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Remedial Title Legislation for Wyoming

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REMEDIAL TITLE LEGISLATION FOR WYOMING

I. THE PROBLEM

The policy of recording acts is to provide a permanent record of ownership, to prevent fraudulent claims and to protect bona fide purchasers.[1] Statutes such as Wyoming's,[2] the race-notice variety, protect the purchaser who records first, providing he has no notice of hostile claims. This first in time, first in right policy makes an owner with the earliest record of ownership secure in that ownership, security which can be passed on to subsequent purchasers. Absolute security can only be obtained by assurances that the title in question is in fact the earliest of record and that it has no defects which might in some manner defeat it. Proving such assurance is the function of the attorney. "Through much of the nineteenth century the economic foundation of the American bar was primarily in the giving of assurances about 'title' to real property."[3] Such assurances took the form of establishing a sufficient history of uninterrupted ownership for, "[w]hile 'no man in his senses would take an offer of a purchase from a man merely because he stood on the ground,' yet he will do so if the vendor has been standing there long enough."[4]

In the United States it became accepted practice that sufficient assurance required that a chain of ownership free from defects be established which ultimately rested in a grant from a sovereign. The following may well be illustrative of the results of such a policy:

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

1. 4 AMERICAN LAW OF PROPERTY § 17.5 (Casner ed. 1952).
2. WYO. STAT. § 34-20 (1957).
3. MAYER, THE LAWYERS 53 (1966).
4. Cretney, *Land Law and Conveyancing Reforms*, 32 MODERN L. REV. 477, 478 (1969).

> of title. Let us compliment you on the able manner in which you prepared and presented the application. However, you have not cleared the title before the year 1803, and therefore, before final approval can be accorded the application, it will be necessary that the title be cleared back of that year."
>
> Annoyed, the lawyer replied: "Your letter regarding titles in Case No. 189156 received. I note that you wish titles extended further back than I have presented them. I was unaware that any educated man in the world failed to know that Louisiana was purchased from France in 1803. The title to the land was acquired by France by right of conquest from Spain. The land came into possession of Spain by right of discovery made in 1492 by a sailor named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the then reigning monarch, Isabella. The good queen, being a pious woman, and careful about titles, almost, I might say, as the RFC, took the precaution of securing the blessing of the Pope upon the voyage before she sold her jewels to help Columbus. Now the Pope, as you know, is the emissary of Jesus Christ, The Son of God, who, it is commonly accepted, made the world. Therefore, I believe it is safe to presume that he also made that part of the United States called Louisana [*sic*], and I hope to hell you are satisfied."[5]

The problem of assuring prospective purchasers of realty that they will be secure in the purchase requires more than a mere tracing of title to a sovereign grant; it also requires an opinion as to the possibility of a disturbance of ownership by attacks on irregularities in the chain of title. The attorney providing such assurances must anticipate all vulnerable links in the chain and advise his client of them. He must anticipate all ills, however trivial, which other title examiners may consider a cloud on the title and a restriction on marketability. This very meticulous search of the record with much emphasis on minor irregularities is time consuming, burdensome and wasteful, but unfortunately considered essential to land security.

5. Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47, 49 (1958).

As each tract of land is subsequently transferred, a new title opinion is sought. Another lawyer meticulously inspects the chain of title, going over the material which has been previously checked. With each subsequent transaction the title examinations continue, becoming longer and requiring greater effort in the search. This snowballing effect borders on economic waste and provides at least a potential area for criticism of the bar. "The fee for a title search is one percent of the mortgage. You get a downtown office building that changes hands every few years, and each time you are paid one percent of the new mortgage for a little job you've already done."[6]

It seems reasonably apparent that as time passes the chains of title become longer and more complex, thus increasing the possibility of error. In addition, land is being subdivided into smaller and smaller tracts, thereby multiplying the task of the title examiner. For example, statistics from one county in New Mexico indicate that recorded transactions increased fourteen times between 1935 and 1965.[7] It is doubtful that the problem exists in such magnitude in Wyoming, but it is an area for concern and preventive action.

Use of a tract index system has been recommended as a partial solution to the title searcher's problem.[8] Wyoming has such a system[9] and it probably has lessened some of the title problems (*e.g.*, dual chains of title, estoppel by deed, and the definition of the chain of title within which a thorough search is required).[10] However, there still exists a substantial requirement to look outside the record to prove extrinsic facts and to eliminate all conflicting interests, however spurious. The whole procedure is complicated by a long chain of title.

6. MAYER, *supra* note 3, at 54. There is no evidence, either statutory or in title standards, indicating that this is a sanctioned procedure in Wyoming. If such a practice exists it would only be at the individual attorney's option.
7. Comment, *Marketable Title Act for New Mexico*, 6 NATURAL RESOURCES J. 446, 449 (1966).
8. BASYE, CLEARING LAND TITLES, § 3, at 11 (2d ed. 1970).
9. WYO. STAT. § 18-130 (1957); *see also* WYO. STAT. § 18-124 (1957) (grantor-grantee index).
10. Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245, 250 (1962).

