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# CONVEYANCING IN NEW YORK

*Lester Nelson*†

Conveyancing law and operations as they exist in most states in the country have recently been the subject of much criticism.<sup>1</sup> Characterized as slow, wasteful and incompatible with contemporary standards of business, the call for reform has issued. In response, some states have enacted corrective legislation which, it is hoped, will resuscitate the infirm system.<sup>2</sup>

New York during the last sixty years has witnessed the modernization and streamlining of many areas of the law.<sup>3</sup> However, the law of real property has not received the attention devoted to other legal subjects. The object of this paper is to evaluate the present law of property in New York as it affects conveyancing in order to determine whether new legislation is warranted.

Unfortunately, no quantitative scale has been devised by which we can measure precisely the effectiveness of the law of property. But we can formulate the criteria of a desirable and efficient conveyancing system which, when applied to that existing in New York, will enable us to appraise its success. For this purpose the following four criteria are established; to the extent the New York system of conveyancing fails to satisfy them reform is needed:

- I — Security of ownership and possession predicated upon public records.
- II — Extinction of ancient claims to free titles of socially useless impairments.
- III — Freedom from all formal defects and irregularities in the records of land transactions to eliminate captious attacks on titles.
- IV — Uniformity of the standards of marketable title to simplify the transfer of land.

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† See Contributors' Section, Masthead, p. 659, for biographical data.

<sup>1</sup> John C. Payne has collected excerpts from the plethora of such criticism in "The Crisis in Conveyancing," 19 Mo. L. Rev. 214 n.1 (1954). He summarizes the situation as follows: "It is more and more apparent that the system employed in [sic] clumsy, wasteful, inefficient and out of keeping with our demands for social institutions of reasonable effectiveness, and there is general agreement among competent, disinterested observers that conventional procedures, if left unmodified, will soon break down of their own weight."

<sup>2</sup> E.g., Cal. Civ. Code § 1207 (1935); Mich. Stat. Ann. §§ 26.1271-79 (1948); Neb. Rev. Stat. §§ 76.601-44 (1943).

<sup>3</sup> Reform has, to cite two examples, been accomplished in the fields of procedure (Civil Practice Act, 1920); and commercial law (e.g., Negotiable Instruments Law, 1897); Conditional Sales Act, 1922; Retail Installment Sales Act, 1957. This is not to suggest that these areas of law are perfect, or that changes may not profitably be enacted.

## I.

## TITLE SECURITY AND PUBLIC RECORDS

The purchaser of a parcel of property expects that upon receipt of the deed tendered him, he will be secure in his title and possession and be able to establish its marketability in the event that he desires to sell. If inexperienced in such matters, he will assume that the existing conveyancing system provides these advantages as a matter of public record and at no great expense. Legitimate as these expectations may be, our prospective property owner will, unfortunately, be disappointed. Should he obtain any assurance with respect to his title, it will be at a substantial expense and it will not generally be a matter of public record. Indignation may well characterize his reaction, and he may question the value of a conveyancing system that does not accomplish such seminal purposes.

If such a purchaser resides in New York there are three primary methods available to him by which he can attempt to secure the title he has acquired: Title registration, title insurance, and an attorney's title opinion and abstract. The relative cost, extent of protection of title, and public nature of the records for each of these methods will be examined in this section in an effort to learn how well the existing law of New York satisfies the first objective of an effective conveyancing system.

*A. Title Registration*

Making the ownership and transfer of real property as simple and uncomplicated as the ownership and transfer of personal property has been the goal of many writers on this subject,<sup>4</sup> and has provided the original inspiration for the development of the system known as title registration by Sir Richard Torrens in Australia in 1858.<sup>5</sup> The Torrens System, as it is popularly known, found immediate favor and was soon adopted in many parts of the world.<sup>6</sup> From 1890 through 1930 there was great enthusiasm for the system in this country, as is evidenced by the enactment of title registration statutes in a number of states.<sup>7</sup> And by an act adopted in 1908,<sup>8</sup> New York authorized the registration of titles within the state.

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<sup>4</sup> See, e.g., 4 American Law of Property § 17.38 (Casner ed. 1952); Spies "A Critique of Conveyancing," 38 Va. L. Rev. 245 (1952); Note, "A Comparison of Land and Motor Vehicle Registration," 48 Yale L.J. 1238 (1939).

<sup>5</sup> For references on the history of the Torrens System, see the bibliography in Powell, Registration of the Title to Land in the State of New York 295-314 (1938) (hereinafter cited as Powell).

<sup>6</sup> *Id.* at 56-73.

<sup>7</sup> *Id.* at 54.

<sup>8</sup> N.Y. Real Prop. Law §§ 370-435.

