Land & Water Law Review

Volume 16 | Issue 1 Article 7

1981

The Wyoming Marketable Title Act - A Revision of Real Property Law

Gary B. Conine

Daniel J. Morgan

University of Wyoming
College of Law

LAND AND WATER
LAW REVIEW

VOLUME XVI 1981 NUMBER 1

The Wyoming Marketable Title Act was passed in 1975. The Act was designed to simplify titles and release them from ancient encumbrances and defects. Recently, in an effort to clarify the Act for the state's attorneys, the Wyoming State Bar Association promulgated title standards pertaining to the operation of the Act. The title standards provide professional criteria by which the Act may be interpreted. The authors of this article discuss the provisions of the Wyoming Marketable Title Act and Title Standards and the effect they have on property interests throughout the state.

THE WYOMING MARKETABLE TITLE ACT--A REVISION OF REAL PROPERTY LAW

Gary B. Conine and Daniel J. Morgan***

I. INTRODUCTION

Lauded by some as a significant improvement in real estate conveyancing and denounced by others as an unwarranted revision of real property law, marketable title acts represent the most extensive curative legislation yet proposed and perhaps the most important single legislative enactments concerning property law since the widespread adoption of recording acts. There is no doubt that marketable title legislation significantly affects traditional concepts. Such acts contain broad operative provisions which can potentially terminate most real property interests of any owner who is not conscious of the provisions of these statutes or sufficiently diligent in preserving his claim. Because such

*Assistant Professor of Law, University of Wyoming; J.D., 1977, University of Oklahoma; B.A., 1970, Southern Methodist University; member, Texas Bar.

**Visiting Associate Professor of Law, University of Wyoming; J.D., 1970, B.A., 1967, University of Wyoming; member, Wyoming Bar.

legislation is designed to simplify titles and release them from ancient encumbrances and defects, the attorney or landowner who is ignorant of the operation of such an act may find that an interest which he still feels is a useful and important one has been extinguished due to his failure to educate himself with the operation of the statute.

The Wyoming Marketable Title Act[1] was passed in 1975.[2] Since that date, little has been written about the effects of this legislation in Wyoming and little effort has been made to educate the attorneys of the state regarding the impact of the Act. During 1980, however, the Wyoming State Bar Association promulgated title standards pertaining to the operation of the Act in an effort to provide a more ready explanation of the operation of the legislation for the state's attorneys and to provide professional standards by which the Act might be interpreted.[3] This article is designed to explore the provisions of the Wyoming Act in detail in the hope of providing a more thorough explanation of the far-reaching implications of the legislation for property owners.[4]

1. WYO. STAT. §§ 34-10-101 through 34-10-109 (1977), hereinafter referred to as the "Act." For reference, the Wyoming Marketable Title Act has been reproduced and included herein as Appendix II to this volume.
2. 1975 WYO. SESS. LAWS, Ch. 119, § 1.
3. The Wyoming Title Standards and accompanying illustrations pertaining to the Wyoming Marketable Title Act have been included herein under Appendix III to this volume. The Wyoming Title Standards were originally adopted in 1947 and fully revised in 1974. Because the Wyoming Marketable Title Act was not passed until 1975, the 1974 revisions contained no reference to marketable title legislation or its effects. In the fall of 1979, the State Title Standards Committee was directed by Mr. Tom Lubnau, President of the Wyoming State Bar, to draft the standards pertaining to the Wyoming Act. The Committee, composed of Mr. Daniel J. Morgan, Chairman, attorneys Don Winship, George Porter, Don Jensen, and Professor Gary Conine of the University of Wyoming, submitted the completed standards to the Wyoming State Bar Commissioners, who approved these standards. Title standards have been adopted in various states for the purposes of providing professional standards for title examiners to determine the presence of title defects. As professional standards, such guidelines provide a basis for the resolution of conflicting title interpretations, the determination of professional malpractice, and judicial interpretation of state law.
4. For further reference to materials pertaining to marketable title acts in general, *see* Aigler, *Clearance of Land Titles—A Statutory Step*, 44 MICH. L. REV. 45 (1945); Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45 (1967); BAYSE, CLEARING LAND TITLES, (1953); Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261 (1962); Boyer and Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 U. MIAMI L. REV. 103 (1963); Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291 (1960); Haines, *Marketable Title Acts—A Means to Improve Title Practice*, 30 DICTA. 423 (1953); Jossman, *The Forty Year Marketable Title Act: A Reappraisal*, 37 U. DETROIT L. J. 422 (1960); Leahy, *The North Dakota Marketable Record Title Act*,

In general, marketable title acts provide that an interest in land arising from a transaction occurring before a determinable date is automatically extinguished by the passage of time unless the owner of such interest has taken certain steps to preserve his claim. Within this framework, marketable title acts can be placed in one of two categories.[5] One form utilizes a limitations period which disallows the commencement of an action on the property claimed if the interest asserted arose prior to a designated time in the past, thereby barring any remedies which might be available to protect the claim. The second form, represented by the Model Marketable Title Act and its variations, including the Wyoming Act, essentially provide that if a person has an unbroken record chain of title for a specified number of years back to his "root of title" (i.e., the most recent transaction in his chain of title that has been of record for the specified length of time), all conflicting claims and interests which are based on a title transaction prior to that root of title are extinguished.[6]

Thus, marketable title acts have been said to combine the features of curative acts, recording acts, and statutes of limitation.[7] However, it is difficult to fully analogize the

29 N.D. L. REV. 265 (1953); Pray, *Title Standards and The Marketable Title Act*, 38 OKLA. B. A. J. 611 (1967); Rankin, *Merchantable Title Legislation for Nebraska*, 26 NEB. L. REV. 219 (1947); Ruemmele, *The North Dakota Marketable Record Title Act*, 41 N.D. L. REV. 475 (1965); Smith, *The New Marketable Title Act*, 22 OHIO ST. L. J. 712 (1961); Swenson, *The Utah Marketable Title Act*, 8 UTAH L. REV. 200 (1963); Comment, *Marketable Title Acts*, 10 ALA. L. REV. 415 (1958); Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Co-existence Possible?*, 29 U. FLA. L. REV. 916 (1977); Comment, *Marketability Acts: A Step Forward for Title Examination Procedure in Illinois*, 1957 ILL. L. REV. F. 488 (1957); Note, *The Indiana Marketable Title Act of 1963: A Survey*, 40 IND. L. J. 21 (1964); Comment, *Marketable Title Legislation for Maine*, 20 MAINE L. REV. 283 (1968); Webster, *The Quest for Clear Land Titles, Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation*, 44 N.C. L. REV. 89 (1965).

5. Comment, *Marketable Title Acts*, 10 ALA. L. REV. 415, 416-417 (1958); Note, *The Minnesota Marketable Title Act: Analysis and Argument for Revision*, 53 MINN. L. REV. 1004, 1005 (1969).
6. Simes and Taylor, *Improvement of Conveyancing by Legislation* 4 (U. of Mich. Law School 1960), [hereinafter referred to as Simes and Taylor]. This treatise was prepared for the Section on Real Property, Probate and Trust Law of the American Bar Association in conjunction with its work on the Model Marketable Title Act. *See* note 19, *infra*.
7. These features were identified by the Minnesota Supreme Court in Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 816 (1957):

> 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,

marketable title act in either of its forms to such other enactments. Marketable title legislation is best regarded as truly unique.[8]

It must not be overlooked that there are several exceptions to the operative provisions of these acts which also take two forms. First, there are certain types of property interests which are not subject to extinguishment.[9] Secondly, there are property interests which may be extinguished, but which may also be preserved by certain circumstances,[10] the most notable of which is the claim to an interest which has been periodically recorded since the effective date of the "root of title."[11]

The basic purpose of marketable title legislation is simply the improvement of conveyancing.[12] The length of record titles in many states has reached the point that record examination back to the original grant from a state or the United States Government has become excessively expensive and burdensome. Thus, one goal of marketable title acts is to limit the length of a title search to a specified period of time in all transactions by extinguishing, or limiting actions on, all interests arising prior to that specified date. The Wyoming Act states that the purpose of the legislation is to simplify and facilitate land title transactions by allowing reliance on a record chain of title qualifying under the Act as a "marketable record title," subject only to certain express limitations.[13] However, a second purpose inherent in

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 [citation omitted]. 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.

8. Simes and Taylor, *supra* note 6, at 4.
9. *See, e.g.*, WYO. STAT. § 34-10-108 (1977).
10. *See, e.g.*, WYO. STAT. § 34-10-104 (1977).
11. *See, e.g.*, WYO. STAT. § 34-10-104(a)(ii) (1977).
12. Simes and Taylor, *supra* note 6, at 3.
13. WYO. STAT. § 34-10-102 (1977).

the approach of marketable title acts is the extinguishment of title defects of a given vintage, whether or not a title transaction is pending which might be facilitated, thereby clearing all titles of ancient encumbrances and defects which are usually of more nuisance value than of any true legal value.[14] Although not an expressly stated purpose, this latter effect is the ultimate result of the Act.[15]

With respect to the principal purpose of facilitating title examinations, it should be recognized that in order to shorten the examination period in a meaningful way, marketable title acts must be sufficiently broad to extinguish *all* early claims and interests. Even one exception to the operation of the Act requires a full title exam to insure the exception is not present somewhere in the chain of title. Unfortunately, as previously discussed, most marketable title acts provide for numerous exceptions to the operation of the legislation so that careful title searches back to the patent are still essential.[16] But despite the fact that the examination period may not be shortened, the title examiner's burden is lightened to some extent by the fact that he may be able to ignore a large number of interests and defects which arose prior to the period of time prescribed by the Act and which have not been excluded from the effects of the Act.

Based upon this, it has been suggested that the real justification for marketable title acts is the simplification of title examinations and the reduction of the amount of curative action necessary to derive good title.[17] But given the broader effect of such legislation, the extinguishment of ancient defects and claims, the true impact of these acts, if not their original purpose, would actually appear to be the elimination of certain interests of a specified age unless properly reasserted.

