the interest thus dealt with, the existence of which claims arises out of or depends upon any act, transaction, or event or omission antedating such 40 year period, unless within such 40 year period a notice of claim as provided in section 3 hereof shall have been duly filed for record. The claims hereby extinguished shall mean any and all interests of any nature whatever, however denominated, and whether such claims are asserted by a person sui generis or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental.

An act such as this can be very helpful in clearing land titles and thereby facilitate transfers of ownership. If it were thought wise to do so, no doubt *all* interests and claims over a certain age could be barred unless the preserving notices were recorded, thus making a forty year (for example) title safe. Of course, an exception would have to be recognized with reference to federal government claims. I have pointed out other exceptions that seemed to us almost imperative. But it must be recognized that if *any* exceptions are made, the ideal of a completely safe title covering a stated period becomes an impossibility.

One may seem brash to speak in terms of percentages, but I hazard the assertion that our Michigan act frees titles going back as much as forty years, with no one in hostile possession, of well over ninety per cent of the forty-year-old interests, claims and defects that under the law prior to 1948 might have led to disapproval of an offered title.

When the movement in our state was initiated some of us wondered what would be the attitude towards the project of the title companies, abstracters, etc., as well as that of the traditionally conservative members of the bar. Our concern proved to be unfounded. As I understand it, our bill passed both houses of the legislature without a dissenting vote. My information is to the effect that the act is relied upon frequently. Indeed it is given full recognition in the newly adopted Title Standards.

The natural conservatism of the bar leads to an understandable skepticism regarding the constitutionality of all legislation of a new type, and it must be recognized that these statutes do purport to destroy not a few property interests. Until the validity of the legislation has been definitely set at rest, it is to be expected that full use of it will not be made.

In December, 1951, I published an article on the subject.⁹ At that time I could discover only one decision that came at all close to being a direct authority. It was *Lane v. Travelers Ins. Co.*¹⁰ It was there decided that certain minors who were claiming as contingent remaindermen under a will that had taken effect many years in the past were barred. The conclusion was rested upon the Iowa statute to which reference has earlier been made.¹¹ That statute is one of those in the general framework of a statute of limitations:

No action based upon any claim arising or existing prior to January 1, 1920, shall be maintained . . . against the holder of the record title . . . in possession when such holder of the record title . . . in possession, and his grantors . . . are shown by the record to have held chain of title . . . since January 1, 1920, unless such claimant . . . shall within one year from and after July 4, 1931, file in the office of the recorder of deeds [a preserving notice].

The case is a clear instance of application of the act, thereby cutting off the claims of minor remaindermen. It is, perhaps, a bit weakened by the fact that the affected parties made no attack upon the statute's validity. The court said:

It may be that the legislature did not intend this provision to apply to such a case as the present. However, as we view it, the language of the statute is plain and unambiguous. Nor are we concerned with the policy of lawmakers in enacting this measure. We may observe, however, that there can be little doubt of the desirability of statutes

8. MICH. COMP. LAWS §§ 565.101—565.109 (1949).

9. Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951).

10. 230 Iowa 973, 299 N. W. 533 (1941).

11. *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 533 (1941).

giving greater effect and stability to record titles. We believe it our duty to enforce this statute as written.¹²

In that article, reference¹³ was made to two decisions, one in Kansas,¹⁴ the other in Pennsylvania,¹⁵ that might be thought to indicate a contrary conclusion. These cases, however, are distinguishable: they ran afoul of the constitutional safeguards in that the statutes involved contained provisions not found in the Iowa statute nor in the marketable title acts, with the exception of the one in Indiana. It will be remembered that the marketable title acts provide for the preservation of the old interest or claim by the simple step of recording a preserving notice. In the Kansas and Pennsylvania cases the statutes under examination required the institution of a suit within one year.

The Kansas court said: "There is a wide distinction between that legislation that one having a mere right to sue, to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action and then limits the time in which the suit may be brought."¹⁶

For preserving the old interest the Indiana statute¹⁷ (a marketable title act) requires record of the preserving notice *and* the institution of a suit within one year. Such a provision was in the early version of the Minnesota marketable title act, but the language requiring the suit was later removed.

If the *Lane* case in Iowa were sought to be distinguished on the ground that the statute there applied is in the form of a limitations act, while the typical marketable title act in effect declares the ancient interest or claim extinguished, it seems a complete answer to point out that the running of statutes of limitations regarding property, though in terms barring merely the remedy, does have the effect of extinguishing the right. The constitutional question, therefore, is the same.

