Tulsa Law Review

Volume 9 | Issue 1

Spring 1973

The Oklahoma Marketable Record Title Act Introduction

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THE OKLAHOMA MARKETABLE RECORD TITLE ACT INTRODUCTION

By John F. Hicks*

This article is based upon speeches delivered in 1972 to the Tulsa Title and Probate Lawyers Association and the Real Property Section of the Oklahoma Bar Association. The interest of attorneys across Oklahoma in the Oklahoma Marketable Record Title Act[1] was evidenced by the comments and questions raised during these speeches. Although the Act has been in effect for almost ten years, there is no judicial construction of it as yet and relatively little non-judicial interpretation of it.[2] The purpose of this article is to help fill in this gap by discussing the basic features of the Act and examining some of the complexities surrounding it.

BACKGROUND OF MARKETABLE RECORD TITLE LEGISLATION

Problems in the American Conveyancing System in the Absence of Marketable Title Legislation

Practitioners in the conveyancing field are well aware of many of the problems in this field that have given rise to the

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1 Okla. Stat. tit. 16, §§ 71-80 (1971), *amending* Okla. Stat. tit. 16, §§ 71-81 (Supp. 1963).

2 *See* Blair, *Marketable Title: Should It Be Defined by Statute in Oklahoma?*, 29 Okla. B. Ass'n J. 1853 (1958); Pray, *Title Standards and the Marketable Title Act*, 38 Okla. B. Ass'n J. 611 (1967); Simes, *The Improvement of Conveyancing: Recent Developments*, 34 Okla. B. Ass'n J. 2357 (1963); Comment, *Estates In Land: Effect of Unconstitutionality of Similar Legislation on Oklahoma's Marketable Record Title Act*, 20 Okla. L. Rev. 442 (1967).

need for marketable record title legislation.[3] First, the mere passage of time is causing chains of title to grow ever longer. Increased business activity, population mobility, home ownership, mortgage financing, the population growth and the shift from rural to urban land patterns have increased the volume of title activity that puts a strain on the present recording system and conveyancing practice. These factors, which make title examination more time consuming and complex, present the examiner with the dilemma of charging a fee that is too expensive for the average client or too low to justify the time spent.

Added to this problem is the inefficiency and expense of examining the title all the way back to its source each time an examination is required. This problem is particularly acute in older states with long title histories and has often led to the custom of tracing titles back for a stated number of years and until a warranty deed is encountered.[4] Of course, this custom is without legal justification and exposes both the purchaser and his examiner to potential loss.

A second problem involves future interests that make the duration of present estates uncertain. From a practical standpoint the only property interests that are generally marketable are fees simple absolute, leases for years and fees simple subject to such leases. When a present interest is subject to a future interest which is to take effect at an uncertain time, neither interest is marketable because of the uncertainty involved. This is especially true of possibilities of reverter and rights of re-entry for condition broken.

[3] *See* P. BASYE, CLEARING LAND TITLES 3, 5, 60-61, 368 (2d ed. 1970); L. SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING 32-36 (1961); Barnett, *Marketable Title Acts — Panacea or Pandemonium?*, 53 CORNELL L.Q. 45 (1967); Basye, *Trends and Progress — The Marketable Title Acts*, 47 IOWA L. REV. 261 (1962).

[4] In Massachusetts and Connecticut tracing title back sixty years is customary. In other states periods of forty-five or fifty years are customary. P. BASYE, *supra* note 3, at 12-13.

A third problem relates to facts extrinsic to the record which may affect title but which cannot be ascertained from examination of the records. Such facts as forged deeds and the acquisition of title by adverse possession fall into this category. What has been needed is a legislative device to reduce the number of extrinsic facts which must be considered by a title examiner. Marketable record title legislation satisfies this need.

Fourth, although statutes of limitation[5] and various curative acts[6] are helpful, they are not alone sufficient to cure a title of defects and stale claims and promote efficient title examination and marketability. The Oklahoma statute of limitations, as is true generally, applies only when the technical requirements for adverse possession have been met; affects only present interests and leaves unaffected future interests; includes tolling provisions for present interest owners under disability, and results in a title that is not marketable without judicial action. The Oklahoma curative acts do not define or declare what constitutes a marketable title. They take the negative approach of declaring what will not be a defect or claim against title, but do not attempt an affirmative definition of what constitutes marketable title, as does marketable record title legislation.

And, fifth, in the absence of marketable record title legislation, the present system has made no provision for official verification of the validity or effect of any title transaction. Therefore, a purchaser must hire "experts" such as abstractors to compile the record of the title under investigation and attorneys or title insurance companies to examine the record and draw conclusions concerning the status of the title. The conclusions are inevitably very conservative because legal standards for titles are not susceptible to mathematical measurement or precision and the examiner must, in part, base his

[5] OKLA. STAT. tit. 12, § 93; tit. 60, § 333 (1971).
[6] OKLA. STAT. tit. 16, §§ 4, 27(a), 39(a), 51, 61-66 (1971).

conclusions on what conclusions a later examiner of the same title may draw. This process leads to overabundant caution that can degenerate into the "fly-specking" which most examiners deplore but which many follow.

History of Marketable Record Title Legislation

Throughout the twentieth century there have been attempts to solve the problems inherent in the American conveyancing system. One of the most successful approaches has been through marketable record title legislation. In 1919, Iowa adopted a rudimentary marketable record title act that barred all actions based upon any claim arising or existing prior to January 1, 1900, unless notice of the claim was filed before July 4, 1920.[7] The date of the bar or recording requirement has been advanced periodically. The innovation of the act is that it went beyond the conventional statutes of limitation in applying to claims that were not presently actionable, to future interests as well as present interests, to contingent interests as well as vested interests, and to persons under disabilities as well as those of full capacity. The act was *comprehensive* in its approach to eliminating defects and stale claims in a title.

In 1945, Michigan adopted a prototype of the current Model Marketable Record Title Act.[8] Its features are similar to the Model Act, upon which the Oklahoma Act is based. Lewis Simes and Clarence Taylor of the University of Michigan Law School used the Michigan Act as the basis for a joint project with the Section of Real Property, Probate and Trust Law of the American Bar Association and the University of Michigan Law School, which resulted in the publication of the Model Marketable Record Title Act.[9] The Model Act pro-

[7] IOWA CODE ANN. § 614.17 (Supp. 1972).
[8] MICH. COMP. LAWS ANN. § 565.101 (1967).
[9] L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 6-20 (1960). Other products of the project are a set of Model Title Standards and a Handbook surveying the problems in American conveyancing practice and discussing proposed solutions.

vides that outstanding interests and defects that are not found within the recent history of the chain of title in question are extinguished as a matter of law. The Model Act is comprehensive in its approach to eliminating stale claims and defects in a title in the same way as is the Iowa Act discussed earlier. A total of fifteen states have now adopted some type of marketable record title legislation.[10] Some of the acts are similar to the original Iowa Act in that they impliedly extinguish old outstanding interests and defects by barring any remedial action on the claims. A majority of states adopting this type of legislation have used the framework found in the Model Act which expressly extinguishes certain outstanding interests and defects. The Oklahoma Act, adopted in 1963 and amended in 1970, is substantially similar to the Model Act.

