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THE NORTH DAKOTA MARKETABLE RECORD TITLE ACT

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ARTICLE II, Section 67 of the North Dakota Constitution provides that acts of the legislative assembly shall take effect the first day of July after the close of the session unless the legislature shall vote otherwise. Thus Chapter 280 of the Session Laws of 1951, entitled the "Marketable Record Title" act became law on July 1, 1951, that being the first day of July after the close of the 1951 session. For all practical purposes, however, the "Marketing Record Title" act, hereinafter referred to as "the Act," did not become effective until July 1, 1952. This is because the Act itself extends the time until one year from the effective date of the Act for the filing of notices and affidavits of possession provided for therein.[1]

In view of the fact that the Act has therefore only been in effect one year, it seems proper that it be discussed and evaluated at this time.

THE DECLARED PURPOSE OF THE ACT

The act, in section 10 thereof, sets forth the legislative purpose in enacting it as follows:

> "Purpose of Act. This act shall be construed to effectuate the legislative purpose of simplifying and facilitating real estate transactions by allowing persons to deal with the record title owner as defined herein and to rely upon the record title covering a period of thirty years or more subsequent to the recording of deed of conveyance as set out in section 1 of this act, and to that end to bar 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, event, or omission occurring before the recording to (of) such deed of conveyance, unless a notice of such claim, as provided in section 5, shall have been duly filed for record. The claims hereby barred shall mean any and all interests of any nature whatever, however denominated, whether such claims are asserted by a person sui juris or under disability, whether such person is or has been within or without the state, and whether such person is natural, corporate, private, or governmental." [2]

In analyzing this, it is clear that the legislature intended to enact a law which is, in effect, a statute of limitation to run against old claims to real estate of any nature and however denominated,

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1. N.D. Sess. L. 1951, c. 280 §3.
2. Id., §10.

whether they be recorded or not. It is the declared purpose of the Act that if the owner of real property is a record title owner as defined in Section 2 of the Act, such record title owner need only rely on the record for a period of thirty years prior to the date of the examination of the record. It is the purpose of the Act" . . . to bar all claims that affect or may affect the interest" [3] of the record title owner, "the existence of which arises out of or depends upon any act, transaction, event or determination occurring before the recording" [4] of the thirty-year-old instrument upon which the record title owner bases his title.

The act, however, gives to the claim holder a method of preserving his claim by the recording of a notice within the thirty year period under which title is claimed by the record title owner.[5] Further, in declaring the purpose of the Act, the legislature states definitely what claims are barred. They are "any and all interests of any nature, however denominated, whether such claims are asserted by a person sui juris or under disability, whether such person is or has been within or without the state, and whether such person is natural, corporate, private or governmental." [6]

Will The Act Accomplish Its Purpose?

Because the use of dates and periods of time is essential to the discussion of whether the act will accomplish its purpose, it is important to note that an inconsistency has crept into the act with regard to measuring the periods of time.

In Section 1 of the Act, a person is declared to have a marketable title if he "has an unbroken chain of title to any real estate by himself or his immediate or remote grantors under a deed of conveyance which has been recorded for a period of thirty years or longer. . ." [7]

Section 2 of the act uses thirty years as a measuring period, in defining an unbroken chain of title. The thirty year period is also used in Section 10 in declaring the purpose of the act to be "simplifying and facilitating real estate title transactions by allowing persons to deal with the record title owner as herein defined and to rely upon the record title covering a period of thirty years or more."

It will be noted, however, that while the first part of Section 3

3. Ibid.
4. Id.
5. Id. §§3, 10
6. Id., §10.
7. Id., §1.

of the act purports to allow the title holder and his successors to take the land free and clear of any claims, the existence of which depends upon an event that occurred thirty years or more ago, the last part of Section 3 qualifies this in that if a claimant records a notice of claim on or before *thirty-one years* from the date of the recording of the conveyance under which title is claimed or within one year from the effective date of the act, whichever is latest in point of time, that the claim is not barred by the statute. Thus, section 3 purports to allow one to deal with the record title owner who is in possession and holds under a thirty year chain of title, yet at the same time allows a claimant thirty-one years in which to file a notice of claim. It is therefore the opinion of the writer that the time for filing notices as set forth in the last part of Section 3 should have been thirty years in order to harmonize with the rest of the Act.