That marketable title acts are within the state's legislative power seems perfectly clear when one reminds oneself of the status of our familiar recording acts.

When A, the owner of land, executes an effective deed in favor of X, the latter acquires ownership at the time the deed is executed. But to avoid having that ownership taken away from him the recording act requires him to go through the simple process of recording his deed. If he fails to do so, a subsequent conveyance by O, then no longer the owner, in favor of B, a bona fide purchaser, may destroy X's ownership and/or confer it upon B.

12. 299 N. W. at 555.

13. Aigler, *supra* note 9, at 191.

14. *Murrison v. Fenstermacher*, 166 Kans. 568, 203 P.2d 160 (1949).

15. *Girard Trust Co. v. Pennsylvania R. Co.*, 364 Pa. 576, 73 A.2d 371 (1950).

16. 203 P.2d at 162, quoting *Dingey v. Paxton*, 60 Miss. 1038 (1883).

17. IND. STAT. ANN. § 2-628 (Burns, Supp. 1951).

18. See note 7 *supra*.

The constitutionality of the recording act is taken for granted — the fact that in its operation it may destroy or change ownership shocks no one. We accept recording acts with their drastic operation because there is a general agreement that the general good that comes from making it possible for a land purchaser to determine with considerable safety from the public records with whom it is safe for him to deal, outweighs the possibility that some private interests may be destroyed. The one whose interests may be so affected may save himself from such consequences by the simple step of recording.

The philosophy that leads to the enactment of recording acts and their support, is behind marketable title acts and their first cousins, those statutes, such as in Wisconsin¹⁸ and Iowa¹⁹ cast in the form of limitation acts. The simplification and expediting of land title transactions is in furtherance of the public interest. The owner of an ancient interest or claim may protect his ownership by the same simple device by which a grantee protects himself against loss of *his* ownership by operation of the recording act.

When a state enacts a marketable title act such as I have been discussing, a multitude of chains of record title are declared marketable and a lot of possible claims are wiped out unless excepted by the terms of the act or preserved by recording preserving notices. Sufficient time must be allowed the owners of such claims, etc., to prepare and file those notices for record. If an unreasonably short time is allowed, constitutional difficulties are encountered.

A closely analogous question is presented when a statute of limitations is amended by cutting down the allowable period of time. Those amendments must allow sufficient time for commencing suit upon the existing causes of action. On the question as to how much time must be allowed to clear the constitutional hurdle, authority is plentiful. A leading case in the United States Supreme Court²⁰ upheld a statute though it required claimants with existing causes of action to sue within nine months and seventeen days. Another significant decision by the same Court is *Turner v. New York*.²¹ Addressing itself to this question, the Michigan court said:

Every suitor must have a reasonable time in which to commence an action to enforce his rights, and it is for the legislature to provide a general rule applicable to all cases falling within a class, and not for the judiciary to declare what is or should be a reasonable time varying with the circumstances of each case as it arises.²²

My reading of the cases on this point leads me to say that an allowance of as much as a year should satisfy the constitutional demands. Not a few

19. See note 10 *supra*.

20. *Terry v. Anderson*, 95 U.S. 628 (1877).

21. 168 U.S. 90 (1897).

22. *McKesson v. Davenport*, 83 Mich. 211, 47 N. W. 100 (1890).

decisions by respectable courts have upheld legislation which allowed less than a year.²³

While there was little in the way of direct authority to rely on, I satisfied at least myself, in 1951, that well established general principles of constitutional law warranted the conclusion that marketable title acts such as we are considering were well within the constitutional framework. In 1958, we may well feel even more confidence in that opinion: there are now three decisions by courts of last resort in clear support of the validity of this sort of legislation.

The first of these cases was decided by the Supreme Court of Minnesota in 1953.²⁴ One finds no discussion of the constitutional question in the opinion, but the ruling of the court in a controversy between the litigating parties as to which one had the better claim to a tract of land was based squarely on the marketable title act of that state. Harris showed forty years of connected record title; indeed, it dated back to 1855. The City claimed by adverse possession from 1876 to 1891. Since the City could not show that it had taken the steps which under the statute would have preserved its right, if any, it was "conclusively presumed" under the terms of the act to have abandoned its claim.