Objectives of Marketable Record Title Legislation

Although there are variations in the acts found in the fifteen states that have adopted some type of marketable record title legislation, there are three objectives[11] that are basic to all of these acts, including Oklahoma's.

The first objective is to simplify land title transactions

[10] Connecticut, Florida, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont and Wisconsin; *see* CONN. GEN. STAT. ANN. §§ 47-33(b) to 33(1) (Supp. 1973); FLA. STAT. ANN. §§ 712.01-.10 (1969); ILL. ANN. STAT. ch. 83, §§ 12.1-.4 (Smith-Hurd 1966); IND. ANN. STAT. §§ 56-1101 to -1110 (Supp. 1972); IOWA CODE ANN. §§ 614.17-.20, .29-.38 (1950), *as amended,* (Supp. 1972); MICH. COMP. LAWS ANN. §§ 565.101-.109 (1967); MINN. STAT. ANN. § 541.023 (Supp. 1973); NEB. REV. STAT. §§ 76-288 to -298 (1971); N.D. CENT. CODE §§ 47-19A-01 to -11 (1960); OHIO REV. CODE ANN. §§ 5301.47-.56 (Baldwin 1971); OKLA. STAT. tit. 16, §§ 71-80 (1971); S.D. COMP. LAWS §§ 43-30-1 to -15 (1967); UTAH CODE ANN. §§ 57-9-1 to -10 (1963), *as amended,* (Supp. 1971); VT. STAT. ANN. tit. 27, §§ 601-606 (Supp. 1972); WIS. STAT. ANN. § 893.15 (1966).

[11] L. SIMES & C. TAYLOR, *supra* note 9, at 297-306.

by reducing the period of title search and the period of title examination. Strictly speaking, marketable record title acts do not limit search and examination more than that which would be otherwise conducted because of, for example, the exceptions[12] included in the acts. But the acts can promote and standardize conventional limitations on search and examination[13] and can obviate the necessity of searching or examining instruments creating interests which are barred by the acts. The acts, then, eliminate the risk involved in customary limitations on search or examination that may be followed in a particular area.[14]

The second objective of this legislation is to *comprehensively* clear land titles by clearing that portion of a chain of title antedating the period prescribed by the legislation. In this objective the acts go beyond conventional statutes of limitation and curative acts and apply to all defects or interests affecting title except for those specifically exempted from operation of the respective acts. In addition, marketable record title legislation makes the legal effect of the clearance apparent from the record rather than from facts extrinsic to the record.

The third objective is to give a positive, usable definition to the concept of "marketability." The problem in this area is that there has been no precise meaning, no accepted frame of reference for the term "marketability." Marketable record title legislation has given a positive definition to the term "marketable title" and has defined the consequences flowing from such definition so as to make the determination of marketability of a given title reasonably simple and within a restricted period of record search and title examination.

It should be pointed out here that "marketable record

[12] *See* p. 92 *infra.*

[13] Oklahoma Title Examination Standard 19.13 states what must be included in an abstract under the Oklahoma Marketable Record Title Act.

[14] *See* note 4 *supra* and accompanying text.

title" as defined by the acts is not necessarily a commercially marketable title; it is not necessarily a title which a vendor under a contract of sale could force on the vendee in an action for specific performance of the contract. This distinction exists because of two inherent limitations in all marketable record title legislation: (1) the acts cleanse a title only of pre-root-of-title interests and defects and do not clear the title of post-root-of-title interests and defects; and (2) the acts provide for certain exceptions to their operation.

Basic Operation of the Oklahoma Marketable Record Title Act

There are two basic features to the operation of the Oklahoma Act. The first feature deals with the definition of a "marketable record title." Section 71 provides that if one having the legal capacity to own land has an unbroken chain of record title of at least thirty years duration, with no defects in that record chain of title and no recorded instruments during that period which purport to divest the title, then that person has a marketable record title. Several aspects of this Section should be stressed. The unbroken chain of record title may consist of either a single conveyance or other title transaction which purports to create an interest and which has been a matter of public record for at least thirty years, or a connected series of conveyances or other title transactions of public record in which the root of title has been a matter of public record for at least thirty years.[15] But, in either situation, the chain of title must be of record; unrecorded links in the chain of title prevent the title from being a marketable record title. In addition, there must be nothing appearing of record within the basic thirty-year period purporting to divest the marketable record title claimant of his interest. Oklahoma Title Examination Standard 19.4 states that matters "purporting to divest" within the meaning of this Section are those matters appearing of record which, if taken at face

[15] *See* OKLA. STAT. tit. 16, ch. 1, app. (1971) Oklahoma Title Examination Standard 19.3.

value, warrant the inference that the interest has been divested.

The second feature deals with the effect on certain interests of a title being defined as marketable. Section 73 provides that all interests created prior to the first title transaction, called the "root of title," recorded at the beginning of the basic thirty-year period are extinguished as a matter of law. The effect of this Section is to make the status of a given title dependent on a recent period of its history rather than on its entire history. This allows title search and title examination to likewise be confined primarily to the same recent period of the given title's history. The word "primarily" is used because the Act includes certain limitations and exceptions to its operation which force title search and title examination back beyond the basic thirty-year period.[16]

CONSTITUTIONALITY OF THE OKLAHOMA ACT

Questions have been raised periodically concerning the constitutionality of marketable record title legislation.[17] Two principal arguments have been made against its constitutionality. One argument is that such legislation is retroactive in character in that it affects existing or vested property interests rather than merely affecting property interests to be created in the future. There is no provision of the United States Constitution prohibiting the enactment of retroactive legislation, as such, other than the prohibition against ex post facto laws, and this is held to apply only to criminal laws.[18] However, this argument against the retroactive application of marketable record title legislation to vested property interests can be linked to the provision of the Fourteenth Amendment

[16] *See* p. 92 *infra.*

[17] *See* L. SIMES & C. TAYLOR, *supra* note 9, at 253-92; Aigler, *Constitutionality of Marketable Title Acts,* 50 MICH. L. REV. 185 (1951); Aigler, *A Supplement to Constitutionality of Marketable Title Acts,* 56 MICH. L. REV. 225 (1957).

[18] Calder v. Bull, 1 U.S. (3 Dall.) 269 (1798).

to the United States Constitution against depriving a person of property without due process of law.[19] These comments apply to the Oklahoma Constitution as well.[20] The second argument generally raised relates to Section 10 of Article I of the United States Constitution which prohibits the impairment of the obligation of contracts. The Oklahoma Constitution has a similar provision.[21] These two arguments are discussed together in the following paragraphs since common principles relate to their applicability to marketable record title legislation such as the Oklahoma Act.