Undoubtedly, what the legislature had in mind was the creation of a reasonable length of time during which to allow the filing of notices of claim before claims were barred. However, the legislature did provide this period of time by allowing claims to be filed "within one year from the effective date of this Act. . ." [8] and it was not necessary to use the figure thirty-one in the phrase "on or before thirty-one years from the date of the recording of deed or conveyance under which title is claimed. . ."

By allowing claims to be filed thirty-one years from the *date of the conveyance under which title is claimed,* the legislature has actually extended the time used in Sections 1, 2 and 10.

Under Sections 1, 2, 10 and the first part of section 3, one dealing with the owner in possession need only go back thirty years. Suppose that one is dealing with Richard Roe, an owner in possession, and the present date is July 15, 1952. It is necessary only to check back to see if he has an unbroken chain of title as defined in Section 2 for thirty years, thus back to July 15, 1922. If Richard Roe is in possession and has an unbroken chain of title, then under the first part of section 3, he can convey his title free and clear of any claims that arose more than thirty years ago. Suppose, however, that on February 1, 1922, an event took place giving rise to a claim in John Doe. Doe has done nothing about it. His claim is more than thirty years old. Is it barred by the Act? Section 1, 2, 10 and the first part of Section 3 seem to say so, *but* the last part of Section 3 allows John Doe to file a notice in writing on or before thirty-one

8. Id., §3.

years from the date of recording of the conveyance under which title is claimed. Richard Roe claims title under a deed of conveyance recorded on July 15, 1922. Thirty-one years from that date will be July 15, 1953. Thus, John Doe has until that date to file his notice of claim. In dealing with Richard Roe, therefore, reliance cannot be placed upon his thirty-year chain of title. One must wait thirty-one years to escape the effect of the last part of Section 3 of the Act.

As pointed out heretofore, two different times are given within which a notice of claim may be filed. The last part of Section 3 provides for the filing of the notice (1) on or before 31 years from the date of the recording of the deed of conveyance under which title is claimed or (2) within one year from the effective date of the act, whichever event is latest in point of time. It must be noted, however, that after July 1, 1952, which is one year from the effective date of the act, the 31 year computation will always give a date which is the latest in point of time where one is dealing with a chain of title approximately 30 years in length.[9]

In the illustration given, Richard Roe on July 15, 1952, had an unbroken chain of title which stemmed from a deed of conveyance recorded on July 15, 1922. In order to have the act be effective and give to Richard Roe a marketable title, he must have an unbroken chain of title for 30 years and be in possession of the real estate. In dealing with him, purchasers will want to have some evidence of his possession and Section 7 of the Act provides for the recording of such affidavit of possession. However, the Section further states that "no such affidavits of possession shall be filed as to any real estate before the expiration of 31 years from the recording of deed of conveyance under which title is claimed, or before one year after the effective date of this act, whichever event is the latest in point of time, . . .". Can Richard Roe on July 15, 1952 file such affidavits of possession? No, he can not. He must wait until 31 years from July 15, 1922, which is the date of the recording of the deed of conveyance under which he claims title.[10] Thus, he must wait until July 15, 1953 before he can record said affidavit because that is the latest in point of time. Therefore, in the opinion of the writer, attorneys cannot safely use the 30 year

9. In dealing with a title based upon a conveyance 32 years or more prior to July 1, 1952, then of course the application of one year from the effective date of the Act will be the latest in point of time. However, as pointed out above, where dealing with chains of title only 30 or 31 years old, the application of the 31-year figure will give the latest date in point of time.

10. N.D. Sess. L. 1951, c. 280, §7.

period as mentioned in Sections 1, 2, 3 (first part) and 10. Practitioners must use the 31 year period in order to be sure that there will be no claims which can be preserved by filing notices thereof. The 31 year time limitation must also be used in filing affidavits of possession.