The second case, *Tesdell v. Hanes*,²⁵ was an action for a declaratory judgment that the vendor's title to a tract of land which he had contracted to sell to defendant was "good and merchantable" as provided in the contract. The vendor had a record title going back beyond 1907. In that year the then record title owner had executed a deed to his successor through whom the vendor claimed, but by mistake the subject matter as described in the deed was a different tract. The abstract of title showed that the deed of 1907 and its record had been corrected, but there was no reference therein showing by whom the change was made or who authorized it. Under those circumstances the defendant claimed that the abstract did not show the agreed merchantable title.

Applying the Iowa statute with the general features of the marketable title acts, the court entered judgment for the plaintiff. The court held that the statute purports to bar all claims affecting the title to realty except those of the state or the United States, specifically, that no allowances or exceptions are made for disabilities, etc. It is then succinctly stated that, "we are satisfied the legislature had ample authority to enact a limitation statute such as [this one] subject to a condition a reasonable time must elapse before it becomes effective."²⁶

23. See *Mulvey v. City of Boston*, 197 Mass. 178, 83 N. E. 402 (1908).

24. *B. W. and Leo Harris Co. v. City of Hastings*, 240 Minn. 44, 59 N.W.2d 813 (1953).

25. 248 Iowa 742, 82 N.W.2d 119 (1957).

26. 82 N.W.2d at 123.

The third decision to which I call your attention is *Wichelman v. Messner*,²⁷ decided by the Minnesota Supreme Court on June 18, 1957. In 1897, H conveyed a small parcel out of his farm to a school district, the deed containing the following language:

provided nevertheless and on condition however, that said premises shall be used and occupied as and for a school house site and school grounds and that whenever such occupancy and use of the same shall cease and terminate said premises shall revert to said parties of the first part, their heirs and assigns and again become a part of and belong to lot No. 4 above described.

The school board closed the school in 1946, and since then it was not used for school purposes, and a sale was decided upon in 1952. Shortly thereafter, the school lot was sold and conveyed to Messner, the present owner of the H farm. Plaintiff received quit claim deeds from the heirs of H. The action was then instituted for the determination of adverse claims. A judgment for plaintiff was reversed by the supreme court. Thereupon a petition for rehearing was filed. This petition was supported by a multitude of lawyers from all over the state. The court evidently adhered to its conclusion but substituted for its earlier opinion the one found in the Reporter; it covers seventeen pages plus a syllabus by the court in thirty paragraphs. The decision is based squarely on the marketable title act and apparently was arrived at after listening to a wide variety of contentions advanced by presumably erudite and resourceful counsel.

The decision is peculiarly significant, for the marketable title acts are in considerable part patterned after the legislation in Minnesota and Wisconsin. The question before the court was, in a sense, within rather narrow compass. It was whether the ownership of the school parcel had been freed of the power of termination or possibility of reverter, whichever it was. The defendant could show, and did so, (1) that he was on the current end of a connected chain of record title of at least forty years and (2) the plaintiff's claimed interest arose out of an event or transaction more than forty years in the past, with no recordation of any preserving notice by him or his predecessors before the forty year period had expired. That meant, if the statute was applicable, that plaintiff's claimed interest was to be deemed abandoned and the title of defendant's predecessor was marketable despite the old interest created in 1897. The court so concluded because, as it pointed out, the Minnesota Title Act so declared.²⁸

The decision is of peculiar interest and value because of the constitutional point. One may have reservations regarding the court's construction of the act before them, but they weaken in no degree the force of the conclusion on the constitutional question.

27. 250 Minn. 88, 83 N.W.2d 800 (1957).

28. *Id.* at —, 83 N.W.2d at 820.

The following language of the court is worth quoting; it expresses a problem and what should be the judicial approach to handling problems arising under the marketable title acts:

Counsel amici curiae for the plaintiff assert that the act raises serious questions as to the status of the relative rights of parties on all instruments of record more than 40 years and make specific references to certain continuing interests in real estate. In considering this objection we must continue to keep in mind that the statutes should be given a reasonable construction in light of its stated purpose that 'ancient records shall not fetter the marketability of real estate.' Although the language of the statute is general, it may be limited in its operation to cases which may be said to fall within the mischief intended to be remedied.²⁹

At the beginning of my discussion of the constitutional question I referred to decisions³⁰ in Kansas and Pennsylvania in which statutes aimed at barring claims and interests were held invalid. I pointed out that the vice in those statutes was that a suit within a short time was declared necessary, if the old interest was to be preserved. Such suits were required even though no cause of action had arisen. The marketability title acts, except in Indiana, do not require suits; the claimant may save his right by merely recording a preserving notice. The Minnesota court³¹ distinguished a Florida decision³² on the ground that the statute there invalidated was one with the same feature in it (bringing suit) that characterized the legislation in the Kansas and Pennsylvania cases.