These sections of the United States Constitution do not guarantee absolute protection against interference with property rights or contract rights by a state. Both are subject to the reasonable exercise of a state's police power in protecting the public health, safety, morals or welfare.[22] Two tests are applied in determining whether or not the legislation is a valid exercise of the state's police power.[23] The first test involves the question of whether or not the legislation has a valid objective. Marketable record title legislation can be considered valid because it promotes the public welfare, which is a well established objective of a state's police power. There is a great similarity here between marketable record title legislation and recording acts which, though operating to destroy property interests, have been upheld because they enable the public to rely on record ownership[24] and because they promote the free alienability of land,[25] which is a major goal of modern property law. Now that the public record is

[19] *See* J. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 8-18 (1953).
[20] OKLA. CONST. art. 2, §§ 7, 15.
[21] *Id.* § 15.
[22] Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1913); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1933).
[23] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1933).
[24] Connecticut Mut. Life Ins. Co. v. Talbot, 112 Ind. 373, 14 N.E. 586 (1887).
[25] Opinion of the Justices, 101 N.H. 515, 131 A.2d 49 (1952).

growing so long as to lose clarity and certainty,[26] resort to another device, such as marketable record title legislation, ought to be similarly valid. The Oklahoma Act states its purpose in terms that clearly come within the legitimate exercise of the police power to promote public welfare:

> This act shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 1 of this act, subject only to such limits as appear in Section 2 of this act.[27]

The second test in determining whether the legislation is a valid exercise of the state's police power involves the question of whether the measures taken under the legislation are reasonable and appropriate to the stated objectives. As far as marketable record title legislation is concerned, the answer to this question should be yes. The public good in terms of more secure land transactions outweighs the burden and risk imposed on owners of property interests which fall within the operation of the legislation. Marketable record title legislation is reasonable because it includes a period for existing property interests affected by it to be protected by recordation. The 1963 version of the Oklahoma Act contained a two year savings period for existing interests affected by the Act.[28] The 1970 Amendments to the Oklahoma Act also contain a two year savings period for existing interests affected by cutting the operational period of the Act from forty years to thirty years.[29] Marketable record title legislation is reasonable because it provides ample time for individuals whose property interests may be affected by the legislation to protect their interests by notice recordation. The Oklahoma Act provides that recording notice of an interest within thirty

[26] *See* p. 69 *supra.*
[27] OKLA. STAT. tit. 16, § 80 (1971).
[28] Law of March 29, 1963, ch. 31, § 11, [1963] Okla. Laws 35 (repealed 1970).
[29] Law of March 27, 1970, ch. 92, § 71, [1970] Okla. Laws 118.

years of the recordation of the marketable record title claimant's root of title will protect the interest from extinction.[30] Marketable record title legislation is reasonable because certain exceptions are made to preserve fairness in its operation. There are specific interests that are excepted from operation of the Oklahoma Act.[31] Interests and defects which are inherent in the muniments of title forming the chain of record title are not affected by the Oklahoma Act.[32] And possession can protect the interest of the possessor from extinction under certain circumstances under the Oklahoma Act.[33] And, finally, marketable record title legislation is reasonable because it is comprehensive in its operation, applying to all interests rather than singling out certain interests.

These constitutional attacks have been made against marketable record title legislation in two jurisdictions and in each case the legislation has been upheld as valid.[34] Although not having yet been passed on by the Oklahoma Supreme Court, the constitutionality of the Oklahoma Act has been upheld in a 1968 opinion of the Attorney General of Oklahoma.[35]

INDIAN LANDS

Under the Congressional Enabling Act[36] enabling the Territory of Oklahoma and the Indian Territory to form a constitution and a state government and be admitted to the Union, and under the Oklahoma Constitution,[37] the State of Ok-

[30] OKLA. STAT. tit. 16, §§ 72(b), 74(a) (1971).
[31] *See* p. 97 *infra.*
[32] *See* p. 92 *infra.*
[33] *See* p. 89 *infra.*
[34] Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957); Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957).
[35] *Okla. Att'y Gen. Op. No.* 67-444 (March 21, 1968), 39 OKLA. B. ASS'N J. 593 (1968).
[36] Act of June 16, 1906, ch. 3335, 34 Stat. 267.
[37] OKLA. CONST. art. 1, § 3.

lahoma disclaimed all rights and title to lands owned or held by any Indian, tribe, or nation, and affirmed the federal government's authority and jurisdiction over such lands. Therefore, there is a stringent limitation placed on the jurisdiction of the State of Oklahoma over Indian lands which casts doubt on the applicability of its statutes, such as the Marketable Record Title Act, to such lands. Oklahoma Title Examination Standard 19.1, declaring the remedial effect of the Marketable Record Title Act, recognizes this problem in a caveat, which states:

> Whether or not the provisions of the Marketable Record Title Act may be relied upon to cure or remedy such imperfections of title as fall within its scope, which imperfections occurred or arose during the time title to the land was in a tribe of Indians or held in trust by the United States for a tribe of Indians or a member or members thereof, or was restricted against alienation by treaty or by act of Congress, is a matter for determination by Congress or by a federal court in a case to which the United States is properly made a party. Until such determination, the Marketable Record Title Act should not be relied upon to cure or remedy such imperfections. . . . However, it is possible that the federal courts will consider the Marketable Record Title Act to be a statute of limitations within the meaning of the Act of April 12, 1926, with respect to the Five Civilized Tribes.

For a number of reasons, however, it is doubtful that the Oklahoma Act can be construed to be a statute of limitations within the meaning of the Act of April 12, 1926. One of the draftsmen of the Model Act, upon which the Oklahoma Act is based, has stated that marketable record title legislation should not be considered as a statute of limitations.[38] Under a statute of limitations, one's cause of action is barred if he fails to file suit on such cause of action within the period prescribed; whereas, under marketable title legislation, one

[38] L. SIMES & C. TAYLOR, *supra* note 9, at 350; L. SIMES, *supra* note 3, at 43.

whose interest is extinguished by its terms may never have had any cause of action, and the period prescribed may not start from the accruing of any cause of action. Contrasted with this approach is that of the Act of April 12, 1926, which speaks of barring causes of action. For example, the clause providing for a grace period provides: ". . . Provided, That no cause of action which heretofore shall have accrued to any Indian shall be barred prior to the expiration of a period of two years from and after approval of this Act . . . ."[39] A member of the Solicitor General's staff, when asked about the applicability of the Act of April 12, 1926, to the Oklahoma Marketable Record Title Act, once stated that in his opinion the Department of Interior would not permit the application of the Oklahoma Act under the provisions of the Act of 1926, and that the Department had a standing practice of resisting this in other states which have a marketable record title act.[40]

The Real Property Committee of the Oklahoma Bar Association passed a resolution in 1965 urging the Association to urge Congress to pass legislation giving effect to the Oklahoma Act in all cases involving restricted Indian lands.[41] But Congress has taken no action on this matter up to the present time.