There exists some evidence of public policy which regards extremely zealous title search as wasted effort. Title 34, Chapter 5[11] of the Wyoming Statutes is dedicated to validation of conveyances generally but is limited in value because it cures errors prior to a fixed date, a procedure considered undesirable because as time passes the period after the effective date becomes longer and subsequent legislation is required to keep it current and useful. Similar legislation without the fixed date problem was enacted in 1947 in the form of a Comprehensive Curative Act[12] which waives administrative deficiencies[13] in instruments that have been of record for a period of ten years. In addition, the general tenor of the Standards for Title Examination[14] adopted by the Wyoming Bar seems to be the elimination of much of the over-meticulous examination of titles.

While there exists at least some evidence of a policy encouraging streamlined title searches, the remedial action taken to date in Wyoming does not eliminate the greatest ill of the conveyancing system—repeated searches over many years of recorded title. The purpose of this article is to explore some devices providing a remedy to the title search problem and to recommend one form of proposed legislation.

II. ALTERNATIVE APPROACHES

A. Quiet Title Action

The quiet title alternative[15] provides security of ownership but has substantial drawbacks. Most significant is that a lawsuit is required in each case. This alone detracts from the effectiveness of quiet title actions in that more than nominal expense is involved and delay is inevitable. In an area where the docket is full, the delay alone may be enough to discourage the lawsuit. In addition, the quiet title action, even though it is an *in rem* proceeding, may involve notice and joinder problems, and service of process may be difficult.

11. WYO. STAT. §§ 34-80 to -96 (1957).
12. WYO. STAT. §§ 34-107 to -111 (1957).
13. *E.g.*, recording, attestation, and execution.
14. WYOMING STATE BAR STANDARDS OF TITLE EXAMINATION (1952).
15. For a discussion of quiet title action in California see Willemsen, *Improving California's Quiet Title Laws*, 21 HASTINGS L. REV. 835 (1970).

However, there are statutes which lessen the impact of these procedural matters by allowing an action to be brought against unknown claimants.[16]

The value of a quiet title action is a judgment call in each particular case. The decision maker must weigh the cost and delay of the lawsuit against the probability of having his title defeated by adverse interests. A large part of this decision will, of course, involve the amount of security of ownership he requires on the tract of land involved. In some cases the decision will be that a quiet title suit is worth the price, but in many cases it would be a very inefficient means of clearing the record of adverse interests. The cost of eliminating interests which present only a remote threat to the title would be too high, so the quiet title action would be foregone and the adverse interests which cloud the title would remain.

B. Title Insurance

Initially, title insurance does not secure ownership in the land, it only provides a pocket for the insured. The attorney, on the other hand, assures his client that the title is free from critical errors. Basically the function is the same—taking precautions to see that an owner is secure in his ownership.[17] Title insurance substitutes exhaustive search for and correction of minor defects with a loss-spreading feature when occasionally an omitted defect defeats the insured title. This system may be sufficient in a substantial number of cases where money damages are an adequate remedy (*e.g.*, to a mortgagee), but title insurance is no answer to the purchaser who considers the land unique and does not want to be ousted from possession even though he is reimbursed. The most unfortunate result of title insurance is that, even in the case where cash is an acceptable substitute for ownership and possession, it only spreads the loss and does nothing to solve the costly business of title research.

16. N. J. REV. STAT. § 2A:62-14 (1952).

17. In many cases the attorney's opinion contains so much exculpatory language and so many notes regarding possible defects that it may work to foster insecurity.

Title insurance covers risks such as forgery and incapacity; for additional premiums, known but unimportant risks or discoverable risks requiring a longer search of the record[18] can be included. However, a search of the record to some extent seems to be required to serve as a basis for premium assessment. Title insurance may guarantee record title listed on the policy,[19] eliminating the cost of an attorney's title opinion but not an abstract. In some areas the attorney fee is not saved since the cost of the insurance includes the cost of a title opinion.[20]

While title insurance may eliminate some title searching and error correction expense, the savings of attorney fees may well be eliminated in paying claims or in paying to defend titles under attack. It may well be that the total cost of either system will be roughly equal and most probably high, while defects in title still exist and remain on the record to plague the next conveyancer.

C. Statutes of Limitation

These statutes are probably the most familiar of all remedial legislation. "They stimulate to activity and punish negligence. While time is constantly destroying the evidence of right, they supply its place by a presumption which renders proof unnecessary."[21] The Wyoming statute of limitations[22] for realty prevents claims to recover possession[23] after ten years. An adverse possessor can take land from a record owner if such possession is actual, open, notorious, exclusive, continuous, hostile and under color of right.[24] Thus land is kept in the stream of commerce by placing priority on use and occupation rather than on naked ownership.