Several advantages of such legislation are readily apparent. One of the principal advantages is the elimination

14. Swenson, *supra* note 4, at 202-203.
15. *See* Wyoming Title Standard 4.1.
16. Due to this necessity, Wyoming Title Standard 4.13 has been adopted to emphasize the danger of limiting title examinations to the forty (40) year period referenced by the Act.
17. Barnett, *supra* note 4, at 91.

of minor defects which have been a part of the record with no legal consequence for prolonged periods. Such defects might involve the absence of seals or acknowledgments. The problem of a gap in the chain of title prior to the specified period of time is also eliminated. For example, a gap resulting from the failure of a grantee to record his deed or from the destruction of county records prior to the root of title no longer necessitates obtaining curative instruments to explain or close the gap.[18] An additional problem removed is the encumbrance of title by interests less than a fee simple to which the title may still be subject after the practical use of the encumbrance has been terminated. These interests may include easements, equitable servitudes, restrictive covenants, liens and mortgages, and future interests.

The possibility of obtaining these advantages has resulted in considerable interest in many states, leading to the enactment of marketable title acts in seventeen jurisdictions.[19] However, depending upon one's frame of reference, there are certain disadvantages to marketable title legislation. Individuals whose interests have been extinguished by

18. *Id.* at 85.
19. The first legislation of this type was passed in Iowa in 1919 and achieved considerable popularity among midwestern states during the 1940's. In 1945, after extensive study by the Committee on Real Property Law of the Michigan Bar Association, Michigan adopted a marketable title act which has become the basis of most enactments since that date.

In large part, this is due to the fact that the Model Marketable Title Act, the product of a research project on the general subject of the improvement of conveyancing sponsored by the Section of Real Property, Probate and Trust Law of the American Bar Association, was itself largely based upon the Michigan Act, along with similar acts in Wisconsin and Ontario. Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 924 n. 58 (1977).

As of this writing, those states which have adopted marketable title acts include the following: Connecticut, CONN. GEN. STATS. ANN. tit. 47, § 33b et. seq. (1978); Florida, FLA. STAT. ANN. §§ 712.01 through 712.10 (1969 and 1980 Supp.); Illinois, ILL. ANN. STAT. Ch. 83, §§ 12.0 through 12.4 (Smith-Hurd 1966); Indiana, IND. CODE ANN. §§ 32-1-5-1 through 32-1-5-10 (1973); Iowa, IOWA CODE ANN. §§ 614.17 through 614.20 (1950 and 1980 Supp.); Michigan, MICH. STAT. ANN. §§ 565.101 through 565.109 (1967); Minnesota, MINN. STAT. ANN. § 541.023 (Supp. 1980); Nebraska, NEB. REV. STAT. §§ 76-288 through 76-298 (1976); North Carolina, N.C. GEN. STAT. §§ 47B-1 through 47B-9 (1976 and 1980 Supp.); North Dakota, N.D. CENT. CODE §§ 47-19.1-01 through 47-19.1-11; Ohio, OHIO REV. CODE ANN. §§ 5301.47 through 5301.56 (1980); Oklahoma, OKLA. STAT. ANN. tit. 16 §§ 71-81 (Supp. 1979); South Dakota, S.D. COMPILED LAWS ANN. §§ 43-30-1 through 43-30-15 (1967 and 1980 Supp.); Utah, UTAH CODE ANN. §§ 57-9-1 through 57-9-10 (1963, Supp. 1965); Vermont, VT. STAT. ANN. tit. 27, §§ 601 through 606 (1975 and 1980 Supp.); Wisconsin, WIS. STAT. ANN. § 843.33 (1980 Supp.); Wyoming, WYO. STAT. §§ 34-10-101 through 34-10-109 (1977).

the indiscriminate operation of one of these acts would firmly feel that the traditional concepts of real property law have been circumvented or abused by excesses in the legislative process. For example, under the operation of these acts it is possible under certain circumstances for the record owner of a fee simple interest to find that his interest has been extinguished and is now held by an individual claiming under a maverick or wild deed.[20] Such difficulties have led some to not only question the wisdom of these acts but also to challenge the constitutionality of marketable title legislation.

The focus of these constitutional attacks to date has been on the retrospective aspects of the legislation. Clearly, certain vested property rights can be affected by a marketable title act immediately upon passage of the legislation if the interest arose prior to the cutoff date computed from the effective date of the act. However, other forms of retrospective legislation, such as curative acts and statutes of limitation, are regarded as valid so long as a reasonable period of time is granted under the legislation for parties to enforce or preserve vested rights. In order to provide such a "period of grace," most marketable title legislation has included a provision granting an additional period of time during which to preserve one's interest if the designated period of extinguishment will have expired before or shortly after the passage of the act.[21] As long as the period of grace is not so short as to be unreasonable, the courts will usually sustain the validity of the legislation.[22]

Marketable title acts have successfully survived such constitutional attacks in at least two states,[23] leading some writers to assert that the constitutionality of marketable title acts has been firmly established.[24]

20. For a more extended discussion of this situation *see* text accompanying footnotes 56-57, *infra*.
21. *See e.g.*, WYO. STAT. § 34-10-108(c) (1977).
22. Wichelman v. Messner, *supra* note 7.
23. *See*, Wichelman v. Messner, *supra* note 7; Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957); Lane v. Travelers Insurance Co., 230 Iowa 973, 299 N.W. 553 (1941); Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975), *cert. den.* 423 U.S. 830.
24. *See*, PATTON ON TITLES § 563 (Supp. at 51); Note, *The Indiana Marketable Title Act of 1963: A Survey*, 40 IND. L. J. 21, 24 (1964). *But, see also* Board of Education v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 184-185, 259

Although an expertly drafted proposal, the Model Marketable Title Act and the enacted variations of it, undeniably carry the disadvantage of extinguishing still vital interests as well as the advantage of simplifying title examinations for property owners and the legal community. It is argued that these potential disadvantages can be overcome by the owner periodically recording a notice of his interest as permitted under the Act, a relatively small additional burden given the benefits of the legislation.[25] The situation is similar to that which was faced with the adoption of recording acts which placed on the owner the additional burden of promptly recording one's conveyance in order for it to be valid against third parties. However, this argument presupposes that information concerning the Marketable Title Act has been fully disseminated and fully explained to both property owners and the legal community itself. Furthermore, unlike the application of the Recording Act, the recording of a notice of claim to preserve one's interest is not a matter which can be made a routine part of all title transactions; it is a recurring requirement which must be performed so infrequently that it is likely to be overlooked unless special care is taken.

A thorough understanding of the operation of the Wyoming Marketable Title Act requires considerably more than a familiarity with the ability of the Act to extinguish old interests after a designated period of time and the mechanics of recording a notice of claim to preserve such interests. Numerous other provisions concerning requirements for establishing "marketable record title" in order to qualify for the benefits of the Act; the specific operation of the Act, including the effect of the Act on competing chains of title; factors which may preserve interests subject to extinguishment; and the exclusion of certain interests from the operation of the Act must also be understood. There is extensive interdependence among the various provisions of the Act

N.Y.S.2d 129 (1965), discussed in Roberts, *A Eulogy For The Old Property*, 20 MAINE L. REV. 15, 23-29 (1968). For further discussion of the constitutional issues, *see* Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951); Aigler, *A Supplement to "Constitutionality of Marketable Title Acts," 1951-1957*, 56 MICH. L. REV. 225 (1957).

25. Simes and Taylor, *supra* note 6, at 4.

and, consequently, no single provision should be relied upon before carefully considering the impact of other sections of the legislation.[26]

II. MARKETABLE RECORD TITLE

As previously discussed, the essential purpose of the Marketable Title Act is to simplify land titles by eliminating certain interests or claims arising before a specified period of time which have not been properly preserved under the Act. In order to benefit from the operation of the Act, however, the interest held by the party seeking to clear his title must be deemed a "marketable record title." To qualify his interest as a "marketable record title," the owner must meet four requirements.[27] The owner must (1) be a person having the legal capacity to own land in Wyoming, (2) have an unbroken chain of record title of forty years or more (3) to an interest in land, and (4) be able to show that nothing appears of record purporting to divest the owner of his asserted interest.[28]

It should be noted that the word "person" is not defined in the Wyoming Act, as it is not defined in the Model Act. This has created some ambiguities in jurisdictions adopting the Model Act, since the scope of the Model Act is significantly affected by whether other entities such as corporations, estates or trusts are to be included within the term. Given the usual use of the word "person" as a generic term including both natural and artificial persons, the term would most properly be interpreted to include other entities recognized by law beyond natural persons only. There is nothing within the purpose or intent of the Model Act which would justify a more restrictive interpretation. The effect of the Model Act is directed at land titles generally. No provision of the Model Act indicates a restriction of the purpose of the Act to owners or claimants of any particular classification.

26. This interdependence is emphasized in the introductory note to Chapter 4 of the Wyoming Title Standards. It should be noted that there is also a similar interdependence among the title standards contained in Chapter 4.
27. *See* WYO. STAT. § 34-10-103 (1977).
28. These four requirements have been summarized in Wyoming Title Standard 4.2.

However, in Wyoming clarification is provided by Section 8-1-102(a)(vi) of the Wyoming Statutes. This general interpretive statute provides that the term "person" in any statute includes individuals, partnerships, corporations, joint stock companies, or any other association or entity, public or private, unless a different meaning is specified by the legislature or the context requires a different meaning.

The only further qualification that the "person" himself must meet is that of having the legal capacity to own land. Perhaps more important with regard to qualifying a person under the Act are those matters which are not required. It is significant to note that the owner need not qualify as a bona fide purchaser, nor is there any requirement that the individual or entity claiming a marketable record title have been in possession of the land at any time.

The second requirement prescribes that the "person" attempting to qualify his title as a marketable record title have an unbroken chain of record title for forty years or more.[29] Such an unbroken chain of title is deemed to exist when the official public records disclose a title transaction placed of record for at least forty years at the time the marketability is to be determined, which purports to create the asserted interest in either the person now claiming the interest or in some other person from whom the present claimant has acquired the asserted interest through one or more title transactions.