The inability to utilize the Oklahoma Act's remedial provisions when present or former Indian lands are involved is reflected in Oklahoma Title Examination Standard 19.13, dealing with abstracting. Section (f) of this Standard states the following requirements for a sufficient abstract covering Indian lands:

> Where title stems from a tribe of Indians or from a patent where the United States holds title in trust for an Indian the abstract shall contain all recorded instruments from inception of title other than treaties . . . .

[39] Act of April 12, 1926, ch. 115, 44 Stat. 339, 340.
[40] Pray, *supra* note 2, at 617.
[41] 36 OKLA. B. ASS'N J. 2094 (1965).

Exceptions to this requirement are made in situations where there is an unallotted land deed or where a patent is to a freedman or intermarried white member of the Five Civilized Tribes and where a patent is from the Osage Nation to an individual and there is of record a conveyance from the allottee and a certificate of competency. Under these circumstances a less inclusive abstract is sufficient.

TYPES OF INTERESTS PROTECTED BY THE OKLAHOMA ACT

Section 71 of the Oklahoma Act states that the holder of "any interest" who meets the requirements of the Act shall be deemed to have marketable record title to "such interest." Marketable record title acts in some jurisdictions[42] have been construed to be limited in application to a fee simple title. But Oklahoma's Act, on its face, is not so limited. Therefore, many interests, such as fees simple determinable, fees simple on condition subsequent, and life estates, as well as fees simple absolute, are protected by the Oklahoma Act. Granted, the Act will be applied to fees simple absolute in most cases because they are most commonly created and because only interests inconsistent with the protected interest are affected by the Act;[43] nevertheless, the approach taken in the Oklahoma Act renders a greater number of titles marketable and lessens the burden of title search and title examination for interests less than fee simple.

[42] *See,* e.g., MINN. STAT. ANN. § 541.023 (Supp. 1973). This statute protects "a claim of title based upon a source of title, which source has been of record at least forty years," which the Minnesota Supreme Court, in Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957), construed to refer to a fee simple, including fees simple subject to other interests, but not to the other interests.

[43] Barnett, *supra* note 3, at 64.

TYPES OF INTERESTS SUBJECT TO EXTINGUISHMENT UNDER THE OKLAHOMA ACT

It is the extinguishment feature of the Oklahoma Act that differentiates it from legislation such as statutes of limitation and curative statutes. The Act is truly comprehensive in its scope, applying to all types of interests not found within a particular thirty-year chain of title.[44] The Act can operate on both present and future interests, vested and contingent interests, possessory and non-possessory interests, and genuine and technical interests. It is equally applicable to both legal and equitable interests. It is applicable to the interest of persons who are either *sui juris* or under a disability, who are either within or without the state, who are either natural or corporate, private or governmental. The only limitations to the Act's applicability are found in Sections 72, 74 and 76, which are discussed later.[45]

WHO MAY CLAIM A MARKETABLE RECORD TITLE UNDER THE OKLAHOMA ACT

The comprehensiveness of the Oklahoma Act is also demonstrated by the profile of a claimant under the Act. There are both negative and positive characteristics that combine to define what type of person may claim protection under the Act. The negative characteristics differentiate the underlying philosophy of the Act from other types of corrective legislation. To begin with, a claimant under the Act need not be a bona fide purchaser; he can have knowledge of outstanding interests extinguished by the Act.[46] Since one of the objectives of the Act is to simplify land title transactions by simplifying title examination and since this can be done only by eliminating to the extent possible all matters extrinsic to the record, such extraneous factors as the bona fides of a particu-

[44] OKLA. STAT. tit. 16, § 73 (1971).
[45] *See* p. 93 *infra*.
[46] Barnett, *supra* note 3, at 53, 64.

lar individual are omitted as requirements. Indeed, the very requirement of being a purchaser is omitted as a required characteristic of a claimant under the Act; the Act's extinguishment feature benefits the interests of owners as well as those of purchasers.[47] Therefore, a conveyance or other title transaction need not occur as a condition precedent to the operation of the Act. Also, a claimant under the Act need not have been in possession of the land involved at any time.[48] Just as in the case of the bona fides of the claimant, the fact of possession is extrinsic to the record and is omitted as a requirement of a claimant under the Act in order to facilitate the Act's objectives of simplifying land transactions by simplifying title examination and comprehensively clearing land titles. Since the Act affects title to vacant as well as occupied land, its coverage is much more inclusive of all lands within Oklahoma than would otherwise be the case. Finally, as was noted earlier,[49] one need not claim a fee simple title to enjoy the benefits of the Act.

The affirmative characteristic which a claimant under the Oklahoma Act must possess is provided for in Section 71, which states that a marketable record title holder must have an "unbroken chain of title of record" from the root of title onward. Therefore, until all gaps in the post-root chain of title are filled in by recorded instruments, the extinguishment feature of the Act will not operate. For example: if one of the gaps is caused by an owner's death intestate, the extinguishment feature will not operate until there has been some type of judicial determination of heirship.

[47] P. BASYE, *supra* note 3, at 425; Barnett, *supra* note 3, at 53.

[48] Barnett, *supra* note 3, at 63-64. Some acts specifically require that the claimant be in possession to enjoy the benefits of the Act. *See, e.g.*, NEB. REV. STAT. § 76-288 (1971); N.D. CENT. CODE § 47-19A-01 (1960).

[49] *See* p. 81 *supra*.

WILD DEEDS AND QUITCLAIM DEEDS AS ROOTS OF TITLE

Wild Deeds

It is rare that a person deliberately purports to sell the land of another or that an owner deliberately attempts to sell the same land twice. However, "wild deeds," those instruments unconnected with the true chain of title, can arise in a number of fairly common situations. For example, when subdivided land is sold by a common grantor, the descriptions in the deeds to the various subdivided portions may overlap. In another situation, a grantor may convey his land by warranty deed to one person and by quitclaim deed to another. Also, a mistaken land description in a deed can give rise to this problem.