The doctrine of adverse possession has some serious limitations as a title clearing device. First, the proof of the claim

18. Fiflis, *Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform*, 38 COLO. L. REV. 431, 453 (1966).
19. *Id.*
20. *Id.* at 461.
21. Wood v. Carpenter, 101 U.S. 135, 139 (1879).
22. WYO. STAT. § 1-13 (1957).
23. Note that this bars a right to recover possession. It could be argued that if an owner came into peaceful possession after ten years his title may again be asserted.
24. Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 910 (1929).

requires an inquiry outside the recorded chain of title. Second, to be alienable and marketable, the title obtained by adverse possession must be recordable, which probably means that a quiet title action must be brought. Third, it creates the possibility of two chains of title; in states which do not use the tract index system the discovery of a second chain of title would require a search outside the record. Fourth, the statute does not run against those under a disability.[25] Fifth, it does not run against non-possessory estates or future interests.[26] Sixth, adverse possession of the surface does not carry with it the rights to a severed mineral estate;[27] such an interest must be adversely possessed separately.

Statutes of limitations protect possession but are of little value in clearing record title and thereby reducing the title search problem. This is particularly true of mineral estates.[28] As previously mentioned, the doctrine of adverse possession, which finds its existence in statutes of limitations, may create some problems which are particularly acute for title searchers since their discovery and resolution require a search outside the record. These criticisms are not intended as an overall condemnation of statutes of limitations but are intended merely to point out that they are insufficient as a method of streamlined title assurance.

D. Curative Acts

The type of legislation embodied in curative statutes reaches into the past to cure defects.[29] Wyoming's curative legislation for real estate, which was discussed earlier, eliminates some would-be costly errors and irregularities by validating instruments of record. It is aimed at curing defects of a procedural nature that should be evident from the re-

25. WYO. STAT. § 1-14 (1957).
26. Such person's cause of action does not accrue until he has a right to possession. The Wyoming Statutes allow ten years after the cause of action accrues to obtain possession. WYO. STAT. § 1-13 (1957).
27. *E.g.*, Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 A. 597 (1893); Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 235, 18 A. 724 (1889).
28. *See* Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 LAND & WATER L. REV. 73 (1972).
29. Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1124 (1949).

corded instruments themselves (*i.e.*, execution errors, attestation errors, errors in validation, etc.). Such legislation does nothing to reduce the period of search or eliminate stale claims against the record title.

E. Marketable Title Legislation

The general objective of marketable title legislation is to perfect titles which have been of record a given period of time from conflicting claims prior to that period.[30] Marketable title acts are designed not as a substitute for but as a supplement to the recording acts.[31] The value of recording is enhanced after the passage of time in that a title is substantially less vulnerable to attack after being of record for the prescribed period. Such a system has the value of reducing the gross period of search,[32] which can appreciably lessen the effort involved and proportionately reduce the total cost of conveyancing.

There is some practical advantage to reform of this nature. It preserves the recording system, which has firm roots in the whole conveyancing operation, has been accepted by society as a workable system, and has withstood the test of time. Utilizing the existing and accepted framework to affect needed reform seems preferable, or at least less controversial, than radical change requiring old methods to give way to entirely different ones.

It may be said that marketable title legislation is incompatible with the recording statutes since in some cases a title recorded early and subsequently being inactive could be defeated by a later acquired hostile title of record a sufficient but lesser period of time. The marketable title act would extinguish the earliest claim, but this result does not automatically obtain because all interests are capable of preservation by a saving clause. Timely filing of a notice of claim by the

30. SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION, tit. 1, at 4 (1960).

31. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 52 (1967).

32. For a contrary view see Swenson, *Marketable Title Acts*, 6 UTAH L. REV. 472, 491 (1959). The author is of the opinion that the exceptions to the Act require a search back of the root of title in many cases.

owners of the earlier but inactive record title will save that claim from being extinguished. This approach seems to be in accord with the general policy of statutes of limitations—that of rewarding activity and penalizing inactivity.

The effect marketable title legislation has on title insurance will probably be insignificant. Most title insurance claims arise from relatively recent defects and would not be subject to extinguishment. Therefore, title insurance rates will probably be little affected.[33] Even though marketable title acts do little to enhance title insurance it would be incongruous to claim that the two are incompatible. The marketable title act would extinguish ancient claims and title insurance would continue to serve as a security device for the most recent period unaffected by the marketable title legislation.

The marketable title acts in general seem to combine the desirable features of several of the alternatives previously mentioned. Deciding a case under the Minnesota statute, the Supreme Court of that state said:

> The Marketable Title Act is a comprehensive plan for reform in conveyancing procedures and encompasses within its provisions the collective sanctions of a) a curative act, b) a recording act, and c) a statute of limitations. It is a curative act in that it may operate to correct certain defects which have arisen in the execution of instruments in the chain of title. It is a recording act in that it requires notice to be given to the public of the existence of conditions and restrictions, which may be vested or contingent, growing out of ancient records which fetter the marketability of title. . . . It is as well a statute of limitations in that the filing of a notice is a prerequisite to preserve a right of action to enforce any right, claim, or interest in real estate founded upon any instrument, event, or transaction which was executed or occurred more than 40 years prior to the commencement of the action, whether such claim or interest is mature or immature and whether it is vested or contingent.[34]

33. Comment, *A Marketable Title Act for Maine*, 22 ME. L. REV. 419, 422 (1970).
34. Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 816 (1957).

