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Marketable Title Acts - A Means to Improve Title Practice

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MARKETABLE TITLE ACTS—A MEANS TO IMPROVE TITLE PRACTICE*

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Our Supreme Court has defined a marketable title as one "that is fairly deductible of record . . . that is reasonably free from such doubts as will affect the market value of the estate; one which a reasonably prudent person with knowledge of all the facts and their legal bearing would be willing to accept."

The central concept of this definition is an economic one. That is, if a reasonably prudent person would feel sufficiently secure from the loss of his investment in the title that he would purchase it without discount, then the title is marketable. However, we do not practice what we preach. The reagent by which the transactions in a chain of title are tested is not the probability of economic safety, but is a set of formal legalist standards. As applied to transactions which took place within recent times these standards are objective in character and provide only a reasonable margin of security. However, as to transactions dating back more than two or three decades, they lose their validity in the light of economic safety as the guiding principal of marketability. Even our relatively complete set of curative statutes and statutes of limitations do not bring our present methods of title examination into happy accord with economic realism.

Probably every lawyer of considerable experience has occasionally felt compelled to reject a title as unmarketable for defects in instruments which have remained of record for thirty or more years. Such a result can arise in any case where the description in an old deed fails to close, thus rendering the conveyance void; or where it may be impossible to identify the ground described in the old conveyance as corresponding exactly with the ground now claimed under the chain of title; or where there is a variance in names, which exceeds the limits of the doctrine of idem sonens and of our statute relating to variances in names. These defects, among others, produce an apparent though usually not a genuine break in the chain of title. It is because one of our technical requirements for a marketable title is that it be deducible by a continuous chain of transfers of record from original source in the sovereign down to present occupant, that such defects render titles unmarketable. The customary antidote for such defects is a proceeding under Rule 105 in which some person or persons who have made no claim to any interest in the property for several decades

*In this article the author recommends certain action to the Bar Association and supports his recommendations with apparently sound arguments. Readers are invited to submit criticisms or comments to the Secretary of the Colorado Bar Association.

[1] *Federal Farm Mortgage Corporation v. Schmidt*, 109 Colo. 467, 469.

will be named defendant, served in all probability by publication, and solemnly proceeded against at an expense of around $200.00.

That such a quiet title proceeding is often mere legal incantation is demonstrated by the frequency with which clients are advised that a title is "safe", but that the seller should be required to put up a deposit to pay for procedures to render it marketable. This amounts to saying "this title is good enough that you may at once part with nearly all of your life's savings to buy it in safety; but $200.00 or more must be withheld from the purchase money to satisfy the technical requirements of lawyers." It is small wonder that some laymen consider the custom of title examination by lawyers to be little better than a racket. The public is entitled to demand that our standards of marketability more nearly conform to economic reality. But lawyers are at present almost helpless to remedy the situation because of the absence of any means of differentiating in principle between mere ancient phantom breaks in the title chain, such as above mentioned, and genuine though ancient, outstanding interests. A legislative solution to the problem is required.

The technical requirement that a marketable title must be supported by an unbroken chain of title from original source has another undesirable effect on our methods of title examination. It is an inevitable corollary to this requirement that an examiner must review and consider each document which has ever been recorded relating to the title to the parcel of land under consideration. Abstracts showing all such documents become even longer and more expensive. The time required of the attorney to examine them becomes ever greater. All participants in title transactions suffer on account of the endlessly lengthening chains of title. The cost to the buyer and seller is obvious. The lawyer cannot increase his fees enough to pay proportionately for his added time. The abstract company is compelled to forever maintain its ancient records at high expense but with low return, since most of their work is current continuations. When they do make new complete abstracts they run greater risk of liability for error as to entries made from their older records. Title insurance companies must also carry the added risk of ancient error as well as pay the higher costs for searching title back to source. All this is suffered primarily to guard against mere paper defects in title, and not to protect against actual outstanding interests. The time must surely come when the constantly increasing burden on title transactions will no longer be tolerated.

In some eastern states a custom has developed to make title examinations for a certain number of years only. In at least one state such examinations are said to be for "80 years to a warranty deed." That is, the examination starts with the latest warranty deed which has remained of record for eighty years. Such a custom

at least stops the perpetual increase of the burden of title examination and demonstrates that an unbroken chain of title from original source is not essential to marketability from the economic viewpoint. However, an eighty year examination still involves too much needless expense as well as the rejection of titles for defects which, on account of age, should not derogate from marketability. On the other hand, failing to examine to source, requires closing the eyes to possible actual outstanding ancient interests.