In view of the differences in time limitations, it is the opinion of the writer that wherever the figure 31 has been used, the Act should be changed to read 30 and then all sections of the Act will be consistent. If the figure 30 were used in the last part of Section 3 and in Section 7, the following would be the result of our illustration. Richard Roe on July 15, 1952 would have an unbroken chain of title back to July 15, 1922. Within 30 years from July 15, 1922, notices of claims would have had to have been filed. Thus, on July 16, 1952 the 30 year time for filing claims would expire and it is to be noted that date is later in point of time than one year after the effective date of the act. Thus, on July 16, 1952, all claims which arose prior to July 15, 1922 would have been barred. Note also, if 30 years were used in Section 7, that on July 16, 1952, Mr. Roe could file for record the affidavit provided for in Section 7 because the date of the beginning of Mr. Roe's title is July 15, 1922 and using 30 years allows him to record such affidavits on July 16, 1952.

With the exception of inconsistencies heretofore set forth, the writer is of the opinion that the Act will serve the purposes outlined in Section 10. The Act not only acts as a statute of limitations but also sets forth what constitutes a marketable title.[11] This, it is believed, will go a long way to facilitate and simplify title transactions. It is a positive statement of what a marketable title is. According to the Act, a person is deemed to have a marketable title whenever he has an unbroken chain of title to any interest in real estate for a period of 30 (31) years subject only to claims and defects of which notice has been filed within that period of time, and of course subject to claims that are less than 30 (31) years old, and are of record or known to the person dealing with the record title holder.

While other states have similar statutes, no cases have been found which set forth the types of claims that are barred by these statutes. However, according to the Act itself, all interests, claims or any charges whatever dependent in whole or in part upon any event that occurred more than 30 (31) years ago are barred.[12] This in-

11. Id., §1.
12. Id., §§), 10.

cludes claims or charges asserted by persons under disability without regard to residence in the state or whether the person asserting the claim is natural, corporate, private or governmental.[13] In view of the strong language used in Sections 3 and 10 there seems to be no doubt that the legislature intended to bar all types of claims more than 30 (31) years old, except those specifically excepted in Section 11.

Assuming that the person who holds the record title is in possession and has an unbroken chain of title for 30 (31) years, the writer believes that the following claims will be barred:

(1) A claim arising under tax title which is more than 30 (31) years old.

(2) A defective quiet title action, mortgage foreclosure, probate proceeding, or sale under a judgment.

(3) A deed executed by a husband or wife only without stating that it does not cover a homestead.

(4) Informalities in the execution or acknowledgement of conveyances.

(5) Interests which are present or future, vested or contingent with the exception of the reversionary interest of a lessor or his successor and the rights of remaindermen upon expiration of a life estate or trust created prior to the date of the recording of the conveyance under which title is claimed.[14]

The case of *Lane v. Travelers Insurance Company*,[15] sheds light on the construction of the type of statute under discussion when applied to barring contingent future interests. In the Lane case the testator devised his land to his son, Patrick, for life with a remainder to Patrick's heirs.[16] Patrick mortgaged the land in 1906, which mortgage was foreclosed and a sheriff's deed issued in 1910. In 1913, the land then pased through several conveyances to Margaret Lane, wife of Patrick. In 1926, Margaret and Patrick mortgaged the property to the defendant and said mortgage was foreclosed and a sheriff's deed issued to the defendant in February, 1938. Patrick and Margaret's six children, all born prior to January 1, 1920, sought to establish their interests in the property and commenced the action on the day the sheriff's deed was issued to the defendant. At that time Iowa had a statute which barred any claim arising or

13. Id., §10.

14. This list is not intended to be all-inclusive, but simply to call attention to the more common defects found in chains of title.

15. 230 Iowa 973, 299 N.W. 553 (1941).

16. Iowa has abolished the rule in Shelley's Case by statute, and hence it did not apply in this instance. Iowa Code §§10059, 10060 (1935).

existing prior to January 1, 1920, unless a notice of claim was filed on or before July 4, 1932. None of the children filed such notices and in 1938 at the time of the institution of the action, two of the children were minors. The question then arose as to whether the statute barred the claims of the children of Patrick including the two minor children. The Supreme Court of Iowa held that the interests of all of the children arose prior to January 1, 1920, and that in view of the fact that no notices thereof were filed prior to July 4, 1932, that the interests of all the children were barred after that date.