Two writers on land law undertook a work concerned with conveyancing problems under the current system in the United States.[35] Their book deals with the conveyancing system in general and discusses various methods which have been used to improve the present system.[36] The authors had this to say about marketable title legislation:

> No other remedial legislation which has been enacted or proposed in recent years for the improvement of conveyancing offers as much as the marketable title act. It may be regarded as the keystone in the arch which constitutes the structure of a modernized system of conveyancing.[37]

Marketable title legislation has found acceptance in a considerable number of states.[38] The provisions vary somewhat from state to state. However, the general thrust of the statutes is fairly consistent. This is largely due to the Model Marketable Title Act[39] which has been used as a guide for the legislators in several of the states having such acts. The Model Act could be acceptable legislation for Wyoming. It is reproduced in its entirety in the appendix and will be discussed in the following section.

III. THE MODEL MARKETABLE TITLE ACT

A. An Overview

At the outset it is necessary to establish the meaning of marketable title. As used in the act it does not carry the generally accepted legal connotation but "means simply that the forty-year title extinguishes all prior interests, subject to a

35. Professor Lewis M. Simes and Professor Clarence B. Taylor.

36. SIMES & TAYLOR, *supra* note 30.

37. *Id.* tit 1, at 3.

38. FLA. ANN. STAT. §§ 712.01 to .10 (1969); ILL. ANN. STAT. ch. 83, §§ 12.1 to .4 (Smith-Hurd 1966); IND. STAT. ANN. § 56-1101 to -1110 (Burns Supp. 1971); IOWA CODE ANN. §§ 614.17 to .20 (Supp. 1972); MICH. STAT. ANN. §§ 26.1271 to .1279 (1970); MINN. STAT. ANN. § 541.023 (Supp. 1971); NEB. REV. STAT. §§ 76-288 to -298 (1966); N.D. CENT. CODE §§ 47-19-01 to -11 (1960); OHIO REV. CODE §§ 5301.47 to .56 (Repl. 1966); OKLA. STAT. ANN. tit. 16 §§ 19.1 to .13 (Supp. 1971); S.D. COMPILED LAWS ANN. §§ 43-30-1 to -15 (1967); UTAH CODE ANN. §§ 57-9-1 to -10 (1963, Supp. 1971); VT. STAT. ANN. tit. 27, §§ 601-06 (Supp. 1971); WIS. STAT. ANN. § 893.15 (1966).

39. SIMES & TAYLOR, *supra* note 30, tit. 1, at 6.

very few exceptions."[40] For that reason it is termed a marketable title.

In order to claim the benefits of the Act, the claimant's chain of title must qualify. Section 1 of the Act provides that "[a] person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined." Thus the claimant must look in his chain of title for a deed which was recorded at least forty years previously, such deed being termed the root of title.[41] The Act will then operate to extinguish all interests (except as later specified) existing "prior to the effective date of the root of title."[42]

It is important to note that the Act does not extinguish interests over forty years old but only those which predate the deed and which have been of record for forty years, the root of title. For example, if the claimant relied on a deed which was recorded sixty years ago, only those interests prior to that deed would be extinguished. Those between forty and sixty years old would still be viable.

The Model Act uses forty years as its enabling period. Designating the enabling period in effect prescribes the period of title search generally required. The benefits of a short period must be compared with the burden of preserving interests and a balance struck. Forty years would seem to be a reasonable balance of interests and has been accepted by most states having marketable title legislation, although other periods have been used.[43]

Section 1 is a departure from accepted practice in a race-notice jurisdiction in that "any person . . . who has an unbroken chain of title of record" can claim the benefits of the Act; there is no requirement of bona fides. A requirement of lack of notice or good faith would severely limit the appli-

40. *Id.* tit. 1, at 11.

41. MODEL MARKETABLE TITLE ACT § 8(e) [hereinafter cited as MODEL ACT]. *See* Appendix.

42. *Id.* at § 3.

43. 22 years in Nebraska and South Dakota; 30 years in Florida, Wisconsin and North Dakota; 40 years in Ohio, Oklahoma, Virginia; 50 years in Utah, Connecticut, Illinois, Minnesota, Michigan and Indiana.

cation of the Act and would encourage evidentiary problems since proof of matters outside the record would be necessary. This extreme approach of the Act is somewhat ameliorated by the saving provisions of section 2.

Reliance upon the title records is still very much necessary since proof of an unbroken chain of title for the forty years is a condition precedent to claiming the benefits of the Act. The necessity of a title opinion or title insurance still exists in a very real sense. The period of assurance has just been reduced to forty years. The chain of title used by the Act can be one instrument on record for forty years or more under section 1(a), or a series of recorded instruments covering that same period under section 1(b).