This title transaction which is the most recent to be recorded as of a date forty years prior to the time marketability is being determined is referred to as the "root of title."[30] The title transaction which is the root of title is required to be within the official public records. Furthermore, for purposes of the Wyoming Act, the effective date of the root of title is the date on which it was recorded.[31] By definition, this recorded "title transaction" may arise

29. This second requirement is addressed in Wyoming Title Standard 4.4.
30. *See* WYO. STAT. § 34-10-101(v) (1977).
31. *Id.*

from any number of conveyances, including not only typical transfers, such as warranty deeds, deeds of trust or mortgages, but also conveyances by will or descent, tax deeds and judicial sales. The Wyoming Act also indicates that the title transaction may be by quitclaim deed.[32] Therefore, if a marketable record title is being determined in 1980, the person claiming the interest must trace his present claim from a transaction recorded no more recently than 1940. The most recent transaction in his chain of title occurring on or before 1940 becomes the root of title. Only in rare circumstances will the root of title have been on record for exactly forty years. Typically, the instrument will have been recorded for a longer period of time. Because the operative provisions of the Wyoming Act will exclude only interests arising prior to the root of title, a detailed title examination must always be conducted for at least forty years, usually more, back to the root of title.

The requirement that the root of title purport to create the interest being asserted for marketable record title has created some difficulties. Clearly, the requirement means that the interest benefitting from the operation of the Act cannot be any greater than, nor expanded beyond, that which was granted by the root of title. For example, the grantee of a mineral estate could not use the Act to assert ownership of the surface as well as the minerals, because his root of title only purported to create a mineral interest severed from the surface. Thus, although a quitclaim deed may serve as a root of title, one court has held that the interest which can claim benefit of the marketable title act cannot be any greater than the interest of the grantor to the deed, since all that a quitclaim deed purports to convey is the true interest held by the grantor.[33] Therefore, under this approach, a quitclaim deed from a cotenant could not later be used to assert title to the entire fee, cutting off the other cotenants.

32. The significance of permitting a quitclaim deed to serve as a root of title will be discussed later in this article. Where there has been no express provision permitting quitclaim deeds to serve as a root of title, courts have frequently refused to permit such a deed to serve in that capacity. *See, e.g.*, Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325, 329 (1959). The importance of including quitclaim deeds as roots of title is emphasized by Wyoming Title Standard 4.12.
33. Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325 (1959).

This may, but need not, contradict the definition which permits quitclaim deeds to serve as roots of title, but it generates a greater ambiguity with the operation of the "inherent defects" exception to be discussed later.[34]

In addition to the requirement that the chain of record title exist for at least forty years, the chain must also be unbroken. As a result, until all gaps in the forty-plus-year chain since the root of title are filled by recorded instruments or by curative documents or proceedings, the operative provisions of the Wyoming Act extinguishing earlier interests will not be effective. And, because we are dealing with a recorded chain of title, any defects in the instruments which might invalidate the recording of the documents, such as a lack of acknowledgment, will affect the ability of the chain to qualify under this second requirement for "marketable record title."[35]

It should be noted at this juncture that the public records and the recording of certain interests, claims, and notices play significant roles under the Act. The second requirement for marketable record title calls for an unbroken chain of *record* title.[36] The root of title by definition must be a *recorded* conveyance or transaction.[37] As will be discussed later, the marketable record title can remain subject to certain interests or defects inherent in the chain of *record* title[38] or expressed in certain notices filed of *record.*[39]

Given the importance of the recording of various instruments to the provisions of the Act it is necessary that a clear understanding exist as to the records which might be utilized by a claimant to establish his chain of title or to preserve an earlier claim. Normally, given the impact of the recording acts, reference to public records is comprehended to mean the county clerk's real property records.

34. *See* text accompanying footnotes 76 and 77.
35. Barnett, *supra* note 4, at 65 n. 58. It must be recognized, of course, that in the event an instrument is invalidly recorded for lack of acknowledgment, that defect in the instrument may be overcome by the provisions of WYO. STAT. § 34-8-103 and 104 (1977).
36. WYO. STAT. § 34-10-103 (1977).
37. WYO. STAT. § 34-10-101(v) (1977).
38. WYO. STAT. § 34-10-104(a)(i) (1977).
39. WYO. STAT. § 34-10-104(a)(ii) and § 34-10-107 (1977).

But, under the Marketable Title Act, the records which a party may rely on and must refer to include a much broader range of public records. By definition, "records" includes not only the records of the office of the county clerk and ex officio register of deeds, but also "probate and other official public records."[40]

Consequently, the records which might be utilized under the Marketable Title Act include probate, lien, tax and judicial records which might not have been incorporated into the county clerk's real property records. Arguably, state land commission records could be utilized where documents were placed on file which dealt with both private and public lands in a single transaction.

As a result, gaps existing in the county clerk's records, whether arising from a missing instrument or a document improperly recorded for lack of acknowledgment, might be remedied by locating the instrument in any other official public record where they had been properly filed.

Only with respect to the filing of notices to preserve an interest or claim is there a recording location specified. As will be discussed in more detail later, such notices are required to be filed of record with the county clerk.[41]

Thirdly, it is necessary that the person seeking the application of the Act own an interest in land. In *Wichelman v. Messner*[42] the Marketable Title Act of Minnesota was interpreted to apply only to fee simple interests, which includes determinable fees. In order to avoid this restriction of the scope of these acts, the Model Marketable Title Act was drafted to expressly apply its benefits to "*any* interest in land." Such an interest may apply not only to fee simple interests but also to easements, profits, licenses, life estates, reversions, remainders and other future interests, whether legal or equitable, possessory or nonpossessory.[43]

40. WYO. STAT. § 34-10-101(a)(ii) (1977). Wyoming Title Standard 4.3 has been included to emphasize the breadth of this definition.
41. WYO. STAT. § 34-10-107. *See* text accompanying footnotes 78-89, *infra*.
42. *Supra* note 7, at 815.
43. Note, *The Indiana Marketable Title Act of 1963: A Survey*, 40 IND. L. J. 21, 27 (1964); Note, *The Minnesota Marketable Title Act: Analysis and Argument for Revision*, 53 MINN. L. REV. 1004, 1015 (1969).

The fourth and final requirement is that there be no recorded transaction subsequent to the root of title which purports to divest the interest of the person seeking to establish a marketable record title. Unfortunately, neither the Model Act nor the Wyoming Act specifically indicates those transactions which would be regarded as "purporting to divest" such an interest. Quite clearly, a prior conveyance by the person presently asserting record title, who is not indicated in the record as having reacquired the title, would purport to divest that person of his interest.[44] Similarly, a divestiture under a judicial sale, tax sale, mortgage foreclosure, or through settlement of a decedent's estate would prevent the person's interest from qualifying as a marketable record title unless reacquired by that person.

The difficulty in construing this requirement arises when there is an inference, warranted from matters appearing of record in a transaction between third parties, that the interest being asserted by a person was previously divested. For example, where a stranger to the title records an affidavit asserting that he has been "in continuous, open, notorious and adverse possession" of the land for the preceding ten years, such an instrument would purport to divest the true owner of his interest.[45] A more difficult question would arise where A is the record owner of Blackacre and a deed to Blackacre from X to Y is recorded containing the following recital: "Being the same land heretofore conveyed to X by A." If the recitation is taken at face value, the record would purport to divest A of his interest.[46]

44. For example, see Illustration No. 1 to Wyoming Title Standard 4.5. For reference to one case refusing to apply a marketable title act because of prior divestment, *see* Murray v. Buikema, 54 Mich. App. 382, 221 N.W.2d 193 (1974).
45. *See* Illustration No. 7 to Wyoming Title Standard 4.5.
46. *See* Illustration No. 2 to Wyoming Title Standard 4.5. As a further example, suppose a conveyance from A to B in 1930 was the last conveyance in the regular chain of title to Blackacre. If in 1950, there is a recorded conveyance from X to Y of the identical interest formerly conveyed to B which contains a recitation that B died intestate and that X was B's sole heir at law, an inference is raised by the recorded conveyance to Y that B's interest has terminated. Consequently, B cannot assert a marketable record title and is not entitled to the benefits of the Act.

On the other hand, if the conveyance from X to Y was simply a wild deed, reciting no reference to B's ownership, there is no inference that B has been divested of his interest. The deed to Y may represent a conflict-

Because this fourth requirement of the statute does not refer to proof of an actual divestiture but to a *purported* divestment, the more appropriate construction of the requirement would be to deny marketable record title where an inference is warranted from recitations taken at face value.[47]

III. OPERATION OF THE ACT

If the interest being asserted meets all of the requirements for marketable record title, the interest is subject to the operative provisions of the Act.[48] For those persons holding conflicting interests to a marketable record title, this is the crucial portion of the Act, for once the other interest is determined to be a marketable record title, the Act stipulates that the marketable record title interest shall be held free and clear of all interests, claims or charges, the existence of which depends upon an act, transaction, event or omission occurring prior to the recording date of the root of title and that such conflicting interests antedating the root are null and void.[49] The sweep of this provision is extensive and the result final.

To illustrate the operation of the Act, suppose that A acquired Blackacre in 1915 subject to a possibility of reverter in B. Assume further that in 1920 A conveyed Blackacre to X in fee simple absolute, omitting from the conveyance any reference to the possibility of reverter in B. In 1960, if there have been no other transactions of record which might purport to divest X of his interest and no notices have been filed referencing the possibility of reverter, X will have a marketable record title. Because B's possibility of reverter depends for its existence on a transaction occurring before the recording date of X's root of title, X's interest in Blackacre is held free and clear of B's possibility of reverter and B's interest becomes null and void.

---

ing chain of title and place a cloud on B's interest, but it does not preclude B's interest from being a "marketable record title" to which the operative provisions of the Act could be applied to extinguish defects and encumbrances arising prior to the root of title.

47. *See* Wyoming Title Standard 4.5.
48. *See* WYO. STAT. § 34-10-105 (1977).
49. *See* Wyoming Title Standard 4.6.

Practically any interest or claim, other than an interest on which the marketable record title would be dependent for its own existence,[50] would be extinguished automatically once a sufficient period of time had elapsed to cause the creation of that interest to antedate the current root of title of an opposing interest.[51] Furthermore, after having been extinguished there is no way of reviving the terminated claim.

In this way, a "marketable record title" is freed of conditions and encumbrances created prior to its root of title. It is this termination of prior interests arising from any title transaction or from any defect or omission in the chain of title of the interest qualifying as a marketable record title which simplifies the title examination and clears the title itself.