It is interesting to note that at the time of the institution of the action in 1938, Patrick was still living, and therefore, the children's interest were contingent remainders. Nevertheless, the court held that the plain and unambiguous terms of the statute make it applicable to any interest or claim that arose or existed prior to January 1, 1920, even though the holder of such interest or claim was a minor.

If the situation in the Lane Case, arose in North Dakota, our statute would not bar the plaintiff because Section 11, paragraph b of the Act specifically excepts from the application thereof, "The rights of any remainderman upon the expiration of any life estate or trust created before the recording of deed of conveyance as set out in section 1 of the act." Nevertheless the *Lane* Case is important in that in applying the Iowa statute, which is similar but not identical with our Act, the holder of an interest is required to record the notice even though he may be a minor or *possibly not in existence* at the expiration date for filing notices.

This same requirement is specifically set forth in our Act. The Act provides that, "no disability nor lack of knowledge of any kind on the part of anyone shall operate to extend the time for filing such claims after the expiration of thirty-one years from the recording of such deed of conveyance . . ." [17] Section 10 goes further and states, "The claims hereby barred shall mean any and all interests of any nature whatever, however denominated, whether such claims are asserted by a person sui juris or under disability, whether such person is or has been within or without the state, and whether such person is natural, corporate, private, or governmental." And should there be any doubt as to the barring of claims of minors, persons under disabilities and even persons not in existence, Section 4 should remove that doubt. The legislature,

17. N.D. Sess. L. 1951, c. 280, §3.

realizing that minors, persons under disability, and even unborn claimants will be unable to record the notice of their claim, allows the notice to be filed, " . . . by any other person acting on behalf of a claimant who is under disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such claim for record."

While the application of the Act may work a hardship in rare occasions upon minors, unborn children or other persons under disability, nevertheless it is the opinion of the writer that in sacrificing these claims, a public purpose is being served in facilitating and simplifying land transactions. Furthermore, Section 4 gives to parents and other relatives the right to file the claim to preserve possible interests of their children or heirs.

As we have pointed out heretofore, this Act will serve the purpose as set forth in Section 10 once the time of the limitations are changed so that they are all the same. The Act will go a long way to facilitate and simplify real estate transactions. However, it does not go so far as to allow a title examiner to go back only thirty years to commence his examination of the title. Because of the exceptions contained in Section 11 of the Act, an examiner will still have to go back to the origin of the title and examine down to date. The Act merely provides that should there be interests, claims or charges, more than thirty years old, the examiner may disregard them provided that the record title holder is in possession and gives an affidavit to that effect. And, of course, provided that the interest, claim or charge is not excluded from the Act.

A consideration of the exclusions therefore seems warranted. Section 11 provides: "11. Exceptions.) This Act shall not be:

1. Applied to bar:
   a. The rights of any lessor or his successor as reversionary of his right to possession on the expiration of any lease by reason of failure to file the notice herein required;
   b. The rights of any remainderman upon the expiration of any life estate or trust created before the recording of deed of conveyance as set out in section 1 of this Act;
   c. Rights founded upon any mortgage, trust deed, or contract for sale of lands which is not barred by the statute of limitations; or
   d. Conditions subsequent contained in any deed; nor
2. Deemed to affect the right, title or interest of the state of

North Dakota, or the United States, in any real estate in North Dakota.

3. Applied to the right, title, or interest of any railroad."

At first glance, excluding a lessor from the requirement of filing a notice of his interest, especially where the lease is for a long term, appears to be a reasonable one. However, upon giving the matter further thought, it is difficult to imagine a situation where a lessor's reversionary interest could be cut off. It must be kept in mind that two things are necessary in order that one have a marketable title. They are (1) an unbroken chain of title for 30 (31) years, and (2) possession, evidenced by an affidavit thereof. A lessee, of course, could give an affidavit of physical possession, but it is difficult to imagine a situation where the lessee would have an unbroken chain of title for 30 (31) years.[18]