Section 2 limits the operation of the Act in certain instances and saves some interests from extinguishment. Without section 2 the Act would have some fairly obvious constitutional problems. Section 2(a) "simply says you cannot rely on a forty-year chain of title to extinguish defects and interests which are recognized in that same chain of title."[44] This exception imposes no great hardship on the title examiner since such outstanding interests will not be preserved unless "specific identification be made therein [the deed in the chain referring to another interest] of a recorded title transaction which creates such easement, use restriction, or other interest."[45] Thus the search is not only confined to the record but is already identified in the record. If not so identified, the oustanding hostile interest can presumably be ignored.

Section 2(b) is the primary saving clause of the Act. It allows an interest that would have been extinguished to be preserved by filing a notice in accordance with section 4(a) or by continuous possession for forty years. The continuous possession provision is qualified in section 4(b). This is the only part of the Act which makes possession alone sufficient to save an interest. It protects a qualifying interest from being extinguished by another deed (which may be wild or forged). This protection is more critical in a state with only

44. SIMES & TAYLOR, *supra* note 30, tit. 1, at 11.
45. MODEL ACT § 2(a).

grantor-grantee indexes. The protection afforded and the reasons for it will be discussed later.

Section 2(c) protects the rights of an adverse possessor. It is necessary to point out at this time that the adverse possession must occur in whole or in part subsequent to the date the root of title was recorded. To eliminate this provision would increase the period of adverse possession beyond the ten years required by the Wyoming statutes.[46] For instance, if adverse possession which started five years prior to the root of title were cut off by the Act, the adverse possessor would have to occupy for fifteen years—five years prior to the root of title and ten more years after it.

This section creates a problem that is generally thought to be detrimental to remedial conveyancing legislation—the necessity of looking outside the record.[47] Suppose that A conveyed land to B in 1910 but an adverse possessor had been on the land since 1901. In 1911 the adverse possessor's claim would ripen (assuming a ten-year statute of limitation), and he would have a claim against the land. If B then conveys to D in 1960, the claim of the adverse possessor has not been extinguished and D has no means of determining its existence from the record.

This problem is non-existent in a jurisdiction which requires payment of taxes as a condition to effective adverse possession. In such a state, reference to the tax records would reveal the hostile adverse claim. Wyoming requires only claim of right in addition to the general requirements of adverse possession (*e.g.*, open, hostile, notorious possession, etc.).[48] The situation here presented would occur in probably an insufficient number of cases to render the Model Act ineffective. In any event, if complete protection is desired, a legislative redefinition of the requirements of adverse possession would be a solution.

46. WYO. STAT. § 1-13 (1957).

47. BASYE, CLEARING LAND TITLES § 2, at 7 (2d ed. 1970).

48. Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908 (1929).

Section 2(d) deals with dual chains of title and wild deeds.[49] The import of this section can be best illustrated by an example given by the authors of the Act:

> Suppose a deed coveying land from A to B in fee simple is recorded in 1912. A second deed conveying the same land from B to C in fee simple is recorded in 1925. In 1915, a deed conveying the same land from X to Y in fee simple is recorded. In 1955, Y may be said to have a marketable record title under the statute, since 40 years has elapsed after the effective date of his root of title, 1915. And the 1925 conveyance from B to C cannot be said to purport to divest Y, since it is an entirely independent chain of of title. Nevertheless, by the terms of this clause, Y takes subject to the interest of C arising from the deed recorded in 1925. It will be noted, therefore, that the recording of C's deed in 1925 operated in much the same way as if he had filed a notice, and prevented Y from wiping out C's title in 1955.[50]

This is because marketable title shall be subject to "[a]ny interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which an unbroken chain of title of record is started."[51] This prevents a wild deed (the X to Y deed) from divesting a true owner if there has been activity in his chain of title during the forty-year period. But the result is different if there was no title transaction in C's chain of title within forty years after the X to Y deed in 1915.

> Suppose, however, that a conveyance from A to B in fee simple is recorded in 1912 and then a conveyance from B to C in fee simple is recorded in 1957. Another chain of title consists in a conveyance in fee simple from X to Y, recorded in 1915. In 1955 Y has marketable title under the statute; and this wipes out B's interest at that time.[52]

This inconsistent result based upon a fortuitous happening, the dates of title transactions in the chain, seems to be a

49. For a discussion of the results of a wild deed under the Florida act see Comment, *Marketable Record Title Act: Wild, Forged and Void Deeds as Roots of Title*, 22 U. FLA. L. REV. 669 (1970).
50. SIMES & TAYLOR, *supra* note 30, tit. 1, at 13.
51. MODEL ACT § 2(d).
52. SIMES & TAYLOR, *supra* note 30, tit. 1, at 14.

bit arbitrary. It would seem that if the equities of the parties remain the same, C should prevail whether he received his title in 1925 or in 1957. The reason for the different result is that C could have protected himself in 1957 when he purchased from B. In 1957 the root of title was the deed recorded in 1912. C should have ascertained if there was another interest subsequent to the root of title. A search of the tract index would have revealed the 1915 transfer from X to Y, and C should have realized that in 1955 Y obtained marketable title because the Act extinguished B's interest.