It is somewhat misleading, however, for the Act to label a property interest as having a "marketable record title." The fact that such an interest qualifies under the definition of "marketable record title" and is thereby afforded the benefits of the Wyoming Act does not necessarily mean that the interest is commercially marketable in the traditional legal sense of the term.[52] The terms "commercially marketable" and "marketable record title" are not synonymous. Whereas a "marketable title" is generally understood to mean a title free of all reasonable doubt and, therefore, one which a reasonably prudent person would be willing to accept, a "marketable record title" is not a title which has been cleansed of all defects which might be objectionable to

50. The Marketable Title Act could not be used to extinguish an interest on which one interest is dependent for its own existence. For example, the owner of an easement could not extinguish the fee simple to which the easement applied. The two interests would not be inconsistent, nor would the easement be an estate large enough to consume the fee simple. *See* Barnett, *supra* note 4, at 64. Thus, it is rare that any benefit would be gained by the Act from interests less than a fee simple. However, one interest less than the fee simple might challenge an equal interest under the Act. For example, a tenant under a leasehold estate might wish to nullify another leasehold estate previously granted by the same lessor.

51. It should be noted that as time passes the root of title in any chain will change. Whereas a conveyance from A to B in 1920 may be the root of title as of 1960, in 1965, a conveyance from B to C in 1924 would become the root of title for that chain.

52. This difficulty has been noted in the introductory note to Chapter 4 of the Wyoming Title Standards and in Title Standard 4.2.

a reasonable purchaser. The operation of the Act on a "marketable record title" does not clear the title of defects arising contemporaneously with or after the root of title, nor does it eliminate all encumbrances and defects antedating the root of title by virtue of the exceptions to the operations of the Act and the methods provided for preserving interests and claims. As a result, even though a property claim may qualify as a "marketable record title" and the majority of preroot defects have been eliminated by operation of the Act, there may be reasonable objections to title remaining which might disqualify the title as being "marketable" as required in the typical land sale contract.[53]

It must also not be overlooked that an interest in land may qualify as having a "marketable record title" under the Act, but not be marketable in a commercial setting. Because the Act pertains to any interest in land, a life estate may meet the definition of "marketable record title" and be subject to the operation of the Act but still not be readily marketable because of the limited duration of the estate.[54]

Nevertheless the operative provisions of the Wyoming Act may be of some significant assistance in establishing a marketable title in the traditional sense of the term. Where a defect in title has been identified which arose from a transaction or omission prior to the root of title, the Act may free the title under examination from the prior defect or claim. In order to take advantage of the Act in this situation, however, it would be necessary to bring a quiet title action based on the provisions of the Wyoming Act.

53. With regard to this matter, Simes and Taylor, *supra* note 6, comment at p. 11:

> It should be noted at this point that the term marketable record title as used in the act, and as defined in Section [101], does not mean a title which a vendee under a land contract can be compelled to accept. It means simply that the forty year title extinguishes all prior interests, subject to a very few exceptions. It is true, if these prior interests are extinguished, the title will generally be marketable in every sense of the word, but that does not necessarily follow. All the statute says is that, subject to the exceptions and qualifications stated in Section [104], all interests prior to the beginning of the forty-year period are extinguished. The qualifications stated in Section [104] may sometimes mean that the title is not really marketable from a commercial standpoint.

54. Swenson, *supra* note 4, at 201. *See* Wyoming Title Standard 4.6, Illustration 1.

This would be necessary in order to establish that the interest in question met the requirements for a "marketable record title" and, more importantly, to establish affirmatively that the claim sought to be eliminated had not been preserved by some method allowed under the Act.[55]

To illustrate the breadth of the operative provisions of the Act, one need only consider that the Act is capable of divesting fee simple title in a record owner and recognizing a new title, free of all prior claims and defects, in a grantee holding under a wild or maverick deed. Although the Act will normally operate to eliminate or terminate encumbrances and defects to the original chain of title, there is nothing in the Act which would preclude the vesting of a full title in a new individual under the proper circumstances. For example, assume that A was the record owner of Blackacre in 1930 and later in that same year, X executed a deed to Y purporting to convey Blackacre. If Y records his deed immediately, in 1970 both A and Y would be able to claim that they possess a "marketable record title" to Blackacre. As a result, two competing chains both qualifying as marketable record titles would be subject to the operative provisions of the Act in order to determine which was the superior claim. Based on these provisions, the marketable record title of Y would be held free and clear of any interest or claim asserted by A, since A's interest depended upon a transaction occurring prior to the effective date of Y's root of title. Although A may be able to show that his chain of title extends back to the original patent to Blackacre, the provisions of the Marketable Title Act would vest the fee simple in Y.[56]

All that is required for such a result is that the root of title purport to convey the interest asserted. This has led some to argue that it is possible for a complete stranger to divest the true title holder of his claim. This is not literally

55. *See* WYO. STAT. § 34-10-104 (1977). These exceptions to which the marketable record title is subject are discussed in detail in the text accompanying notes 62-108, *infra*.
56. With regard to conflicting marketable record titles, *see* Wyoming Title Standard 4.14.

true, as will be discussed in more detail later in this article[57] since judicial decisions to date seem to indicate that the wild instrument, having been based on forgery or fraud, would contain an inherent defect which would preclude operation of the Act. Nevertheless, even if the wild instrument could not serve as an appropriate root of title, a subsequent conveyance by the grantee of the wild instrument, not being based on forgery or fraud, could meet the requirements of the Act and upon recording serve as an effective root of title for a parallel and competing chain which, after forty years, might establish a marketable record title superior under the operative provisions of the Act, divesting the original owner of his interest.

It should again be noted that the result in the wild deed situation is not dependent on whether the grantee was a bona fide purchaser nor on whether the original owner, A, was in possession of Blackacre at any particular time. Apparently, even if the grantee has actual or constructive knowledge of A's chain of title or A's possession at the time he received his grant, the Act would operate to vest title in Y.

The effect of this result on the recording act is astonishing. Ordinarily, even if A and Y acquired their grants from the same individual, and A recorded his interest first, the operation of the Recording Act would recognize a senior draft in A. However, under the Marketable Title Act, a reversal of this rule is accomplished. Because the effective date of an instrument under the Act is regarded as its date of recording, the superior grant after forty years would be the one which was last recorded. This result arises naturally out of the purpose of the Act to shorten the period of search in title examinations by disregarding the quality of a title conveyed prior to the root.[58]

57. *See* text acompanying notes 67-73, *infra*.
58. *See* Barnett, *supra* note 4, at 57. For those interested in the effect of marketable title acts upon recording statutes, the Barnett article contains an excellent and extensive discussion of the subject.
It should be noted, however, that the Act does not adversely affect all previous property doctrines. For example, rules pertaining to boundaries by acquiescence have been held to continue to apply. *See* Olsen v. Park Daughters Investment Co., 511 P.2d 145 (Utah 1973).

It has been argued that the possibility of such an extreme result ever occurring under the operation of the Marketable Title Act would be very slim. It must be admitted that only in rare circumstances will a nonowner attempt to defraud some individual or a true owner purposefully sell the same land to two separate grantees. However, wild deeds are not uncommon and will occasionally arise because of mistakes in land descriptions. Furthermore, competing claims have been known to result when an owner is persuaded to give a quitclaim deed to the same tract which he has previously conveyed by warranty deed to another individual. Because, as mentioned previously, the Wyoming Act expressly recognizes quitclaim deeds as appropriate instruments to serve as roots of title, the latter situation is viable under the Act.[59]

On the other hand, because most land is subject to at least one transfer within each forty year period, it is indeed unlikely that a new chain could acquire senior status except in areas of undeveloped and unoccupied land. This result arises because each transfer which occurs more frequently than forty years would prevent either asserted interest from arising prior to the root of title of the other chain.

The breadth, impact and finality of the operative provisions of the Marketable Title Act are supported by the legislative admonition that the Act be construed liberally to effect the purpose of the Act, and to simplify and facilitate title transactions.[60] Obviously, when the statute declares that an extinguished interest, claim, or charge is null and void for the benefit of an interest qualifying as a marketable record title, a liberal construction will require just that result. The use of the Act is skewed under the legislature's admonition in favor of freeing marketable record title of conflicting and adverse claims wherever possible.[61]

59. *Id.* at 58.
60. WYO. STAT. § 34-10-102 (1977).
61. Although it would not appear to be the true purpose of the Act, it might be contended that WYO. STAT. § 34-10-102 restricts the operation of the Act to some extent. Because this purpose provision references only the simplification and facilitation of title transactions, it could be argued that the Act would not apply unless a pending conveyance was dependent upon freeing the interest of the claim to be extinguished. Thus, the Act would not permit an owner to try to eliminate an outstanding encumbrance simply

because of the passage of time. The owner must first show that there was a pending transaction which would benefit from the operation of the Act.

It might also be anticipated that some courts will react strongly to injustices resulting from the literal application of these acts, particularly where there is an exemption which might somehow afford relief. For example, the Illinois Fourth District Appellate Court has stated:

> The proper public purpose of the Act is obviously to make real estate more marketable. In accomplishing that purpose, the Act defeats and cuts off interests in real estate. We deem it important that we exercise great care to see that the Act is not ruled to operate in a way which is contrary to its intent and which makes a hardship.

Davis v. Havana Mineral Wells, Inc., 48 Ill. App.3d 996, 363 N.W.2d 856, 860 (1977).

The Illinois Supreme Court has taken the matter a step further in refusing to apply the state's marketable title act to chains originating in wild deeds, finding that this would not promote the purposes of the Act:

> A consideration of our Act, including the section declaring the legislative purpose of "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title" leads us to conclude that the Act contemplated the existence of only one record chain of title holder. We deem that the application of the statute in a case involving two competing record chains of title as are presented here was not intended. Hence, we judge that Lawndale cannot use the Act as a defense to the action.
>
> Were we to hold otherwise it could result in a "wild deed" being enabled to serve as the foundation of a new record chain of title, so that it, as the more recent 40-year chain of title would be entitled to the benefit of the Act. This could result in unwelcome holdings and possible constitutional complications, for it would be then possible for the grantee of a complete and even fraudulent stranger to title to divest the title of a record owner, who may have satisfied the usual responsibilities of ownership, such as paying taxes, but who did not file a statement of claim to preserve his interest, as the statute requires. [*See* Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 57 (1967).] The legislation not having so provided, we believe that it was not intended that a chain could be founded on a wild deed, or as one court expressed it, "on a stray, accidental or interloping conveyance." (*Cf.* Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816). Too, the legislative purpose under the Act of "simplifying and facilitating land title transactions" would hardly be furthered by a contrary holding. A purchaser, though he might trace title back to an original grant from the United States and might have examined grantor-grantee indices, could not be assured that a chain of title based on a "wild deed" did not independently exist, to the prejudice of his rights.