To meet this problem in a better way several states have enacted Statutes[2] which are designed to provide an economically realistic standard of marketability and remove the extravagant necessity of making and examining abstracts showing all recorded instruments. Such statutes have a twofold operation. On the one hand, with certain exceptions, they render null and void all interests dependent upon transactions more than, for example, 40 years old unless such interests are kept alive by recording within the forty year period notice of the claim thereto. On the other hand they provide that a person in possession of land has a marketable title if he can show an unbroken chain of title for 40 years free from such notices of older outstanding interests. Of these statutes, C. G. Patton and R. G. Patton say, "But of paramount help to an examiner, or to the vendor whose title he is appraising, are the statutes of several states barring all conflicting or encumbering interests which are based solely upon ancient origin."[3] And, of the Wisconsin Act, Paul E. Basye says, "Considering this legislation in its entirety and the system of land title transfers which it inaugurates, it should operate in a dramatic way to purge our land title system of its medieval barnacles and establish it as a twentieth century method adapted to twentieth century institutions."[4]

As an example of such statutes a brief digest of the Michigan Compiled Laws (1948) §§ 565.101 to 565.109 is presented as follows:

> 565.101 Any person . . . who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period be deemed to have a marketable record title to such interest, according to the terms of the muniments of such chain recorded within said 40

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[2] Illinois, Smith Hurd Supp.—Ill. Ann. Stat. c83 § 10a.
Indiana, Ind. Stat. Ann (Burns Supp. 1947) §§ 2-628 to 2-637.
Iowa, Iowa Code (1946) § 614.17.
Michigan, Mich. Comp. Laws (1948) §§ 565.101 to 565.109.
Minnesota, Minn. Stat. Ann (1949) § 541.023.
Nebraska, Neb. Rev. Stat. Ann. (Supp. 1947) §§ 76-288 to 76-298.
South Dakota S. D. Laws 1947 c. 233.
Wisconsin, Wis. Stat. (1947) § 330.15.

[3] American Law of Property vol. IV p. 843, § 18.96.

[4] Paul E. Basye, *Streamlining Conveyancing Procedure*, Mich. L. Rev. (1949) Vol. 47 p. 1115.

years. Provided that it does not apply to land in hostile possession of another.

565.102 Such chain of title must start with a conveyance or other title transaction which has been of record more than 40 years purporting to convey or create the interest claimed.

565.103 Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all interests, claims and charges whatsoever, the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred prior to such 40 year period, and all such interest, claims and charges are hereby declared null and void. Provided such interests based on ancient transactions may be kept alive by recording a verified notice of the claim thereof. "No disability or lack of knowledge of any kind" shall suspend the running of the 40 year period. Notices of claim may be filed by the claimant or by any person in behalf of a claimant who is under disability or unable to assert a claim in his own behalf or a member of a class whose identity is uncertain at time of filing the claim.

565.109 Excerpts from operation of the law interests of the United States, and the State of Michigan and its subdivisions, also excepts the rights of reversioners after terms of lessees in possession, mortgages executed by railroads or other public utilities, prior to maturity, and easements clearly observable by physical evidence of their use.[5]

565.105 Provides form for notices and fees.

565.106 Declaration of legislative intent to simplify and facilitate land transactions. Claims extinguished by the statute to include all interest "however denominated

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[5] It seems clear that the interests of the United States must be excepted from the operation of such a law. The use of easements involving obvious physical evidence of their existence is so much like possession that owners of such interests should not be required to file renewed notices of claim. But further exceptions should be made only with the greatest care, or, better still not at all. The interests of the State itself, like the interests of the United States, can be fairly easily set up for abstracting by filing patents and conveyances to and from the sovereign separately. But the similar preservation of records for various special classifications of individuals, companies and even political subdivisions would be so cumbersome that the value of the new law would be destroyed. The exception of severed mineral interests from such a law should be strenuously opposed. In fact this simple way of brushing aside the vast numbers of stale mineral leases, reservations, and the like which hamper mineral leasing would make it well worth the while of the active operators to record notices of any claims they may hold which would be affected by the law.

and whether such claims are asserted by a person sui juris or under disability."

565.107 Act shall not extend other periods of limitation.

565.108 Relates to slanderous notices.

565.109 Provides period for recording notices of claims of interests more than 40 years old at effective date of the Act.