The result may not be so easily dismissed in a state without a tract indexing system. A search of the chain of title by C in 1957 would not reveal the claim of Y. To prevent the obvious inequity of divesting a rightful owner in favor of a wild deed, section 2(b) coupled with 4(b) provides a measure of relief. If B was in possession from 1912 until 1957 and no title transactions took place during that period, B's interest would not be extinguished in favor of Y in 1955. His possession would act the same is if he had filed a notice of claim during the forty-year period and he would still have a valid interest which he could convey to C in 1957.[53]

Some states have gone further in their attempts to eliminate this rather harsh result by requiring that the person claiming under the Act be in possession or at least that the land not be in the adverse possession of another.[54] This type of a provision gives an added measure of protection from wild deeds but should not be necessary in Wyoming. The tract index system would provide sufficient notice of adverse claims capable of defeating the deed under consideration.[55]

One final point concerning section 2(d) is that there can be no revival of an interest previously extinguished. Consider the fact situation previously discussed—A to B in 1912,

53. *Id.*

54. IOWA CODE ANN. § 614.17 (Supp. 1972) requires possession. MICH. STAT. ANN. § 26.1271 (1970) requires absence of adverse possession in another.

55. It may be argued that imposing upon the transferee a burden of actual inspection of the land is not unreasonable. In deciding this issue it is also necessary to keep in mind one of the objectives of conveyancing reform, that of restricting the search to the record. In light of the possibilities open to a transferee and the continuous possession provision of the Model Act, section 4(b), these additional provisions are unnecessary.

B to C in 1957 with another chain X to Y in 1915. In 1955, Y benefits from the Act; his title is marketable and B's interest is extinguished. What then is the effect of the 1957 conveyance? It has none; section 2(d) says that when the interest of B is cut off in 1955, that interest cannot be revived by a subsequent conveyance.[56] Unless B was in possession, his rights are completely extinguished and he can pass nothing to C.

Section 3 describes those interests which the Act extinguishes. The Act extinguishes all other interests whether or not they have vested if they were created prior to the root of title and not saved by another provision of the Act. This section purports to extinguish all interests, private or governmental, but for obvious reasons section 6 excludes interests of the federal government.

Section 4(b) of the Act has been previously discussed. Section 4(a) allows an interest to be preserved by filing a notice of claim. This section takes a policy position somewhat different from that presently existing in Wyoming. Under the Model Act persons with a disability are not exempt from the requirement of filing a claim to preserve their interests. A Wyoming statute,[57] on the other hand, exempts such persons from the running of the ten-year statute of limitations.[58] The policy difference is partially reconciled by the provision in section 4(a) allowing any person acting on behalf of a claimant under a disability to file a notice of claim for such person. The policy of the Model Act is more conducive to keeping land free and alienable than is the Wyoming statute, yet it does not place too onerous a burden on those persons who may be under a disability.

Section 5 describes the records required under the Act. It is not appreciably different from those presently required for recording real estate ownership in Wyoming. This section requires a notice index to be established for recording and indexing of the notices of claims discussed in section 4. This additional index was included for states with only a grantor-

56. SIMES & TAYLOR, *supra* note 30, tit. 1, at 14.
57. WYO. STAT. § 1-14 (1957).
58. WYO. STAT. § 1-13 (1957).

grantee indexing system.[59] Since Wyoming has a tract index,[60] it could be effectively substituted for the notice index required under the Model Act. This is part of the appeal of the Act—it does not require substantial additions to the present system of recording but utilizes existing facilities and procedures.

Section 6, the exception section, is very important for it is here that the Act can loose its vitality. For maximum effectiveness the Act must be allowed to eliminate all but a very few ancient claims. Some states have added exceptions not found in the Model Act[61] which relieve certain types of interests from the filing requirement. It seems that the filing requirement (every forty years) is not so onerous as to erect an insurmountable obstacle to any type of real estate holding. The Act provides needed exceptions (*e.g.*, "any right, title or interest of the United States")[62] and should be left intact at least until the need for an exception is proven. Legislation providing additional exemptions for special interests when a need has been proven would be easily enacted; legislation removing unnecessary exemptions originally enacted would have a more difficult legislative course.

Section 8 provides critical definitions which are generally adequate. However, two additional definitions worthy of note have been suggested. These definitions make the Act more understandable on a first reading and are for that reason valuable.

> "Muniments" means the records of title transactions in the chain of title of a person purporting to create the interest in land claimed by such person and upon which he relies as a basis for the marketability of his title, commencing with the root of title and including all subsequent transactions.
>
> . . . .

59. SIMES & TAYLOR, *supra* note 30, tit. 1, at 15.
60. WYO. STAT. § 18-130 (1957).
61. *E.g.*, Utah exempts pipeline easements. UTAH CODE ANN. § 57-9-6 (Supp. 1971). Nebraska exempts remaindermen of life estates or trusts and mortgage, trust deed and contract for sale rights. NEB. REV. STAT. §§ 76-290 to -298 (1966).
62. MODEL ACT § 6.