Exchange National Bank v. Lawndale National Bank, 41 Ill.2d 316, 243 N.E.2d 193, 195-196 (1968).

This latter approach, however, if examined with regard to its full implications, undercuts the operation and purpose of the entire Act. Certain interests are fully intended to be terminated by the act. Anytime this occurs, a corresponding interest or right is vested in a person with marketable record title. This person is benefitted, even though he cannot trace his full interest under the act back to a patent, to the detriment of another who could. To nullify the effect of the act simply because it terminates an interest traceable to patent would effectively destroy the Act, whether the effect of the marketable record title was created by a wild deed or an owners' failure to preserve his interest.

The legislature's intent was that the simplification of title be a paramount goal over the preservation of ancient property interests not properly retained under the Act. Consequently, the courts must take care in holding that the intent of the legislature did not extend that far in circumstances which might have appeared unjust prior to the passage of the Act. The Act is purposefully far-reaching and a narrow judicial interpretation can easily effect a judicial repeal of the legislation.

IV. AVOIDING THE ACT

The Wyoming Act makes a marketable record title subject to several exceptions, including all interests and defects which are inherent in the claim of record title, 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, the right of any person arising from prescriptive use or period of adverse possession which was in whole or part subsequent to the root of title, and any interest arising out of a title transaction recorded subsequent to the root of title.[62] The Act further excepts rights of reversioners in leases, apparent easements and interests in the nature of easements, water rights, mineral and timber interests, and interests of the state of Wyoming and the United States.[63] Since the Act specifies several interests which are not barred by the Act and which may predate the root of title, it is again emphasized that such interests must be subjected to review in a complete examination of the chain of title beginning with government patent. Hence, the Act has not eliminated the necessity of furnishing an abstract of title for a period in excess of forty years.[64]

A. Inherent Interests and Defects

The first of the exceptions in the Act, as noted above, preserves all interests and defects inherent in the chain of record title.[65] As to the scope and description of the records to be examined as components of the chain of record title, it has been previously noted that "records" includes probate and other official public documents, as well as records in the office of the county clerk and ex officio register of deeds.[66] The exception would appear to protect only those interests described by or based on defects inherent in the recorded transactions within the scope of the "records" which form the links in the chain of record title.

62. WYO. STAT. § 34-10-104(a)(i-iv) (1977).
63. WYO. STAT. §§ 34-10-104(a)(v) and 34-10-108(a)(i-v) (1977).
64. *See* Wyoming Title Standard 4.13.
65. WYO. STAT. § 34-10-104(a)(i) (1977).
66. WYO. STAT. § 34-10-101(a)(ii) (1977).

A significant problem of interpretation of the language of this exception arises, however, in deciding which transactions establishing interests or creating defects inherent in the chain are protected. The question arises as to whether the provision means only those transactions subsequent to the root of title, or includes the root of title itself. Suppose that over forty years ago A conveyed a tract of land in Wyoming to B by a forged deed which constitutes B's root of title. Forty years after the effective date of B's root of title, assuming no additional instruments are recorded in the chain of record title, can B claim a marketable record title free from claims which may arise from the person whose signature as grantor is forged on the deed?

The answer would be clear in the states of Florida and Indiana which have enacted marketable title acts making it clear that the root of title is included within the transactions of the chain of title subject to the exceptions.[67] The opinion of the Florida Fourth District Court of Appeals,[68] which was adopted by the Florida Supreme Court,[69] accepted the point of view that, consistent with the Florida statute, void deeds constituting or subsequent to the root of title would activate the "inherent defects" exception.

Section 2(a) of the Model Marketable Title Act, after which the Wyoming Act is patterned, states:

67. The Florida Act states:
> Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based *beginning with the root of title* (emphasis added). FLA. STAT. ANN. § 712.03 (1) (Supp. 1969).

The Indiana Act states:
> Such marketable record title shall be subject to . . . all interests and defects which are inherent in the muniments of which such chain of record title is formed. IND. CODE ANN. § 32-1-5-2(a) (1973).

However, the Indiana Act defines "muniments" as "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.*" [Emphasis added.] IND. CODE ANN. § 32-1-5-8(b) (1973).

68. Marshall v. Hollywood, Inc., 224 So.2d 743 (Fla. 4th D.C.A. 1969).

69. Marshall v. Hollywood, Inc., 236 So.2d 114 (Fla. 1970). *See also*, Comment, *The Marketable Record Title Act and The Recording Act: Is Harmonic Coexistence Possible?*, 29 UNIV. OF FLA. L. REV. 916, 934 (1977).

> Such marketable record title shall be subject to . . . [a]ll interests and defects which are inherent in the muniments of which such chain of record title is formed.[70]

The lack of clarity in the Model Act concerning the status of the root of title is carried through in the Wyoming version. The ambiguity in the Wyoming Act leaves the possibility open for the interpretation that a marketable record title in Wyoming would not be subject to interests or claims based on a void or otherwise defective root of title. However, it is submitted that the better view is that where the root of title is defective or void (the forged deed in the previous example), the marketable record title should be subject to all interests, defects or claims attributable to the root.

Professor Walter E. Barnett of the University of New Mexico, writing about the Model Act's Section 2(a), above quoted, analyzes the proper interpretation of the Wyoming-Model Act language as follows:

> This exception apparently protects only those interests or claims disclosed by, or based on defects inherent in, the recorded transactions that form the links in the chain of title of the person claiming a marketable record title. The provision means only those links subsequent to and including the root of title itself, although this is not as obvious in the Model Act as in the Florida and Indiana Acts. For example, if the root of title is itself a forged deed, the act will not extinguish the interest of the person whose name appears as grantor therein. . . . Similarly, the [Model] Act will not eliminate the problem of forgeries in any link subsequent to the root of title, although it will extinguish the rights of owners whose names were forged to links in the chain of title prior to the root. The same is true of deeds ineffective for lack of delivery or incapacity of the grantor.[71]

The Oklahoma Supreme Court in the case of *Allen v. Farmers Union Co-operative Royalty Company*,[72] dealt with

70. Simes and Taylor, *supra* note 6, at 7.
71. Barnett, *supra* note 4, at 67.
72. Allen v. Farmers Union Cooperative Royalty Company, 538 P.2d 204 (Okl. 1975).

a situation in which a defective mineral conveyance was the root of title and the Marketable Record Title Act of Oklahoma contained an inherent defects exception exactly like Section 2(a) of the Model Act. The Court concluded that the defect in the root constituted a defect inherent in muniments of the record chain of title of the party claiming marketable record title.[73]

A further difficulty in determining whether fraud can serve as an inherent defect is posed by cotenancy situations. If A and B owned Whiteacre in equal undivided interests and B, without A's knowledge or consent, fraudulently conveyed a total fee simple interest in Whiteacre to X, the deed could eventually serve as a root to a marketable record title, where the fraud perpetrated by B constituted an inherent defect to the deed. Because there is some degree of fraud involved, this would seem to be the case. However, one generally accepted example of the operation of these acts is one where the owner of a remainder interest conveys a fee simple without reference to or exception of the outstanding life estate. Forty years later, the life estate may be extinguished. It is difficult to understand how this result could be different from the cotenancy example, where the distinction rests on the presence of subjective fraud as opposed to simple error. If this is the distinction, the entire question will turn on evidence of a forty year old transaction, a situation which the operation of the recording act alone, but for the Marketable Title Act, would have resolved quite easily from the records. If this is not the distinction, severe ambiguities arise in the application of the Act.

One form of inherent defect which may arise in the records would be a general reference back to a previously created incumbrance or claim against the property. The Act provides that "a general reference in the chain to easements, use restrictions or other interests created prior to the root of title is not sufficient to preserve them, unless *specific identification* is made therein of a *recorded title transaction*

73. *Id.* at 209.

which creates the easement, use restriction or other interest.[74] [Emphasis added.] Suppose A conveyed a tract of land to B by recorded deed sixty years ago, containing a condition subsequent that A or his heirs could reenter in the event of a breach of certain conditions specified in the conveyance. Forty-five years ago, B conveyed to C by recorded deed, the deed reciting that it is subject to "all easements, reservations and restrictions of record." Fifteen years ago, C conveyed to D by recorded deed, with the recitation that it is subject to "that certain condition subsequent described in the deed from A to B, of a given date and recorded in the records of the county clerk." The question now posed is whether the condition subsequent was extinguished forty years after the B-C conveyance, which constitutes D's root of title. The B-C conveyance which constitutes the root of title makes only a general reference to the interest and hence would not serve to preserve the interest under the referenced language of the exception. The C-D conveyance, however, certainly sets forth specific information concerning the A-B conveyance (i.e., date, names of parties and the nature of the interest reserved). However, it still must be determined that this reference qualifies as "a specific identification . . . of a recorded title transaction." We are confronted with a reference which is not "general" but which may not be specific enough to qualify under the statutory language. Certainly the most straight forward "specific identification of a recorded title transaction" would be the recitation of its location by book and page number in the county records. Anything less in the way of descriptions (as illustrated by the C-D conveyance) is subject to the possibility that it is a general reference and thus not preserved under the exception.[75]

The purpose of requiring specific reference is, (1) to avoid the ambiguities created by general references and

74. WYO. STAT. § 34-10-104(a)(i) (1977). *See also* Wyoming Title Standard 4.6 and accompanying illustrations.

75. Notice, however, with regard to this hypothetical that if a period of forty years had elapsed between the B-C conveyance and the C-D conveyance, a marketable record title would have been established which would have extinguished the condition subsequent. Reference in the later C-D conveyance to the conditions subsequent would not reinstitute the conditions subsequent despite specific reference to its creation.

prevent them from preserving pre-root interests so that more formal notice requirements could be circumvented; and (2) to eliminate unnecessary pre-root record searches for non-existent instruments. A contrary requirement would hamper the Act's attempt to encourage all interests to be locatable of record within the last forty years.[76]

However, in some cases, the requirement that a reference be specific, before it creates a defect in the chain of title to which the marketable record title would be subject, may conflict with the requirement that the root of title purport to create the interest being asserted. For example, in states which do not have an exemption for mineral interests in their marketable title acts, there may arise a conveyance of Blackacre exception "the mineral interest heretofore conveyed to M." The reference to the mineral interest is clearly general rather than specific and will not qualify as an inherent defect to which the ownership of Blackacre might be subject under the act. However, read as a whole, the deed does not actually purport to create anymore than a surface interest. Similarly, if a poorly drafted conveyance transferred Whiteacre, subject to a life estate previously granted to X, the reference to the life estate is not specific enough to create an inherent defect which would preserve the life estate under the Act. However, reading the entire instrument, it does not appear that the intent was to convey a fee simple in Whiteacre.