A Florida decision that comes closer to indicating what the court's conclusion would be on a carefully drawn marketable title act is *Mahood v. Bessemer Properties*.³³

I have every confidence that it is possible to draft an act that will go a long way in clearing land titles of old defects and claims. I have pointed out that our Michigan statute was prepared in too much haste, though as I re-examine it I am surprised that it seems to be pretty good. It is interesting that within a short time after it became law, it was virtually copied in Nebraska and the two Dakotas. Indiana also drew on it heavily. I think you will be almost driven to the conclusion that an act that would make possible *complete* reliance upon the records for, let us say, forty years is not feasible. — There will be some old interests that you will not want to cut off and some that you cannot cut off by a statute of the type we have been considering. For example, if the Florida legislature were to enact a marketable title act effective, let us say, March 1, 1960, on that date a multitude of titles would become statutorily marketable and be freed of a variety of

29. *Id.* at —, 83 N.W.2d at 813.

30. Cases cited notes 18, 19 *supra*.

31. *Wichelman v. Messner*, 250 Minn. 88, —, 83 N.W.2d 800, 822 (1957).

32. *Biltmore Village v. Royal*, 71 So.2d 727 (Fla. 1954).

33. 154 Fla. 710, 18 So.2d 775 (1944).

old claims and interests. But suppose as to Blackacre on that date there are two (or possibly more) independent chains of title each one of which factually meets the elements necessary for the statute to operate. I suspect that in such instances you would have to conclude that the statute helps neither party and their positions would have to be determined by general property law. In short, you must not be overwhelmed with disappointment if the statute does not settle *everything*.

If you require possession, as distinguished from absence of hostile possession, you will not get the difficulty just suggested, for there can be only one possession and that must be in a person who has the requisite connected chain of record title. Earlier in this paper I explained why the Michigan bill was changed from possession to the absence of hostile possession. That change makes it possible for one to get the benefits of the act as to vacant lands, but it opens the door to the possibility of competing chains of record title, in which case I believe the act can help neither. Maybe the gain by the change does not offset the difficulties produced thereby.

I want to call your attention to another situation in which I believe the result may be more satisfactory if the possession element is an affirmative one. Let us again assume a forty year act that becomes law in Florida in 1960. Now suppose A in 1961 is on the current end of a forty year chain of record title that was initiated by a recording in 1921. Under the typical marketable title act, A has a statutory marketable title which is freed of claims having their origin *prior* to 1921. Now let us suppose B in 1962 (or even in 1961 *after* A's forty years have elapsed) finds himself on the then current end of a connected chain of record title that was initiated by recording in 1922 (or late in 191). If the statute requires, as it does in Michigan, merely *absence* of hostile possession, B may seem clearly to have a marketable title freed then of all claims that arose prior to 1922. That would wipe out A, who enjoyed his marketable title perhaps only a few months, or even days. Of course, A could have preserved his claim by recording a preserving notice. But that has obvious objections. If, however, the statute required *possession* in order to get the statutory result, the chances are quite overwhelming that the one who would win, A or B, would be the one with the meritorious claim.

In conclusion, I summarize as follows:

1. The complexity, delay and expense in land title transactions in the United States generally are so serious as to warrant drastic remedial measures. The difficulties that prevail today, in the absence of corrective measures, are bound to grow worse as time passes.

2. Two types of current legislation may be taken as starting points for remedial statutes — (a) that found, for example, in Wisconsin and Minnesota, couched basically in the form of statutes of limitation, and (b) that in force, for example, in Michigan in which the primary idea is the declaration,

on prescribed facts, of a statutory marketable title which is then freed of defects, claims and interests that depend in whole or in part upon events that occurred more than a stated number of years in the past.

3. Such legislation, if drawn with care, is within the constitutional powers of the state legislature.

It must not be expected that a statute of the character described will settle *all* title problems. Land title transactions will still have a complexity far beyond those involving chattels. Flyspeckers and their cousins will, however, lose much of their nuisance value.

I dare say that percentage wise the number of land title transactions over the years place Florida high in the list of states, and your title sources are *not* recent. So it would seem to me that legislation in the general nature of a marketable title act would be a real boon to the people of Florida. Despite the fact that, unlike Michigan back in 1944, you now have acts in other states to study, perhaps to copy in some respects, I urge you to give the matter careful study before you draft even one section. This is one area in which even the successful launching of the Russian satellite need not produce hysterical haste.