> "Inherent" relates to all elements of validity in the immediate execution of a transaction recorded by a muniment of title but not the vested title thereby conveyed.[63]

Sections 7, 8, and 10 are self-evident and require no elaboration or explanation except to point out that section 10 provides the grace period for filing a notice of claim after the Act is passed. It is, of course, necessary to make the Act constitutional.

B. Some Special Problems

Before a mineral interest is severed from the surface it is a part of the surface and subject to the Act. After severance the Act would also apply to the mineral interest in the same way it does to the surface estate. Those interests not preserved in accordance with the Act would be extinguished. Qualifying interests would benefit from the application of the Act in the same manner. Thus, if A conveyed a mineral estate in fee simple to B in 1910 and then conveyed the surface of the same tract to C in fee simple in 1911 without reserving or excepting the outstanding mineral interest, in 1951 C will have marketable title to both the minerals and surface unless B preserves his interest. B's interest would be extinguished by the Act.

The weakness of the Act in this area is that "defects which are inherent in the muniments of which such chain of record title is formed"[64] are not extinguished. Therefore, severed mineral interests which are reflected in surface conveyances by exceptions or reservations (the typical situation) are not extinguished by the Act.[65] In some states this problem has been addressed by separate legislation which seeks to eliminate stale mineral claims.[66]

There is some authority which holds that a quitclaim deed cannot serve as a root of title because it does not convey an

63. Comment, *supra* note 33, at 434 & n.53.
64. MODEL ACT § 2(a).
65. Polston, *supra* note 28, at 75.
66. *See* TENN. CODE ANN. § 64-704 (Supp. 1971); MICH. STAT. ANN. § 26.1163 (1970); ILL. ANN. STAT. ch. 30, § 197 (Smith-Hurd Supp. 1972).

identifiable estate in the land.[67] This holding could seriously reduce the effectiveness of a marketable title act in Wyoming since quitclaim deeds have been used in a substantial number of conveyances. This harsh doctrine was somewhat softened by dictum in *Wilson v. Kelley*.[68] The opinion in that case indicated that a quitclaim deed could be a root of title if it "evidences an intent to convey an identifiable interest in the land."[69] If this approach were followed by the Wyoming courts, the vitality of the Model Act would not be severely impaired.

The whole concept of retroactively destroying ancient property interests may well elicit some constitutional objections.[70] In his discussion of marketable title legislation, Professor Basye said:

> The constitutionality of the Marketable Title Acts has been questioned on three grounds: (1) that they are retroactive in character;(2) that their operation deprives persons of their property without due process of law; and (3) that they impair contract rights. They have been upheld on each count.[71]

The Iowa act was tested in the case of *Lane v. Travelers Ins. Co.*[72] where it was upheld even though it cut off the rights of contingent remaindermen. They failed to preserve their claims by filing as required by the statute and the court held such failure to be fatal even though they were minors. No constitutional issues were raised but the court did make an observation about marketable title legislation: "[T]here can be little doubt of the desirability of statutes giving greater effect and stability to record titles."[73]

The Iowa act was again upheld in *Tesdell v. Hanes*.[74] The court, after consideration of precedent, decided that the statute could be applied even though it made no exception in

67. Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325 (1959); Wilson v. Kelley, 226 So.2d 123 (Fla. 1969).
68. 226 So.2d 123 (Fla. 1969).
69. *Id.* at 128.
70. *See* Comment, *Constitutionality of Marketable Title Legislation*, 47 IOWA L. REV. 413 (1962).
71. BASYE, *supra* note 47, § 175 at 384.
72. 230 Iowa 973, 299 N.W. 553 (1941).
73. *Id.* at 555.
74. 248 Iowa 742, 82 N.W.2d 119 (1957).

favor of persons under a disability. The court issued a caveat concerning this type of legislation during the course of the opinion: "We are satisfied the legislature had ample authority to enact a limitation statute [a form of marketable title legislation] subject to a condition a reasonable time must elapse before it becomes effective."[75]

The Model Act allows two years after the effective date to file claims to save interests from extinguishment.[76] This period seemingly is sufficient to satisfy the constitutional warning given in *Tesdell.* Shorter periods have been considered adequate in analogous situations. *Vance v. Vance*[77] held that ten months was a reasonable time in which to record existing mortgages or have them extinguished.[78]

In *Trustees of Schools of Township No. 1 v. Batdorf,*[79] the court considered the constitutionality of a reverter statute which was similar in application to the marketable title acts. It was challenged as impairing the obligations of contracts, being an *ex post facto* law and depriving persons of property without due process of law. The court upheld the statute on all three counts.