It may be argued that the legislature did not intend to permit general references of any type to preserve the referenced interest for the reasons cited above. But, at the same time, the Act does not seem to warrant an undue expansion of an interest beyond that actually intended by the root of title. The ambiguity need not be regarded as a conflict within the Act. Where the reference in the root is specific, there is no question that the interest created is subject to the referenced interest, as either a defect or an exception to the grant. The difficulty arises with regard to general

76. Simes and Taylor, *supra* note 6, at 12; Note, *The Indiana Marketable Title Act of 1963: A Survey*, 40 IND. L. J. 21, 32 (1964).

references and may be resolved by determining whether the reference is sufficient to indicate the parties intended to limit the grant. If, as read in its entirety, the grant clearly appears to have been recognized as restricted by a definite outstanding interest, the grant does not purport to create a larger interest and such larger interest would not qualify as a marketable record title entitled to the benefits of the Act. On the other hand, if the reference is so general that it cannot be said whether an outstanding interest actually existed or the parties were merely attempting to avoid breach of warranty from uncertain encumbrances (e.g., use of the phrase "subject to all restrictions and easements of record"), it would not appear that the parties intended to limit the grant itself. Thus, in the later case the referenced interest would not be preserved as a defect, nor should the broader interpretation of the interest created fail to qualify as a marketable record title. Nevertheless, the conflict between the provisions of the Act dilutes the intended purpose of the specific reference provision cited above.

Another possible scenario, for which we are indebted to Professor Barnett[77] is one in which the B-C and C-D deeds in the previous illustration both contain general references to "all easements, reservations and restrictions of record" insufficient to preserve the condition subsequent. Suppose, however, that thirty years ago, C executed a mortgage to D which recited that it was subject to A's condition subsequent and identified the transaction by parties, date and recording location. The mortgage was released twenty years ago. Since the mortgage was released of record it does not form a link in D's chain of title. The question then becomes whether the mortgage constitutes an interest or defect *inherent* in D's chain of record title? The answer to the question is probably no, even though the reference to the condition subsequent will be discovered by every examination of the post-root chain.

Finally, the exception requires that the reference be made to a *recorded* title transaction. Thus specific identification of an unrecorded interest would not be sufficient to preserve the interest under this section.

77. Barnett, *supra* note 4, at 68-69.

B. Notice

The second major exception under the Wyoming Act provides that marketable record title is subject to interest preserved by the filing of a proper notice.[78] The purpose of the notice exception, and the possession exception discussed later, is to prevent or reduce the possibility of fraudulent use of the Act to extinguish the rights of the true owners of property.[79] The Wyoming Act permits the preservation of pre-root interests by establishing a procedure for the filing of a notice of claim that will be disclosed in the chain of record title subsequent to the root of title.[80] In order for the claim to be effective and to be entitled to record, it must "contain an accurate and full description of all lands affected by the notice which shall be set forth in particular terms and not by general inclusions."[81] If the claim is based upon a previously recorded instrument, the notice description "may be the same as that contained in the recorded instrument."[82] The notice is to be filed in the office of the county clerk of the county or counties where the land is located. Further, the clerk, in addition to the recording of the notice in the tract index, must enter the notice under the grantee index of deeds under the names of the claimants appearing in the notices.[83] Since the notice will be entered in the tract index and should be discovered therein by the title examiner, the recording of the notice in the grantee index is of little importance.[84]

78. WYO. STAT. § 34-10-104(a)(ii) (1977).
79. BROWDER ET. AL., BASIC PROPERTY LAW, 987 (3d. Ed. 1979).
80. WYO. STAT. § 34-10-106(a) (1977).
81. WYO. STAT. § 34-10-107 (1977).
82. *Id.*
83. *Id.* The county clerk is directed to record the notice "in the same way that deeds and other instruments are recorded." This would require that the instrument be indexed in both the tract index and the grantee-grantor index. However, it should also be noted that the statute specifically requires the county clerk to index the notice in the grantee index under the names of the claimants appearing in the notice.
84. In the event the county clerk fails to properly index the notice in both the tract and grantee-grantor indexes, contention may be made that the notice is invalid to preserve the interest claimed therein. However, the majority rule holds that wherever the county clerk has improperly recorded an instrument, the improper recording does not ineffectuate the notice given by the instrument. If this majority rule arising under the Recording Act is extended to include such notices under the Marketable Title Act, the contention stated above should not be sustained.

The notice may be filed by the person claiming the interest, or by any person acting on behalf of a claimant who is under a disability, unable to assert a claim on his own behalf, or one of a class whose identity cannot be established or is uncertain at the time of filing.[85] It is important to note that disability or lack of knowledge on the part of the claimant will not suspend the running of the forty-year period subsequent to the effective date of the root of title.[86] One of the primary purposes of marketable title legislation is to eliminate such interests, the justification being that such persons are adequately protected by allowing the persons acting on behalf of such claimants to file the notice.

The Wyoming Act provides that the notice, to be effective, must be filed "for record during the forty (40) year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable."[87] It should be recognized that the forty-year period in which the claimant must file is *not* forty years from the time he acquired his interest, but rather forty years after the effective date of the opposing root of title.

The notice will continue to be effective to preserve the interest until such time as a new title transaction is recorded which has the effect of becoming a new root of title. Once the chain of record title stemming from the effective date on the new root of title reaches forty years, the outstanding interest will be terminated, unless a new notice was filed within the forty-year period subsequent to the new root of title.[88] In light of this fact, a person desiring to keep his

85. WYO. STAT. § 34-10-106(a) (1977).
86. *Id.*
87. *Id.*
88. Suppose that sixty years ago, by a recorded deed, A conveyed a tract of land to B subject to a possibility of reverter. Forty-five years ago B conveyed to C, the deed not reflecting A's outstanding interest (possibility of reverter). Forty-four years ago A recorded his notice of claim. A year later (forty-three years ago) C conveyed to D, no mention being made of A's possibility of reverter. A does not file an additional notice of claim after the C-D conveyance. At the end of the forty year period from the recording of the C-D conveyance, D has a marketable record title which extinguishes A's possibility of reverter. A's original notice was effective to preserve his interest until the time of the recording of a subsequent title transaction, the C-D conveyance, which became a new root of title

interest viable ought to refile at least every forty years, because he usually will not know how soon after his initial filing a title transaction has been recorded which may mature into a new root of title.[89]

In order to protect the integrity of this notice system, the Act contains a special slander of title provision.[90] This portion of the statute provides that in the event a person utilizes a notice for the purpose of slandering another's title, and such aim is found to have been the sole purpose of filing the claim during a subsequent quiet title action, the injured owner shall be awarded costs and damages.[91] This may deter the improper use of notices to a certain degree, but the impact is somewhat limited. Proof that the notice was filed for the sole purpose of slandering another's title will be difficult. But, more importantly, the cause of action for slander of title will apparently continue to be restricted by the appropriate statute of limitations. Depending upon when the cause of action is found to accrue, this provision may require early efforts by the owner to obtain the benefits of the statute.[92]

C. Possession

Under general property law concepts, possession of land is an important factor due to the constructive notice afforded the unrecorded rights of a possessor and the possibility of title acquisition through adverse possession. The Wyoming

upon which D's marketable record title is premised. The passage of the forty year period dating from the new root of title without A's recordation of a new notice gives D an unbroken chain of record title which does not reflect A's claim and hence, A's interest is terminated.

89. Barnett, *supra* note 4, at 83.
90. *See* WYO. STAT. § 34-10-109 (1977).
91. As such, the provision does not assist much beyond what would be available in bringing a standard cause of action for slander of title. In any event, the elements for a holding under the Act continue to be the same as those required under the common law cause: publication, falsity of publication, malice and damages.
92. It should be noted that various jurisdictions differ over when the cause of action accrues. In some it is governed by the statute of limitations for slander, defamation or tort, while in others the longer limitation on actions on real property is utilized.

Additionally, it should be noted that the language of the statute itself provides the basis for an assertion that the statute implies the absence of any statute of limitations to insure the integrity of the notice system. The provision for a finding of slander of title "in any action brought for the purpose of quieting title to land" permits the argument that if the quiet title action was properly brought, slander of title may properly form a part of the court's decision.

Act addresses the rights of possessors in regard to marketable record title, defining the circumstances in which the interests of persons in continuous possession and of persons whose interest arises by periods of adverse possession or prescriptive use are exempted from the provisions of the Act.[93]

The first of the exceptions relating to the rights of possessors provides that a marketable record title will be subject to the interest of a possessor if he has been the record owner for a period of forty years or more, has been in possession continuously for forty years or more, no title transaction with respect to his interest appears in his chain of title, no notice of claim has been filed by him, and his possession continues to the time marketability is being determined.[94] Assuming that the record owner-possessor can meet this stringent set of criteria, his possession will be treated as equivalent to the filing of a notice immediately preceding the termination of the forty-year period following the effective date of the root of title which is the basis of the claim of the opposing party. The exception is of limited significance because the criteria set forth are unlikely to arise.[95] The claimant must have been in continuous possession[96] for a minimum forty-year period and there must be no title transactions in his chain. A sale of the property, probate, mortgage, or any other "title transaction" will defeat his qualification for the exemption. As a matter of practicality, even assuming forty years of continuous possession by the same owner, the possibility is slight that a title transaction of some nature will not have occurred during the period. The rationale for inclusion of the exception is that in the extraordinary circumstance that such a

93. WYO. STAT. § 34-10-104(a)(ii) and (iii) and § 34-10-106(b) (1977).
94. WYO. STAT. § 34-10-106(b) (1977).
95. Simes and Taylor, *supra* note 6, at 14.
96. With regard to a similar possession requirement, the Supreme Court of Minnesota has indicated that:

> Possession obviously means actual occupancy or use of part or all of the real property. Such actual (or constructive) occupancy or use is itself notice of a claim or interest which has not been abandoned or become nominal. Thus . . . right-of-way easements which are manifested by actual use or "occupancy" (consistent with the nature of the easement created) are protected even if the requirement of filing notice is not met. [Wichelman v. Messner, *supra* note 7, at 814.]

situation should arise, it would be unfair to deprive the owner-possessor of his title.