Iowa's Statute[6] which was adopted in 1919 provided the pattern of extinguishing interests of ancient origin unless current notices of claim were recorded. It did not contain the definition of marketability added to the Michigan law. As originally passed the Iowa law provided for the extinguishment of interests which arose or existed prior to January 1, 1900. It was later amended several times to substitute new, more recent cut off dates as the former ones became too old to be helpful. The Iowa law is the only one yet tested in a court of last resort. It was considered by the Iowa Supreme Court in the case of *Lane v. Travelers Ins. Co.*, 1941, 299 NW 553. In that case Edmond Lane died in 1895 leaving a will by which he devised 160 acres of land to Patrick Lane for life, remainder to the heirs of Patrick. It was conceded that the interests to Patrick's heirs were contingent remainders. Patrick mortgaged the land in the year 1906. The mortgage was foreclosed in 1913 and the grantee of the Sheriff's Deed conveyed in fee simple to Nora Kinney whose title had been conveyed to Travelers. Patrick had two children who were born in 1917 and 1919 and were still minors when the case was tried. They thus escaped the operation of all other statutes of limitation. The issue presented was whether or not the contingent remainders of the two minor children were extinguished because they arose or existed prior to January 1, 1920, the cut off date of the Iowa statute as then existing, since no notice of their claim had thereafter been recorded. The court held that the interests of the two minor children were so barred. In so holding the Supreme Court of Iowa sustained the constitutionality of the requirement that holders of interests in land of ancient origin must make a current recording of their claims to protect them from extinguishment, and that the requirement was fully effective as to interests of those not sui juris.

In 1941 Illinois[7] and Indiana[8] adopted laws based on the Iowa statute and in 1943 Wisconsin[9] and Minnesota[10] enacted similar legislation of an even more advanced type. The Michigan law was

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[6] See Note 2.

[7] See note 2.

[8] The original Indiana statute was found unsatisfactory and was replaced by a new law in 1947. See Note 2.

[9] See note 2.

[10] See note 2.

adopted in 1945 and Nebraska[11] and South Dakota[12] passed laws substantially identical to Michigan's. Concerning the Michigan form of statute, Basye says, it "is the backbone of any comprehensive plan for reform in conveyancing procedure. In one step it accomplishes two of the most important objectives enumerated at the beginning of this study. It defines marketable title positively and at the same time, as a means of doing this, it extinguishes all interests and claims whose existance depends on any act, transaction, event or omission prior to the period of time during which marketability is to be appraised. Such legislation gets at the heart of the matter and eliminates the practical need for certain other kinds of legislation except as to events occuring within the period of the statute."[13]

For some reason when such legislation is first proposed to lawyers, their first reaction is often to express doubt of its constitutionality. However, I think it can clearly be sustained, and indeed, that every principle contained in it is already in some degree in use in our statutes. The original establishment of our recording system was a far more radical change in the law of conveyancing than that here proposed. Prior to that time the person first receiving a grant of land from the owner was thereafter protected from later conveyances by his grantor to others, regardless of the bona fides of the subsequent grantees in dealing with the grantor. The recording statutes subjected the first grantee to extinguishment of his theretofore fully vested and protected interest unless he should record his grant before a subsequent bona fide purchaser should buy for value, and record his grant. In fact under some laws the subsequent grantee will prevail even if he does not record. The justification of the recording laws in thus impinging hallowed property rights is the obvious fact that the public good derived in terms of more secure land transactions far outweighs the burden and risk imposed on land owners to record their interests. The proposed law provides the same measure of public benefit in facilitating land transactions, and the burdens imposed are relatively less than those by the original recording acts since they apply only to the very few who claim interests of ancient origin and who are not in possession of the land. A property owner who is provided with a reasonable means of protecting his interest is not deprived of his property without due process of law when his interest is lost through failure to take advantage of such means. If this were not so, no statute of limitation would be valid. The proposed law is in part a statute of limitation. It requires that the old rights in land to which it relates be asserted within a reasonable time, but permits the as-

[11] See note 2.

[12] See note 2.

[13] Paul E. Basye, *Streamlining Conveyancing Precedure*, Mich. L. Rev. June 1949, Vol. 47, p. 1135.

sertion to be by recording a claim, rather than by instituting a judicial proceeding. It, also, modifies the recording law by, in effect, limiting the time within which a recording has the effect of notice to the subsequent purchasers.