Finally, in *Wichelman v. Messner,*[80] the Minnesota marketable title act was challenged as unconstitutional. The court, after much discussion of case law and authoritative legal studies, concluded that the statute was in fact within the constitutional requirements. It went on to say that such statutes "proceed upon the theory that the economic advantages of being able to pass unclutterd title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate."[81]

The ultimate decision as to the constitutionality of statutes which retroactively destroy rights has to be made by applying a reasonableness test. Deciding if the benefit to society

75. *Id.* at 123.
76. MODEL ACT § 10.
77. 108 U.S. 514 (1883).
78. *See also* Turner v. New York, 168 U.S. 90 (1897); Terry v. Anderson, 95 U.S. 628 (1877).
79. 6 Ill.2d 486, 130 N.E.2d 111 (1955).
80. 250 Minn. 88, 83 N.W.2d 800 (1957).
81. *Id.* at 825.

outweighs the possible detriment suffered by some persons is part of that test. The other part is determining whether those persons have an opportunity to avoid detriment and save their property interests. The objectives of marketable title acts, coupled with the exceptions and saving provisions incorporated into them, make a strong case for a reasonable exercise of the state's police power.

Statutes very similar to the Model Act have been upheld under attack as unconstitutional. One form of a marketability act has been upheld. This is strong evidence that the Model Act would also be considered contitutional. If negative inference be persuasive or at least permitted, such inference can only add to the preceding evidence. In the various states currently having some form of marketable title legislation comparable to the Model Act, there appears no case declaring such statutes to be unconstitutional.

IV CONCLUSION

It would appear that marketable title legislation, while certainly not a complete solution to the problems of conveyancing, does offer a substantial reduction of uncertainty in real estate ownership and could reduce the total cost incurred by title search under the present system. The Model Act provides at least a basic framework for remedial legislation and lends itself to tailoring necessary for problems considered unique to a particular state. It could be incorporated into the present recording system with little additional administrative burden or alteration of procedure.

While Wyoming perhaps does not feel the bite of the inefficiencies of the present conveyancing system to the same extent as more populous states, the legislature should consider remedial action as a prophylactic device. The enactment of the Model Marketable Title Act or similar legislation could reduce repetitious effort and provide a more efficient system of land transactions.

TERRENCE L. O'BRIEN

APPENDIX

Model Marketable Title Act

Section 1. *Marketable Record Title.* Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, shall be deemed to have a marketable record title to such interest as defined in Section 8, subject only to the matters stated in Section 2 hereof. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in

(a) the person claiming such interest, or

(b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest;

with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Section 2. *Matters to Which Marketable Title is Subject.* Such marketable record title shall be subject to:

(a) All interests and defects which are inherent in the muniments of which such chain of record title is formed; *provided,* however, that a general reference in such muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction or other interest.

(b) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with Section 4 hereof.

(c) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title.

(d) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started; *provided,* however, that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of recording by the operation of Section 3 hereof.

(e) The exceptions stated in Section 6 hereof as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, and as to interests of the United States.

Section 3. *Interests Extinguished by Marketable Title.* Subject to the matters stated in Section 2 hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person *sui juris* or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

Section 4. *Effect of Filing Notice or the Equivalent*

(a) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. No disability or lack of knowledge of any kind on the part of any-

one shall suspend the running of said forty-year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is

(1) under a disability,

(2) unable to assert a claim on his own behalf, or

(3) one of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty 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 forty-year period described in Subsection (a).

Section 5. *Contents of Notice; Recording and Indexing.* To be effective and to be entitled to record the notice above referred to shall contain an accurate and full description of all land affected by such notice which description shall be set forth in particular terms and not by general inclusions; but if said claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in such recorded instrument. Such notice shall be filed for record in the registry of deeds of the county or counties where land described therein is situated. The recorder of each county shall accept all such notices presented to him which describe land located in the county in which he serves and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded and each recorder shall be entitled to charge the same fees for the recording thereof as are charged for recording deeds. In indexing such notices in his office each recorder shall enter such notices

under the grantee indexes of deeds under the names of the claimants appearing in such notices. Such notices shall also be indexed under the description of the real estate involved in a book set apart for that purpose to be known as the "Notice Index."

Section 6. *Interests Not Barred by Act.* This Act shall not be applied to bar any lessor or his successor as a reversioner of his right to possession on the expiration of any lease; or to bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use; or to bar any right, title or interest of the United States, by reason of failure to file the notice herein required.

Section 7. *Limitations of Actions and Recording Acts.* Nothing contained in this Act shall be construed to extend the period for the bringing of an action or for the doing of any other required act under any statutes of limitations, nor, except as herein specifically provided, to affect the operation of any statutes governing the effect of the recording or the failure to record any instrument affecting land.

Section 8. *Definitions.* As used in this Act:

(a) "Marketable record title" means a title of record, as indicated in Section 1 hereof, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 3 hereof.

(b) "Records" includes probate and other official public records, as well as records in the registry of deeds.

(c) "Recording," when applied to the official public records of a probate or other court, includes filing.

(d) "Person dealing with land" includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(e) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(f) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, or sheriff's deed, or decree of any court, as well as warranty deed, quitclaim deed, or mortgage.

Section 9. *Act to Be Liberally Construed.* 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 limitations as appear in Section 2 of this Act.

Section 10. *Two-Year Extension of Forty-Year Period.* If the forty-year period specified in this Act shall have expired prior to two years after the effective date of this Act, such period shall be extended two years after the effective date of this Act.