The second of the exceptions dealing with rights based on possession provides that "[m]arketable record title is subject to . . . [t]he rights of any person arising from prescriptive use or period of adverse possession or user which was in whole or in part subsequent to the effective date of the root of title."[97] It is clear that if a person commences adverse possession, continues to possess the land adversely until the expiration of the appropriate statutory period (ten years in Wyoming),[98] and then goes out of possession prior to the effective date of the root of title, he does not fall within the adverse possession exception and his claim is subject to termination by a marketable record title.[99]

Further, it is just as evident that if the entire period of adverse possession or prescriptive use occurs subsequent to the root of title, the marketable record title will be subject to the adverse claim for the simple reason that the adverse possessor is not dependent on any transaction or omission occurring prior to the root of title to establish his interest.

However, consider a situation where A is the record owner of land by virtue of a deed recorded in 1920. Further assume that in 1921 D entered into hostile adverse possession of the land and continued his possession until 1935. In 1933, A conveyed to B by recorded deed. In 1950, D conveyed to C, a bona fide purchaser, also by recorded deed. The subsequent conveyances from A to B and from B to C cannot terminate D's interest under the recording statutes because D's claim to title is based upon adverse possession, not a written

97. WYO. STAT. § 34-10-104(a)(iii) (1977).
98. WYO. STAT. § 1-3-103 (1977).
99. Assume a situation in which A is the record owner of a tract of land by virtue of a deed recorded in 1920. Also, in 1920, O goes into adverse possession of the land and remains in possession claiming in fee simple until 1932. In 1933, A conveys by recorded deed to B. B gets a marketable record title in 1973, forty years after the effective date of B's root of title (the A-B deed in 1933). B's marketable record title extinguishes any claim O could assert by virtue of his adverse possession, because the entire period of O's adverse possession occurred prior to B's root of title. Note, however, that O could have preserved his interest by filing suit or filing proper notice under the Act within the forty year period. *See*, Simes and Taylor, *supra* note 6, at 13. *See also*, Wyoming Title Standard 4.9 and Illustrations contained therein.

recordable instrument. But, a question arises as to whether the Wyoming Marketable Title Act might eliminate D's claim on the basis of C's marketable record title, which ripens in 1973, forty years from the effective date of C's root of title, the B-C conveyance. Since a portion of D's period of adverse possession has taken place subsequent to C's root of title in 1933, the Wyoming Act would not eliminate D's claim. An argument might be made that C's marketable record title terminates D's claim on the theory that under Wyoming's adverse possession statute, D's hostile possession ripens into title at the end of the ten-year statutory period, 1931. Even though D would have to bring a quiet title action at a later time and prove his claim of adverse possession in court, if the evidence is still available, it can be argued that D's title actually vested in 1931,[100] prior to the effective date of C's root of title in 1933, and thus D's adverse possession interest, because of the vesting of title in 1931, is wholly prior to the root of title and not within the exception. Under this approach, the remainder of D's period of possession from 1931 to 1935 would have to be treated as superfluous under the language of the exception. Since the purpose of the Wyoming Act is to be "liberally construed" to the end of simplifying and facilitating land title transactions by allowing persons to rely upon a record chain of title,[101] the argument might have some appeal. The probable result, however, would be that the argument would be rejected because D's actual period of adverse possession continued until 1935, subsequent to C's root of title, and is thus within the practical meaning of the exception.

As a practical matter, in the situation where D has gone out of possession in 1935, and he has not brought suit, filed a claim, or otherwise attempted to assert an ownership interest, it is unlikely that he would be in a position to assert a claim in 1973 or thereafter.

The "adverse possession" exception by its terms exempts recent adverse possession and prescriptive use interests from

100. Konantz v. Stein, 167 N.W. 2d 1 (Minn. 1969).
101. WYO. STAT. § 34-10-102 (1977).

termination by the statute. It would appear that the policy of the Wyoming Act is that adverse possession claims arising after the root of title should be disposed of outside the scope of the Act.[102] Note also that the Wyoming Act provides that it shall not be construed to extend the periods for bringing an action or the doing of any required Act under any statutes of limitations,[103] and if the Act required the adverse possession to be totally subsequent to the root of title, it would be, in effect, extending that period.

Occasions may arise in which an owner may assert an exception to the Act based alternatively on both continuous possession of forty years and adverse possession within the forty year chain. If the successful theory is based on adverse possession, it should be realized that the owner's interest will rest on his title by adverse possession, not on his "record title," which may be a significant distinction.[104]

D. Subsequent Recording

The Wyoming Act's fourth general exception provides that a marketable record title will 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 the unbroken chain of title of record is started."[105] The exception further provides that recording does not give validity to any interest which was previously extinguished.

In a situation where two independent chains of title exist as to the same land, the more recent chain does not necessarily "purport to divest" the interest of the senior chain. If A conveyed to B in 1920 by recorded deed, and if in 1925 X conveyed to Y and in 1926 Y conveyed to Z the same parcel, both by recorded deed and without reference to B's interest, Z's interest does not purport to divest B's.

102. Note, *The Indiana Marketable Title Act of 1963: A Survey*, 40 IND. L. J. 21, 34 (1964).
103. WYO. STAT. § 34-10-108(b) (1977).
104. Barnett, *supra* note 4, at 61.
105. WYO. STAT. § 34-10-104(a)(iv) (1977). It might be questioned whether this particular exception is necessary in light of the fact that the Act will only cut off interests arising prior to the root of the marketable record title. Any transaction subsequent to the root would not be extinguished by the operation of the Act, with or without the particular exception.

However, although B was not purportedly divested of his interest, he will not have a marketable record title in 1960 which extinguishes the interest of Z, because the recording of the subsequent "wild" transactions from X to Y and Y to Z will operate in effect as notices of outstanding claims and B's marketable record title will be subject to Z's claim of right. However, if B fails to file notice of his claim prior to 1966, within forty years from the effective date of Z's root of title, B's interest will be terminated by Z's marketable record title.

Further suppose that in 1968, B conveys to C by recorded deed. In 1966, Z has a marketable record title, and thus, in accordance with the exception, the recording of the B-C deed cannot revive B's interest which was extinguished in 1966.

A question of interpretation of the language of the exception may arise in the context of whether an interest is deemed to "arise out of any transaction" transfering it, or out of the initial transaction by which the chain was created.[106] Assume the following situation: O conveyed to A a fee simple which was recorded in 1920. In 1921, O conveyed the same land to X, the deed being recorded the same year. In 1941, A conveyed to B by recorded deed. In 1961, X has a marketable record title. The question is then posed as to whether B comes within the statutory exception of "subsequent recorded documents" so that X's marketable record title is subject to B's interest. In other words, does B's interest "arise out of" the 1941 transaction, or the 1920 conveyance from O to A which was prior to X's root of title in 1921? If B's interest depends on the 1920 transaction for its existence, his interest would be extinguished because it arose prior to X's root of title. If this is the result, the junior chain cuts off the interest of the senior chain. Simes and Taylor[107] take the position that B's interest should be interpreted to arise out of the 1941 transaction and thus X's marketable record title would be subject to B's interest.[108]

106. Barnett, *supra* note 4, at 55-56, 69.
107. Simes and Taylor, *supra* note 6, at 7.
108. *Id.* at 15. For a further example of an anomalous result which might occur, reference is made to the hypothetical proposed by Professor Barnett, *supra* note 4, at 56:

Thus, there exist two competing chains of title, both of which qualify as marketable record titles, but both of which are also made subject to one another due to transactions recorded subsequent to the root of title of the other. As a result, the Marketable Title Act does not resolve the conflicting claims. Any resolution must be based on other legal principles arising at common law or from statutes other than the Marketable Title Act.

E. Miscellaneous Exemptions

The final exception provision of the Wyoming Act exempts a number of interests from its operation for what would essentially appear to be commercial or political reasons. The exemptions apply to the "rights of reversioners in leases, . . . apparent easements and interests in the nature of easements, . . . water rights, . . . mineral interests, and . . . interests of the state of Wyoming and of the United States."[109]

Lessors and lease reversioners are exempted[110] on the theory that the lessor or reversioner would be out of possession and thus less likely to be aware of adverse claims against his interest which would otherwise be divested. Some criticism has been directed at this exemption on the basis that it discriminates between lessors and lease reversioners and other types of future interest holders, such as life-estate reversioners and persons with rights of entry and possibil-

> [S]uppose that O conveyed to A in 1920, but A did not record his deed until 1922. Meanwhile, O conveyed to X, who purchased in 1921 without notice of the prior deed to A and recorded his deed immediately. There have been no transactions since. The recording acts, whether notice or notice-race, would protect X, because A's deed was unrecorded when X took as a subsequent bona fide purchaser and X recorded first. Under a marketable title act, however, X's interest apparently would be cut off in favor of A in 1962, when A's deed has been of record for forty years. Since X's interest depends on a transaction that occurred before the effective date of A's root of title (1922), it is cut off by Section 3 of the Model Act. Of course, it is also true that A's interest depends on a transaction that occurred prior to the effective date of X's root of title; but A's interest appears to be preserved under Section 2(d) by, of all things, *his late recording*.

An examination of Section 3 of the Model Act will indicate that it is synonymous with § 34-10-105 of the Wyoming Marketable Title Act.

109. WYO. STAT. §§ 34-10-104(a)(v) and 34-10-108(a)(i-v) (1977).
110. WYO. STAT. § 34-10-108(a)(i) (1977).

ities of reverter, whose interests are not protected.[111] The rationale for the distinction is that leases are common long-term transactions designed to serve widespread commercial interests, while other kinds of interests are noncommercial in most circumstances, and their use is less widespread and thus of insufficient significance to warrant exemption.