In excluding from the operation of the Act, remaindermen who will *succeed to an interest* in real estate upon the termination of a life estate or trust, the legislature probably had in mind the *Lane* case, discussed heretofore. Apparently the legislature felt that as between the rights of remaindermen and the simplifying of real estate transactions the rights of remaindermen were of greater importance, even though the legislature did provide for the filing of the notice of claim by any other person on behalf of a claimant under disability or whose identity cannot be established.[19]

In providing that holders of mortgages and trust deeds need not file a notice of claim within the 30 (31) year period, it is apparent that the legislature had in mind long term instruments and those instruments which may have been extended by payments which do not appear of record. Persons holding the above types of instruments are thus protected from the operation of the Act.[20]

The Act next provides that conditions subsequent in a deed shall not be barred by the Act.[21] This of course, means that if a deed contains a condition subsequent, the person or persons to whom the land would go upon the exercise of the right of entry need not file a notice of their possible claim to the land. An example of this situation is where land has been conveyed by "A to B, but if B

18. It is interesting to note that the Minnesota Act, Chapter 118 of the Session Laws of 1947, which is more in the form of a statute of limitation, does not contain any provision excluding a lessor from the operation of the statute. Commenting on this, Paul E. Basye states, "Presumably the owner of land subject to a lease for more than 40 years would not need to comply with the act and record notice of his reversionary interest, since the physical possession of the lessee would be treated as the possession of the lessor." Bayse, *Streamlining Conveyancing Procedure*, 47 Mich. L. Rev. 1117 (1949).

19. N.D. Sess. L. 1951, c. 280, §4.

20. Id., §11 (1) (c).

21. Id., §11 (1) (d).

should cease to use the land as a park, A may reenter as of his former estate." In view of the fact that as time passes, circumstances surrounding the use of certain property may change, and it may be advantageous to use the property for a different purpose, it is the opinion of the writer that interests created by conditions subsequent should be brought within the operation of the Act and barred unless a notice of the claim were filed in accordance with the Act.[22] There should be some way to bar these interest *that arise upon a condition broken,* where the land is no longer suitable for the purpose for which it was granted, and where the deed creating the condition was made many years ago. It is many times difficult and sometimes impossible to locate the person or persons to whom the land passes upon a condition being broken. To require these persons to keep alive their interests by filing a notice of claim within the 30 (31) year period, would seem to the writer another step toward the goal of facilitating and simplifying real estate transactions.[23]

Paragraphs 2 and 3 of Section 11 of the Act exclude the governments of the State of North Dakota and of the United States from the operation of the Act, *and also any railroad.* Thus if any of these three have an interest in the property which appears of record, and is more than 30 (31) years old, the Act does not bar that interest.

CONSTITUTIONALITY

The Act, in effect, is a statute of limitations, although it goes further in that it not only bars existing claims more than 30 (31) years old, but also defines what constitutes a marketable title. There is no question but that the legislature has the power to enact statutes of limitations. Thus there is no need to discuss that here. As to existing causes of action, or as in this Act, as to existing claims, a statute of limitation must afford a reasonable time for the commencement of the action, or as in this Act, for the filing of a notice of claim before the action or claim is barred. What is a reasonable time is to be decided from all the facts. In *Merchants National Bank of Bismarck v. Braithwaite,*[24] our Supreme court held that 13 months from the date of the passage of an act was a reasonable length of time within which an action must be com-

22. It will be noted that the act does not, in terms, except from its operation possibilities of reverter remaining after the grant of a determinable fee.

23. See Ruemmele, *How to Examine an Abstract and Implications of the Marketable Titles Act,* 1952 Sectional Assemblies Booklet of the State Bar Association of North Dakota.

24. 7 N.D. 358, 75 N.W. 244 (1898).

menced. The Marketable Record Title act, which we are discussing, allows one year from the effective date of the Act within which to file a notice of claim. This is more than 15 months from the date of the passage of the Act, and therefore a reasonable time is allowed before existing claims are barred, and thus the Act meets that constitutional requirement.