Competing chains of title to the same land can be created by entirely independent chains of record title. For example, *O*, the true owner of Blackacre, conveys it to *A* in 1940 by a duly recorded deed. In 1942 *X*, who has no connection with Blackacre, purports to convey it by a "wild deed" to *Y*, whose deed is duly recorded. There is no doubt that under either common law principles or a recording act *Y* takes nothing and *A* has good title to Blackacre.[50] But, under the Oklahoma Marketable Record Title Act, in 1972 *Y* can claim that he has a marketable record title to Blackacre which is free and clear of any claim or interest on the part of *A* because *A*'s interest depends on a transaction that occurred prior to the effective date of *Y*'s root of title.[51]

Competing chains of title can also arise from a common source. For example, *O*, the true owner of Blackacre, conveys it to *A* in 1940 by a duly recorded deed, and then in 1942 purports to convey Blackacre again to *Y* by a duly recorded deed. Once again there is no doubt that under either common law

[50] Barnett, *supra* note 3, at 57.
[51] *Id.*

principles or a recording act Y takes nothing and A has good title to Blackacre.[52] However, under the Oklahoma Act, in 1972 Y can assert that he has a marketable record title to Blackacre which is free and clear of any claim or interest on the part of A because A's interest depends on a transaction that occurred prior to the effective date of Y's root of title.[53]

In either of the above examples, will Y be able to successfully assert the Oklahoma Act as a basis for holding title free and clear of any claim or interest in A? Such a result would evidence a remarkable departure from the rules applied to such situations by either the common law or the recording acts. The only two jurisdictions having dealt with this problem have reached opposite conclusions. In Florida, by virtue of the decision in *Marshall v. Hollywood,*[54] a wild deed can serve as a root of title which may ultimately exguish the true title. In this case, the plaintiff sought a decree establishing his interest in certain lands to which he held a claimed legal title but which had been conveyed away in 1924 by a deed claimed to be a forgery and which, by succeeding conveyances in 1924 and 1931, had come into the hands of the defendants. The defendants claimed that the Florida Marketable Record Title Act applied in this situation to extinguish the title of the plaintiff because the plaintiff's interest depended on a transaction that occurred prior to the effective date of the defendants' root of title. The Florida intermediate appellate court upheld this defense on the basis that the Florida Act defines "root of title" as a title transaction which *purports* to create or transfer an estate; therefore, the Act's applicability is not conditioned on an active vesting of some estate or interest in the person claiming the benefit of the Act. The court held that only by interpreting the Act in this way could the Act's purpose of facilitating land transactions by allow-

[52] *Id.* at 54-55.

[53] *Id.*

[54] 224 So. 2d 743 (Fla. Dist. Ct. App. 1969), *aff'd,* 236 So. 2d 114 (Fla. 1970).

ing persons interested therein to rely on a record title be achieved. The court reasoned that adequate protection is given to the true owner under the Act because the extinguishment of the true title by a "wild" chain of title would not occur so long as the true title is still "live" in the sense that: (1) there is a title transaction within the true chain of title within thirty years subsequent to the root of title forming the foundation of the wild chain of title;[55] (2) there has been a filing of notice under the terms of the Act by the true title holder within the time allowed;[56] or (3) the true owner has remained in possession under the provisions of the Act relating to possession.[57] The court concluded that although the original 1924 forged deed in the defendants' chain of title could not serve as root of title,[58] the later 1924 deed and the 1931 deed, although each was void, could serve as root of title.

On the other hand, the Illinois Supreme Court, in *Exchange National Bank v. Lawndale National Bank*,[59] held that a wild deed cannot serve as root of title that will ultimately extinguish the interest of the true title holder. In this case the plaintiff claimed title by a chain of title that commenced with a patent from the United States in 1899. The defendant claimed title from a different chain that commenced subsequent to that of the plaintiff. Although the plaintiff and defendant did not have a common source of title and it was admitted that the defendant's chain of title was founded upon a wild deed, the defendant claimed title by virtue of the Illinois Marketable Record Title Act[60] because neither the plaintiff nor its predecessors in title had kept their claim alive by filing a preserving statement of claim within forty years after the defendant's interest was created. The court held that the Illinois Act was inapplicable to this situation, partly on

[55] *See* p. 96 *infra*.
[56] *See* p. 94 *infra*.
[57] *See* p. 89 *infra*.
[58] *See* p. 93 *infra*.
[59] 41 Ill. 2d 316, 243 N.E.2d 193 (1968).
[60] ILL. ANN. STAT. ch. 83, §§ 12.1-.4 (Smith-Hurd 1966).

the basis that it would be impossible for the true title holder to determine the existence of a chain of title based on a wild deed in the grantor-grantee index system and protect his interest by taking the appropriate steps required by the Illinois Act. Note that if a state provides for a tract indexing system, as Oklahoma does,[61] the basis for the Illinois decision is removed because a chain of title based on a wild deed would be as discoverable as one within the true chain of title.

Quitclaim Deeds

Quitclaim deeds present a problem as to their ability to serve as a root of title because of their characteristic of conveying no particular interest of the grantor, but only whatever interest the grantor actually has. The co-author of the Model Act, upon which the Oklahoma Act is based, has stated that a quitclaim deed in a chain of title has the same effect as any other link in the chain; therefore, it can serve as root of title so as to bring into operation the Act.[62] The Oklahoma Act bears out this view by defining "title transaction" (which serves as root of title under the Act) to include a quitclaim deed.[63] Oklahoma Title Examination Standard 19.10 expressly provides that a recorded quitclaim deed can be a root of title or a link in the chain of title for purposes of a thirty-year record title under the Oklahoma Act.

Oklahoma has a statutory form for the quitclaim deed[64] which, when used, conveys all the right, title and interest of the grantor in and to the premises described in the deed.[65] This provision is a statutory reiteration of the common law rule that a quit claim deed conveys only such interest as the grantor may have. The similarity of the statutory form of quitclaim deed to the common law form is seen in the fact that in both types of quitclaim deeds the estoppel by deed

[61] OKLA. STAT. tit. 19, § 291 (1971).
[62] Simes, *supra* note 2, at 2362.
[63] OKLA. STAT. tit. 16, § 78(f) (1971).
[64] *Id.* § 41.
[65] *Id.* § 18.

rule is not applicable to convey a title subsequently acquired by the grantor to the grantee.[66] Therefore, it would seem that the Oklahoma Act would apply to either type of quitclaim deed in the same way.

The only state having a marketable record title act which has considered this question is Florida. In *Wilson v. Kelley*[67] the plaintiff in a quiet title suit claimed title under what was proved to be the original and paramount source. The defendant claimed title under a chain of title originating subsequent to that of the plaintiff which had a quitclaim deed as its source. The defendant claimed that the quitclaim deed served as root of title under the Florida Act so that ultimately the plaintiff's interest was extinguished by the operation of the Act. The court held that a quitclaim deed may or may not serve as root of title, depending on what it purports to convey. If it does not purport to convey any particular interest, but only whatever interest the grantor may own, it cannot serve as root of title; however, if the quitclaim deed evidences an intent to convey an identifiable interest, it can serve as root of title. In the present case the court held that the quitclaim deed fell into the former category and, therefore, could not serve as root of title. It has been observed that this approach is primarily an exercise in semantics because a true quitclaim deed does not purport to create any specific interest in property and a deed which does purport to create a specific interest should not be labeled a quitclaim deed.[68]

However, Section 78(e) of the Oklahoma Act agrees with the distinction drawn in *Wilson* by stating that a root of title

[66] As to the common law quitclaim deed, *see* 4 H. TIFFANY, THE LAW OF REAL PROPERTY § 1231, at 645 (3d ed. B. Jones 1939).