This combination of a modification of the recording act plus a statute of limitation has already been used several times in Colorado to remove the cloud apparent outstanding interests. Prior to 1921 a conveyance to a grantee as "trustee" without more provided protection to beneficiaries of the trust, if any, by imputing perpetual notice to all purchaser from the record. Sec. 10 of Chapter 40 was adopted in 1921. It provided that after 5 years after its effective date all such instruments theretofore executed should cease to be notice of the trust unless a statement providing the required information should be recorded within such period. The effectiveness and validity of this statute has never been questioned. It has made many titles marketable which would otherwise have required a quiet title suit. In 1933 existing mortgage and other liens securing payment of debts due prior to March 28, 1927, were subjected to extinguishment unless the requisite notice of renewal were recorded within 15 years. Section 116 of Chapter 40 applied the same principle to eliminate the cloud of old option contracts. Whereas such an instrument of record was previously perpetual notice of the equities of the optionee, that law limited notice of the optionee's interest to one year after the date for exercise of his rights and thereafter extinguished such interests unless a lis pendens were filed within the year's period. These laws all applied to interests under instruments already of record at their effective dates. No argument could be made that interests created after the adoption of the proposed legislation would be immune to its provisions.

Sometimes a doubt is expressed that such a law would be effective as to the possible interests of unborn persons. It is axiomatic that an interest in an unborn person must be contingent, and not vested. As unvested interests, they are clearly subject to laws which change or abolish the possibility of acquiring property under existing statutes or common law doctrines.[14] They are even subject to complete abrogation by statute. However, this law does not make any fundamental change in that regard. Under existing law if A conveys land to B for life, remainder to the heirs of C, and if no one records the deed, the interests of the unborn or unknown heirs of C will be extinguished by any conveyance by A to bona fide purchasers; perhaps, in view of the broad language of Section 114 protecting "any class of persons with any kind of rights," such contingent remainders would be extinguished in favor of mere heirs, devisees or donees of A. It is also to be noticed that Section 10 of Chapter 40, mentioned above, would destroy the

[14] American Law of Property §§ 18.93 and 18.95.

interest of unborn beneficiaries of any trust thereby affected, if some living person did not record the statement required by that section. Yet this objection has never been raised as to Section 10.

One further observation should be made as to the operation of the law. By defining marketability the statute would control the interpretation of every land sales agreement thereafter made. Unless the parties expressly stipulated for a different standard to be applied in determining the fitness of the title tendered in performance of a contract, no buyer could raise an ancient title defect as an excuse for refusing to complete the purchase. Where the parties think it necessary, they may stipulate for a longer examination, but it is submitted that, in view of the other provisions of the law, such longer examination would never disclose a title defect.

It must be apparent that the writer is an ardent advocate of the adoption of a Marketable Title Statute of the type in force in Michigan. However, this article is not an attempt to sell Colorado a ready prepared package for enactment 'as is.' Rather, it is hoped that, by thus calling the attention of Colorado lawyers to the advancements in title procedure in other states that the Bar Association will be stimulated to undertake a careful study of these laws with a view to drafting a similar one for Colorado. To those whose interest in this subject has induced them to read this far, it is urged that they read the comprehensive article by Professor Paul E. Basye entitled *"Streamlining Conveyancing Procedure"* which appeared in the May 1949 and June 1949 issues of Michigan Law Review (47 Mich. A. Rev. 935 and 1097). Professor Basye deals with these statutes particularly at pages 1110 to 1136. These statutes are also dealt with more briefly in Title 18, American Law of Property 18.96 nn 38-50 and in Patton on Titles, Supplement 304.

MEETING ON MENTAL HEALTH

The Colorado Association for Mental Health, Inc., cordially invites members of the Bar and other interested persons to attend a Luncheon on November 20, 1953, in the Colorado Room of the Shirley-Savoy in Denver. Henry Weihofen, J.D., S.J.D., Professor of Law at the University of New Mexico and formerly Professor of Law at the University of Colorado, will talk on "Mental Illness and the Law."

Professor Weihofen is widely known as a speaker and for his many articles on law and psychiatry. With Dr. Manfred Gutmacher, he is co-author of *Psychiatry and the Law,* acclaimed by medical and legal authorities as a major contribution to both professions. Call MA. 2221, Ext. 32, before November 18th for reservations or write to the Colorado Association for Mental Health, 314 14th Street, Denver.