The question of whether the Act affords due process must also be considered in discussing the constitutionality thereof. In *Murrison v. Fenstermacher*,[25] the Supreme Court of Kansas held unconstitutional a statute which provided that, where a parcel of land had been platted for twenty-five years or more, deeds executed by the person who platted the property should be conclusively presumed to have conveyed perfect title, notwithstanding any prior defect in the grantor's title. The court based its holding of unconstitutionality on the ground that the statute operated to cut off rights, even of those people who may be in actual or constructive possession of the property. In other words, the statute cut off interests to platted property, more than 25 years old, regardless of whether the person in whose favor the statute operated was in or out of possession.

In view of the fact that our Act provides that a person must be in possession of the property besides having an unbroken chain of title, our Act meets the constitutional requirement set up by the *Murrison* case, and the cases cited therein.

The question of due process is discussed also in the Iowa case of *Swanson v. Pontralo*.[26] In that case the Supreme Court of Iowa points out that the legislature by a "curative" act cannot cure a jurisdictional defect, such as in a tax sale, because to do so would be a violation of due process. However, the court distinguishes between "curative" acts and "statutes of limitation" and states that the legislature can bar the right to assert a jurisdictional defect by one who is not in possession of the realty, without violating due process. Before the jurisdictional defect can be barred, however, the one relying on it must have a reasonable time within which to assert his claim, and he must not be in possession of the property. If the one relying on the jurisdictional defect is in possession of the realty, or if he is not accorded a reasonable time within which to assert it, to deprive him of it would be a violation of due process.

Again, applying those rules to our Act, it is apparent that a claim holder is given a reasonable time within which to assert his claim,

25. 166 Kan. 568, 203 P.2d 160 (1949).
26. 238 Iowa 693, 27 N.W.2d 21 (1947).

and further, he cannot be deprived of his rights if he is in possession of the property. Thus the Act also meets the constitutional requirements of the *Swanson* case.

No cases have been found which directly hold constitutional a statute similar to our Act. However, the *Swanson* case, referred to above, does shed some light on the question because in that case the Iowa court held constitutional a statute, which operates on tax titles alone in a way similar to the way in which our Act will operate on them and on other defects. The Iowa statute, which was construed in the *Swanson* case, allowed a tax title holder, after two years, to record an affidavit setting forth his purchase from the county and the fact that he was in possession of the property. Upon the recording of that affidavit, anyone claiming adversely to the tax title holder had 120 days within which to file a notice of his claim. This statute was held constitutional, and it is interesting to note that the Iowa court refers to the *Lane* case, referred to above, pointing out that while the parties in the *Lane* case did not attack the validity of the statute under discussion therein,[27] the court did say that " . . . there can be little doubt of the desirability of the statutes giving greater effect and stability to record titles." [28] Thus it would seem that the *Swanson* case and the *Lane* case should have a great deal of influence on our Supreme Court, once the constitutionality of the Act is before them.

CONCLUSION

The Marketable Record Title act has as its purpose the simplifying and facilitating of real estate transactions. This purpose will be accomplished, if the members of the bar will study the Act and make use of its provisions. However, the Act does not mean that an examiner need only examine back for a period of 30 (31) years. The record must be examined back to its origin. Should the examiner find a defect therein which is more than 30 (31) years old, and which is not excluded by Section 11, said defect will be barred *if* the record title holder has an unbroken chain of title for a period of 30 (31) years and makes and files an affidavit that he is in possession of the property.

The Act bars all interests, claims or any charges whatever, which are more than 30 (31) years old. Thus the Act will not only cure irregularities and informalities in instruments and proceedings, but

27. The statute applied in the *Lane* case is similar to our own act.
28. Swanson v. Pontralo, 238 Iowa 27 N.W.2d 21 (1947); Lane v. Travelers Insurance Co., 230 Iowa 973, 299 N.W. 553 (1941).

will bar jurisdictional defects in legal proceedings more than 30 (31) years old.

The Act of course, does not operate to bar the exclusions listed in Section 11. As indicated above, some of these exclusions could well be modified so as to bring them within the operation of the Act, and thus make the Act more useful. The enactment of this law, however, is a forward step in the march to streamline conveyancing procedure.

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