[67] 226 So. 2d 123 (Fla. Dist. Ct. App. 1969).

[68] *See* Comment, *Marketable Record Title Act: Wild, Forged, and Void Deeds as Roots of Title,* 22 FLA. L. REV. 669, 671 (1970).

must *purport* to create the interest claimed by the claimant. There is an apparent inconsistency, then, between Section 78(f) of the Oklahoma Act which includes quitclaim deeds in the definition of "title transaction" and Section 78(e) which states that a root of title must *purport* to create the interest claimed by the claimant under the Act. Only if a quitclaim deed, whether statutory or otherwise, purports to convey an identifiable interest by the grantor can it satisfy both of these sections of the Oklahoma Act.

THE RELEVANCE OF POSSESSION

Since possession is a fact extrinsic to the record and since one of the objectives of marketable record title legislation is to facilitate land title transactions by allowing persons to rely on a *record* chain of title, the relevance of possession is minimized under this legislation. However, considerations of basic fairness compelled the authors of the Model Act to make possession relevant to the status of the title to the land possessed in two situations. The Oklahoma Act follows the Model Act in this respect.

The first situation in which possession is relevant is covered in Section 74(b) of the Oklahoma Act. This section provides:

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

The following example illustrates the meaning of this section. *A* is the last grantee in a chain of record title to Blackacre by a deed recorded in 1940. There are no subsequent instruments

of record in this chain of title. *A* has been in possession of Blackacre since 1940 and continues in possession, but has never filed any notice as provided for in Section 74(a) of the Oklahoma Act. A deed to Blackacre, unconnected with *A*'s chain of title, from *X* to *Y*, was recorded in 1942. If no other instruments with respect to Blackacre appear of record, *Y* has a marketable record title in 1972, but, by the terms of Section 74(b), it is subject to *A*'s marketable record title. However, although *A* had a marketable record title to Blackacre in 1971, it was subject to *Y*'s marketable record title in 1972 according to Section 72(d). Thus, the relative rights of *A* and *Y* are determined independently of the Act since the interest of each is subject to the other's interest. *A*'s interest being prior in time and *Y*'s deed being merely a wild deed, under common law principles *A* should prevail.

It should be emphasized, however, that this type of possession saves the possessor's title from extinguishment only in very limited circumstances. The following elements must be present in the situation for this type of possession to be effective in protecting the possessor's interest from extinguishment: (1) the possessor must be a record owner, i.e., the possessor must be connected with a recorded instrument which goes back at least thirty years; (2) possession must begin before the recording of the root of title of the person claiming a marketable record title under the Act and must continue to the time marketability is being determined; and (3) possession must be continuous by the "same record owner," i.e., no "tacking" of possession is allowed.

The second situation in which possession is relevant is dealt with in Section 72(c) of the Oklahoma Act, which provides that a marketable record title is subject to the rights of any person arising from a period of adverse possession or user, which is in whole or in part subsequent to the effective date of the root of title. The following example illustrates the meaning of this section. *A* is the grantee of Blackacre in a deed which was recorded in 1956. In 1957 *X* entered into possession, claiming adversely to all the world, and continued

such adverse possession until the present time. No other instruments concerning Blackacre appearing of record, in 1971 *A* had a marketable record title, but it was subject to *X*'s adverse possession, and when *X*'s period for title by adverse possession was completed in 1972, *A*'s title was subject to *X*'s title by adverse possession.

One interesting question that arises in connection with Section 72(c) of the Oklahoma Act is whether this section can benefit both the true adverse possessor and the true owner under a senior chain of title. For example, in the illustrations given earlier,[69] dealing with wild deeds, could *A's* possession of Blackacre in each instance be considered "adverse possession" under Section 72(c) so as to protect his interest against the claims of *Y*? One authority[70] suggests that a true title holder under a senior chain of title can claim the benefit of this section and there are authorities holding that the holder of the true title can perfect it against a holder of an apparent title.[71] On the other hand, it can be argued that before any possession is deemed to be "adverse" for purposes of Section 72(c) there must be a cause of action arising in favor of someone against the possessor; whereas, no cause of action arises against the true title holder under a senior chain of title. In addition, such an interpretation conflicts with Section 74(b) of the Oklahoma Act which specifies the only way possession can aid the true title holder.

Although adverse possession wholly or partly subsequent to the effective date of a claimant's root of title is relevant under the Oklahoma Act, a title by adverse possession that matures *before* the effective date of a claimant's root of title is extinguished thirty years after that date. The following example illustrates this situation. *A* is the grantee of Blackacre in a deed which was recorded in 1925. In that same year

[69] *See* pp. 84-85 *supra.*
[70] Barnett, *supra* note 3, at 61.
[71] 2 C.J.S. *Adverse Possession* § 21 (1972).

X entered into possession, claiming adversely to all the world, and continued in such adverse possession until 1941. In 1942 a deed conveying Blackacre from *A* to *B* was recorded. No other instruments concerning the land appearing of record, *B* has a marketable record title to Blackacre in 1972 which extinguishes *X*'s title by adverse possession acquired in 1940.

In conjunction with this discussion of the relevance of possession, it should be noted that some marketable record title acts require that persons claiming a marketable record title be in possession in order to obtain the extinguishment benefit of the Act.[72] But the Oklahoma Act does not require this; therefore, in Oklahoma the interest of a senior grantee out of possession can be extinguished by a junior grantee also out of possession. The Oklahoma Act has wide coverage because it is applicable to vacant as well as to occupied land.

INTERESTS EXCEPTED FROM EXTINGUISHMENT

Although marketable record title legislation is unique in its comprehensiveness in affecting stale interests and defects in a chain of title, because one of its objectives is to affect stale, as opposed to viable, claims, there are exceptions to its coverage. The exceptions are important not only because of the interests involved which are not affected by the legislation, but also because of the impact the exceptions have on one of the other objectives of the legislation — the simplification of land title transactions by reducing the period of title search and the period of title examination. To the extent that any exceptions are recognized, the simplification of title investigation is prevented to some extent. However, some exceptions to the operation of marketable record title legislation are desirable from the standpoint of basic fairness and from the standpoint of the constitutionality of the legisla-

[72] *See* Rohde, *Illinois Marketable Title Act,* 39 CHI.-KENT L. REV. 49, 60 (1962).

tion.[73] The exceptions contained in the Oklahoma Act are located in Sections 72, 74 and 76.