The Wyoming Act further exempts railroad rights of way and station grounds, and easements for pipelines, highways, railroad, or other public utility purposes the existence of which is clearly observable by physical evidence of use.[112] Again, the commercial and political interests served by these exemptions are evident. It is interesting to observe that in the Model Act all easements or interests in the nature of easements which are clearly observable by physical evidence of use are exempted,[113] while under the Wyoming Act only various railroad and public utility easements are exempted.

Water rights are exempted in the Wyoming Act,[114] reflecting an obvious legislative concern with the commercial, social and environmental importance of water in arid Wyoming.

Interests of the state of Wyoming and the United States are understandably exempted[115] in the interest of preserving public property rights, although such would probably be the result with regard to federal rights whether expressly exempted or not.

Timber and mineral interests are likewise exempted,[116] reflecting the tremendous impact in Wyoming in the mineral industry, and, to a much lesser extent, that of timber. Without such an exemption, mineral interests would be fully

111. Note, *The Indiana Marketable Title Act of 1963: A Survey*, IND. L. J. 21, 35 (1964).
112. WYO. STAT. § 34-10-108(ii) (1977). For an illustration of the application of the requirement that the easement be "observable by physical evidence of its use" *see* Davis v. Havana Mineral Wells, Inc., 48 Ill. App.3d 996, 363 N.E.2d 856 (1977).
113. Model Act § 6.
114. WYO. STAT. § 34-10-108(iii) (1977).
115. WYO. STAT. § 34-10-108(v) (1977). For an application of this type of exception, *see* People v. Murray, 221 N.W.2d 604 (Mich. App. 1974).
116. WYO. STAT. § 34-10-108(iv) (1977).

subject to the operation of the Act. Any conveyance of Blackacre, without specific reference to a previously severed mineral interest, could eventually serve as a root of title to a chain effectively extinguishing the mineral estate as a separate interest from the surface.[117] This exemption is only found in the acts passed by some western states.[118]

Unfortunately, in drafting the mineral exception, these states overlooked a significant distinction between a mineral estate and other forms of exempted interests. For example, suppose A acquired title to land in 1920 by recorded deed. In 1925, a stranger to title conveyed the land by recorded deed to B. Through recorded instruments, B conveys to C in 1930, and C to D in 1950. In 1970, at the expiration of the forty-year period dating from the recording of the B-C deed, which is D's root of title, D will have acquired marketable record title to the land, assuming that A has filed no notice and has no claim which he can assert the continuous possession exemption. If A conveys the minerals to X in 1975, X could arguably assert that D could not claim the benefit of the marketable title act with respect to the mineral estate because the literal language of the exemption would tend to preclude operation of the Act with regard to minerals at any time. All other exemptions under Section 34-10-108 pertain to interests which must have been affirmatively created by some grant, exception or reservation on a specific date. Thus, there is no difficulty in determining whether or not those interests were in existence prior to the establishment of a marketable record title in the fee simple to the land. However, the mineral interest, at least conceptually, has been in existence since the patent, though never severed from the surface. Thus, it could never have been acquired with the fee simple to the surface estate through the operation of the Act. This permits the assertion that a mineral interest could never be affected by the operation of the Act even though the surface and all other rights might be.

117. *See* In Re Algoma Ore Properties, Ltd. [1953] Ont. 634. Note that such a root of title would not extinguish a mineral interest where the root instrument granted only the surface of Blackacre. The marketable record title can never encompass more than the root of title conveyed.

118. In addition to Wyoming, Ohio, Oklahoma and Utah have included mineral exceptions.

However, this result does not seem to be the intent of the Act. The argument neglects to recognize that the fee simple to a parcel of land is considered to encompass both the surface and mineral estate until such time the minerals are somehow severed from the surface. Until such severance, the surface and minerals should be regarded as one interest to which the Marketable Title Act will apply. As a result, in order for the mineral estate to be exempted from the operation of the Marketable Title Act, it must have been severed from the surface at a date prior to the time that marketable record title is established in the land as a whole. Therefore, D in the example above should continue to hold a marketable record title to both the surface and mineral estates extinguishing A's interest and nullifying the validity of any conveyance from A to X.[119] If A had conveyed the minerals to X in 1969, prior to the running of the forty-year period, the recorded instrument would have served as notice under the Act and X's interest would have been preserved as to the mineral estate. If A had executed a recorded mineral conveyance to Z prior to the effective date of D's root of title in 1930, then Z would own the mineral interest and D's marketable record title would be subject to that interest since a severed mineral interest cannot be affected by the operation of the Act.

Attention should be paid to certain interests not exempted and the possible ramifications of the failure to exempt such interests. Restrictive covenants are among the typical methods for preserving conformity and property standards in residential areas of Wyoming communities. Assume a situation in which a city subdivision is platted and the lots are sold by the owner by recorded deeds containing uniform restrictive covenants during the period 1920 through 1930. A, an original purchaser from the subdivider, conveys to B in 1935 by recorded deed, the deed reciting that the conveyance is "subject to all easements, restrictions, and covenants of record." B conveys to C in 1940, and C to D in 1950, all by recorded deeds containing the general language

119. *See* Wyoming Title Standard 4.11.

of the A-B deed. In 1975, D has a marketable record title based on his root of title (the A-B deed of 1935). D's marketable record title eliminates the original restrictive covenants as they pertain to his property. The general references to the covenants are not sufficient to preserve the restriction as interests or defects inherent in D's chain of record title under the inherent defects exemption of the Wyoming Act. In the event that the restrictive covenants are endorsed on the plat or placed on record by separate instrument, in order to be preserved they must be specifically identified by recording location in the intervening conveyances, or a notice of claim must be periodically filed as to all of the tracts or lots covered by the covenants. The practical difficulties of preserving the restrictive covenants in this situation are evident. Each property owner would be required to file his own notice of claim to preserve his rights against all other owners. No individual owner could file on behalf of any other unless the other owner was subject to a disability. It is suggested that legislative attention to this matter is warranted.[120]

120. In order to preserve the strength of this method of land use control, it would be necessary for virtually all property owners within the subdivision to file a notice every forty years. This is both unlikely and results in an unnecessary multiplicity of filing.

Simes and Taylor, *supra* note 6, at 228-229, have suggested that the following provision could be inserted as Section 34-10-106(c) in the Wyoming Act to permit the filing of one notice to preserve restrictions pertaining to an entire subdivision:

> If any person claims the benefit of an equitable restriction or servitude, which is one of a number of substantially identical mutual restrictions on the use of tracts in a platted subdivision, the plat of which is recorded as provided by law, and the subdivision plan provides for an association, corporation, or committee, empowered to determine whether such restrictions are to be terminated or continued at the expiration of a stated period of time, not to exceed forty years, and, by the terms of such provision, it is determined that such restrictions are to be continued because no determination to terminate has been made, then the officer or other person authorized to represent such association, corporation or committee may preserve and keep effective all such restrictions, not otherwise excepted from the operation of this Act, by filing a notice as provided in subsection (a) hereof, on behalf of all owners of land in the subdivision for the benefit of which such restrictions exist.

This provision has been adopted in Indiana. *See*, IND. CODE ANN. § 32-1-5-4 (c) (1973). However, the operation of this provision is obviously confined within narrow limits.

Oklahoma solved the problem by simply providing an additional exception to the act for all "use restrictions or area agreements which are part of a plan for subdivision development." *See* OKLA. STAT ANN. tit. 16, § 76 (Supp. 1980).

Another nonexempted interest of significance is the mortgage. Suppose in 1925 A executed to B a mortgage and note on certain property repayable over a fifty-year period. The mortgage was recorded in 1925. A then conveyed to C in 1930, the deed making no mention of the previous mortgage. In 1970, C has a marketable record title to the property which cuts off B's right under the 1925 mortgage, which still has five years to run. B's filing of a notice of claim during the forty-year period would protect his interest. It is interesting that even if C continues to make the payments under the mortgage there is no provision in the Wyoming Act which would keep B's mortgage from being terminated in 1970. Perhaps the equitable doctrine of estoppel would assist B in this situation, but B receives no comfort from the Wyoming Act itself. Since most residential mortgage terms are thirty years or less, the problem may not often arise, and the forty-year chain of record title requirement of the Wyoming Act would arguably be sufficient protection for the mortgagee in most situations. For mortgages with terms greater than forty years, however, precautions should be taken by the mortgagee to preserve his interests in compliance with the Act, either by filing notice or by extension agreements or other recorded documents. It would also be advisable for mortgagees to pay close attention to the mortgagor's title and the possibility of the existence of a competing chain or interest which could conceivably divest the mortgagor of his interest through the operation of the Act prior to the approval of any loan based on a mortgage transaction.

V. CONCLUSION

From this brief review of the Wyoming Marketable Title Act, it should be apparent that the effects of the Act on real property concepts are significant. Some of these effects are not readily apparent on the first reading of the legislation, but require a thorough understanding of the Act and the interrelation of the Act's various provisions.

Whether the Act with its exceptions meets the original goal of simplifying title transactions and examinations in

Wyoming is questionable. Because full title examinations must still be conducted to account for all exceptions and interests to which a marketable record title might still be subject, the Act might be more appropriately viewed as a general curative statute designed to eliminate not only ancient defects but also aged property interests arising before the root of title and not somehow preserved. In one sense this curative aspect of the Act does simplify title, but for all property owners, not just those engaged in a present transaction. However, in another sense it further complicates title by expanding the legal concepts at work.

The utility of such legislation might be more understandable in states where chains of title run for well over 100 years. Defects and encumbrances may well have accumulated in those states to an unmanageable degree. But in a state such as Wyoming, where chains of title seldom exceed 100 years, the utility of the legislation may not be realized for some time. The only accomplishment is the revision of real property laws and the creation of new ambiguities in the law. This, together with the inconveniences and dangers to some property owners, raises a serious question as to whether the intended benefits of the Act are outweighed by the problems created. The benefits of the Act can be significant, but are justifiable only if the legal profession and property owners within the State understand the Act and make appropriate adjustments to it, both in pursuing title examinations and in preserving interests still regarded as important.

To a certain extent, the impact of the Marketable Title Act is still unknown. Extensive guidance has been given by the authors of the Model Act and by various other writers. But judicial interpretation has been limited, even in those states which adopted such legislation over 30 years ago. Given the ambiguities of some provisions of the Act and the inequities which can arise from a literal application of the Act, future judicial interpretations will be of great importance to the realization of the true extent to which this Act has altered the law of real property.