Section 72(a) excepts from extinguishment all interests and defects which are inherent in the muniments which form the chain of record title creating the marketable record title. Thus, all interests and defects inherent in the root of title and in all subsequent links in the chain of title are not affected by the Act. Identical language in the Florida Act has been construed to refer to interests and defects in the make-up or constitution of the muniment of title and not to defects or failures in the transmission of title.[74] For example, if the root of title is a forged deed, the Act will not cut off the interest of the purported grantor even though his interest is based on a pre-root transaction. Also, the Act does not eliminate problems of forgeries in any link subsequent to the root of title, or problems of post-root deeds ineffective for lack of delivery or because of the grantor's incapacity to convey. However, this section does not apply to wild deeds[75] involving defects or failures in the transmission of title. This distinction must rank as one of the most anomalous aspects of the Oklahoma Act.

This Section also excepts from extinguishment those pre-root-of-title interests which are specifically identified in any of the muniments forming the chain of record title creating the marketable record title. However, a general reference to such interests is ineffective; the Act requires "specific identification." Comment 3 to Oklahoma Title Examination Standard 19.13 states that the book and page of the recording of a prior mortgage is required to be in the post-root muniment in order to give notice of such prior mortgage,[76] while "specific identification" of other instruments requires either the

[73] *See* p. 75 *supra.*
[74] Marshall v. Hollywood, 224 So. 2d 743 (Fla. Dist. Ct. App. 1969), *aff'd,* 236 So. 2d 114 (Fla. 1970).
[75] *See* p. 84 *supra.*
[76] OKLA. STAT. tit. 46, § 203 (1971).

book and page of recording or such other information as will enable an abstracter to locate the instrument of record.

Sections 72(b) and 74(a) refer to the same exception involving the preserving of any interest by filing for record during the thirty year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice setting forth the nature of the claim. These sections insure that no interest will of necessity be extinguished under the Act because the holder of a viable interest is given the opportunity to preserve his interest. In these sections the Act's objective of cleansing a title of stale claims is clearly seen because, in the ordinary course of events, it will be stale claims, not viable ones, which are no longer of any beneficial or practical importance, but which still cloud title, which are extinguished because of a failure of their holders to file the required notice.

The notice, to be effective, must be in writing,[77] verified by oath,[78] and contain an accurate and full description of all land affected.[79] No disability or lack of knowledge whatever on the part of anyone will toll the running of the thirty-year period. However, the notice may be filed not only by the encumbrancer himself, but also by any other person acting for an encumbrancer who is under a disability, or unable to assert his claim, or one of a class whose identity is uncertain. These provisions effectively remove the possibility of extending the basic thirty-year period by a tolling provision, while at the same time removing much of the harsh effect on an encumbrancer arising therefrom by providing that encumbrancers unable to file a preserving notice can be protected by a filing in their behalf by interested third persons.

Within what period of time must the notice be filed to be effective? Because of the way in which the Act operates,

[77] OKLA. STAT. tit. 16, § 74(a) (1971).
[78] *Id.*
[79] *Id.* tit. 16, § 75.

there are two relevant time points — the starting point and the ending point of the period. If the notice is not filed within these two points it will be ineffective to preserve the interest of the encumbrancer. The starting point is the date of recording of the root of title. Any notice recorded prior to that time is ineffective to preserve any interest. This is the case because the basic effect of the Act, as expressed in Section 73, is to extinguish all interests and claims, including those preserved by the filing of notice, the existence of which depends upon any act that occurred prior to the effective date of the root of title. The ending point is the date thirty years from the effective date (date of recording) of the root of title. This is so because the Act is quieting the marketable record title claimant's thirty-year chain of title because there are no notices filed during this period.[80] Thus, an encumbrancer has thirty years *and only thirty* years from the date of the recording of the root of title in which to record his notice. A recording of notice after this point is ineffective to preserve the interest of the encumbrancer. Section 74(a) specifically provides for this by requiring that a notice to be effective must be filed for record "during the thirty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable."

In two situations the interests of possessors of the land in controversy are protected from extinguishment. Section 74(b) provides that continuous possession by the same record owner for a period of thirty years or more following the recording of the root of title and to the time marketability is being determined is deemed equivalent to the filing of notice immediately preceding the termination of the thirty-year period following the recording of the root of title. Such possession, then, will protect the possessor's interest against extinguishment by the Act. Also, Section 72(c) provides that a marketable record title is subject to the rights of any person arising from a period of adverse possession or user which is

[80] L. SIMES & C. TAYLOR, *supra* note 9, at 354-55.

in whole or in part subsequent to the effective date of the root of title. Since these two sections have been discussed earlier in the article,[81] further discussion of them is omitted here.

Section 72(d) excepts from extinguishment any interest relating to a title transaction which has been recorded subsequent to the effective date of the root of title from which an unbroken chain of record title is started. Oklahoma Title Examination Standard 19.9, which considers this provision of the Act, states that it provides, in effect, that the recording of a title transaction subsequent to the effective date of the root of title has the same effect in preserving any interest conveyed as the filing of the notice provided for in Section 74(a) of the Act. Thus, to the extent that a title is "live," i.e., subject to periodic transactions,[82] the interests transferred will be protected from extinguishment.

Section 72(d) is applicable both where there are claims under a single chain of title and where there are claims arising from two or more independent chains of title. The more common situation involves claims arising under a single chain of title. For example, suppose *O*, owner of Blackacre in fee simple, executed a mortgage to *X* in 1940, which was duly recorded. In 1942 *O* conveyed the fee simple title to *A* by a duly recorded instrument which made no reference to *X*'s mortgage. In 1960 an instrument assigning *X*'s mortgage to *Y* was recorded. In 1973 *A* has a title subject to the mortgage held by *Y*, because the assignment of the mortgage was recorded less than thirty years after the effective date of *A*'s root of title. The more unusual situation, involving claims arising from independent chains of title, the so-called "wild deed" situation,[83] is also covered by this Section. Suppose *O*, owner of Blackacre in fee simple, conveyed to *A* in fee simple in 1930, the deed being duly recorded. Then, in 1935 *X*, a

[81] *See* p. 89 *supra.*
[82] *See* note 54 *supra* and accompanying text.
[83] *See* p. 84 *supra.*

stranger to the title, conveyed Blackacre to Y in fee simple, the deed being duly recorded. In 1942 Y conveyed Blackacre to Z in fee simple and the deed was duly recorded. In 1960 *A* conveyed Blackacre to *B* in fee simple, the deed being duly recorded. In 1973 Z and *B* each have marketable record titles, but each title is subject to the other by virtue of Section 72(d). Therefore, neither extinguishes the other and the relative rights of the parties are determined independently of the Act. Z's deed being merely a wild deed, under common law principles *B*'s title should prevail. Notice that the 1960 transaction prevented *B*'s title from being extinguished by Z's thirty-year chain of title commencing with the 1942 root-deed.

However, under Section 72(d), once an interest has been extinguished prior to such a recording as is described in this section, such recording does not revive or give validity to the interest. For example, in the first example given in the immediately preceding paragraph, if *X*'s assignment of the mortgage to Y was executed and recorded in 1973 rather than in 1960, its recordation would not revive the security interest extinguished in 1972 by *A*'s marketable record title. Likewise, in the second example given in the immediately preceding paragraph, if *A*'s deed to *B* was executed and recorded in 1973 rather than in 1960, its recordation would not revive the interest extinguished in 1972 by Z's marketable record title.

Certain pre-root-of-title interests are excepted from the operation of the Act by virtue of Sections 72(e) and 76. These sections list particular types of interests concerning which no notice of claim need be recorded. There are five such interests listed in the Oklahoma Act: (1) the interest of a lessor as a reversioner on the expiration of a lease; (2) mineral or royalty interests severed from the fee simple title of the land; (3) easements or interests in the nature of easements; (4) use restrictions or area agreements which are part of a plan for subdivision development; and (5) any interest of the United States. These exceptions force title examination behind the root of title and, thus, thwart to some extent one of the basic objectives of the Act — to simplify land title transactions by

reducing the period of title search and the period of title examination. Oklahoma Title Examination Standard 19.11 points this out by stating that the Act has not eliminated the necessity of furnishing an abstract of title for a period exceeding thirty years. In addition, these exceptions tend to thwart another of the basic objectives of the Act—to *comprehensively* clear land titles. Nevertheless, every marketable record title act now in effect has similar exceptions. Let us examine the reasons why.

The Oklahoma Act follows the Model Act in excepting from extinguishment the reversionary interest of a lessor following a lease.[84] The reason given for this exception in the Model Act is that leases of very long duration are common in some jurisdictions, and the lessor who is out of possession might reasonably overlook the requirement of notice filing.[85] This argument could be applied as validly to other types of future interests, such as reversions following life estates, remainders, possibilities of reverter and powers of termination; yet, none of these interests are excepted. Here can be seen a distinction, drawn between commercial interests, which long-term leases usually are, and non-commercial interests that is present in many of the other exceptions as well.

The Oklahoma Act excepts severed mineral and royalty interests from the operation of the Act. This exception is not included in the Model Act. In fact, the draftsmen of the Model Act believed that, rather than being unique, mineral interests have a great deal in common with other specific long-term interests in land insofar as the conveyancing system is concerned; therefore, they should be subjected to a re-recording requirement as other interests are.[86] In the only direct reference to the marketable record title legislation pending in the Oklahoma Legislature at the time, the draftsmen of the Model Act observed: "Its application to mineral interests is consid-

[84] L. SIMES & C. TAYLOR, *supra* note 9, at 9.
[85] *Id.* at 357.
[86] *Id.* at 239-47.

ered one of the most desirable features of a 30-year marketable title act pending in the Oklahoma Legislature."[87] The fact that the legislation, as enacted, contains an exception for severed mineral and royalty interests speaks eloquently of the position of the oil and gas industry in Oklahoma.

The Oklahoma Act excepts *all* easements or interests in the nature of easements from the operation of the Act. Most other marketable record title acts are more limited. The Model Act, for example, excepts only easements clearly observable by physical evidence of their use.[88] This exception can be explained on the basis that most easements today are held by one who holds a great number of similar easements, such as a unit of government or a public utility, and to require periodic re-recording of such easements would place too great a burden on the easement holder and would flood the county clerk's office with recordings. This observation points out one of the basic characteristics of all marketable record title legislation: it is designed and intended to apply to private and singular interests and defects and not to wide-ranging, multiple interests.

This characteristic is seen even more clearly in the exception in the Oklahoma Act relating to use restrictions and area agreements which are part of a plan for subdivision development. These are types of negative easements or servitudes which are different from the easements mentioned above because they are held by private individuals or associations but which are similar in that they likewise create multiple interests which marketable record title legislation is not designed to cope with. If an equitable servitude is part of a subdivision development plan and is one of the large number of reciprocal servitudes binding all tracts within the subdivision, applying the notice filing requirement of the Act to such a servitude would be impractical, burdensome and expensive. To keep the subdivision plan alive each owner would need

[87] *Id.* at 246-47 n. 32.
[88] *Id.* at 9.

to record a claim under the Act against every other lot owner periodically. It is obvious why this would ordinarily not be done, because of the time and expense involved in determining who all the other lot owners are and because of the expense entailed in such multiple filings. But if less than all lot owners filed their claims against all others, some servitudes would be extinguished under the Act and the doctrine of changed character of the neighborhood could apply to end all of the restrictions.[89] The draftsmen of the Model Act anticipated this problem and recommended, as one solution, excepting from the operation of the Act all equitable servitudes which are a part of a plan for subdivision development.[90] This is the solution that the Oklahoma Legislature placed in the Oklahoma Act.

The last exception found in Sections 72(e) and 76 of the Oklahoma Act relates to any interest of the United States. Because of the inability of the State of Oklahoma to affect an interest of the federal government, this exception would exist whether included in the Act or not.[91] Some acts in other jurisdictions exclude any interest of the state from the operation of the act;[92] however, the Oklahoma Act does not exclude any interest of the State of Oklahoma from the operation of the Act.

CONCLUSION

One of the more exhaustive articles written on marketable record title legislation in general is entitled, "Marketable Title Acts — Panacea or Pandemonium?"[93] As is true with

[89] *Id.* at 224-27; *see* 2 AMERICAN LAW OF PROPERTY § 9.39 (A. J. Casner ed. 1952).

[90] L. SIMES & C. TAYLOR, *supra* note 9, at 227-28.

[91] *Id.* at 15.

[92] *See, e.g.*, FLA. STAT. ANN. § 712.04 (1969); MICH. COMP. LAWS ANN. § 565.104 (1967); N.D. CENT. CODE § 47-19A-11 (1960).

[93] 53 CORNELL L.Q. 45 (1967).

most legislation, the effect of the Oklahoma Act falls somewhere between these two extremes. The limitations and exceptions contained in the Act prevent it from being a true panacea for the problems contained in the conveyancing process. And experience thus far in Oklahoma, as well as in other jurisdictions having marketable record title legislation, belies any dire predictions of pandemonium raging through the conveyancing process as a result of the passage of this type of legislation. On balance, the true value of the Oklahoma Act can best be expressed in the following terms which were used to assess the value of the Michigan Act, which served as the indirect model for Oklahoma's Act:

> . . . we may say that while the act did not, of itself, cut off many interests that would otherwise have remained valid and outstanding, it did afford naturally timid title examiners, and also those other attorneys who, for various reasons, felt themselves obligated to anticipate the objections of the timid practitioner, a new rationale for overlooking matters better left unraised. It also provides attorneys with additional legal ammunition when they are confronted with insubstantial exceptions to a title.[94]

[94] Jossman, *The Forty Year Marketable Record Title Act: A Reappraisal,* 37 U. DET. L.J. 422, 424 (1960).