Briefly, the procedure established in New York to register a title requires the commencement of a judicial proceeding which is in the nature of an action in rem to quiet title.<sup>9</sup> If the court is satisfied from the official examiner's report of title<sup>10</sup> that the petitioner has title free from reasonable doubt<sup>11</sup> it will issue a final order or judgment to that effect.<sup>12</sup> Such final order ". . . shall . . . be forever binding and conclusive upon the state of New York and all persons in the world. . . ." despite the fact that persons bound may be under a disability because of infancy or incompetency.<sup>13</sup> At the time a certified copy of the final order is filed with the county registrar a certificate of title setting forth all outstanding interests in the registered property is prepared<sup>14</sup> and kept on file in a title book,<sup>15</sup> and a duplicate thereof is issued to the owner.<sup>16</sup> Upon registration, the owner is also required to contribute one-tenth of one per cent of the value of his property to an assurance fund against which any person who, without negligence, has sustained a loss as a result of the registration of the property may file a claim.<sup>17</sup> In the event the property is transferred the grantor must, of course, execute and deliver a deed to the grantee, and in addition, he must surrender his duplicate title certificate to the registrar, who will issue a new certificate to the grantee.<sup>18</sup>

Despite the logic and seeming advantages of this system<sup>19</sup> in providing a maximum of security predicated upon public records, there can be no doubt that it has not succeeded in New York.<sup>20</sup> Since the effective date of the statute, only about 350 base registrations have been made in the City of New York, presently affecting approximately 1,000 parcels of property.<sup>21</sup>

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<sup>9</sup> *Id.* § 371.

<sup>10</sup> *Id.* § 380.

<sup>11</sup> *Id.* § 391.

<sup>12</sup> *Id.* § 390.

<sup>13</sup> *Id.* § 391; however see § 400 which provides four limited exceptions against which a title certificate is not conclusive: (1) liens and claims arising under the laws or Constitution of the United States which are not required to be of record; (2) taxes, water rates or assessments imposed after initial registration; (3) lease not exceeding one year; and (4) easements and servitudes created after initial registration.

<sup>14</sup> *Id.* §§ 393-94.

<sup>15</sup> *Id.* § 395.

<sup>16</sup> *Id.* § 396.

<sup>17</sup> *Id.* §§ 426-28.

<sup>18</sup> *Id.* § 406.

<sup>19</sup> A compelling statement of the virtues of title registration is made by McDougal and Brabner-Smith, "Land Title Transfer: A Regression," 48 *Yale L.J.* 1125 (1939).

<sup>20</sup> For an evaluation of the operation of the Torrens System in New York, see Powell 4-53. Prof. Powell's arguments against title registration are effectively answered by McDougal and Brabner-Smith, *supra* note 19, and by Fairchild and Springer, "A Criticism of Powell's Book," 24 *Cornell L.Q.* 557 (1939).

<sup>21</sup> These statistics were obtained from conversations held with the clerk in charge of title registration in the Office of the Registrar of the City of New York. The most important area in the city affected by title registration is the Seaview Village Development in Brooklyn, the title of which was registered in the thirties.

The experience of New York in this respect is not unique. Although title registration is used to a greater extent in some areas of the country than others,<sup>22</sup> in general, it has not been extensively adopted in any state.<sup>23</sup> Nor does it appear that there is any tendency for an increased use of the system as time progresses.<sup>24</sup>

Three primary reasons are attributed to the public's rejection of the Torrens System: (1) the cost and difficulty of initial registration; (2) the inconclusiveness of the certificate; and (3) the attack upon the system by title insurance companies, abstractors and lawyers, who believe their economic interests would be adversely affected by its success.

Prof. Powell,<sup>25</sup> after analyzing the relative cost<sup>26</sup> (in 1938) of registering a title as compared to the cost of title insurance and of a title abstract, concludes that title registration is by far the most expensive of the three systems considered. A reply to Prof. Powell indicates that his analysis is fallacious in certain respects.<sup>27</sup> After conducting a comparative study of relative costs, the authors of the reply are of the opinion that title registration is cheaper than title insurance for properties valued above \$5,000. Prof. Powell, himself, concedes that the sale of a registered title is less expensive than obtaining a new policy of title insurance for the same property,<sup>28</sup> since only a nominal fee is required to be paid to effectuate the transfer of the title certificate,<sup>29</sup> while title companies charge the original premium on the re-issue of a title policy to a new owner.

Both the individual landholder who acquires property which has been previously registered and the community at large receive economic benefits from registered titles.<sup>30</sup> But, unfortunately, the person who bears the cost of the initial registration will usually not be too

<sup>22</sup> See 4 American Law Property § 17.30 n.11 (Casner ed. 1952). E.g., in Massachusetts the total number of registrations up to December 31, 1950, is 22,659; in Cook County, Illinois (Chicago) during the period 1941-50, 3,028 titles were registered.

<sup>23</sup> Powell 55.

<sup>24</sup> Within the past twenty years not more than twelve titles were registered in the City of New York. California, one of the states in which title registration was used extensively, has recently repealed its statute. Cal. Stats. 1955, c. 332.

<sup>25</sup> Powell 48.

<sup>26</sup> The items of expense incurred in the registration of a title include: (1) contribution to the State Assurance Fund of one-tenth of 1% of the assessed valuation of the parcel of property registered, N.Y. Real Prop. Law § 426; (2) payment to the Official Examiner of Title, \$20 plus one-tenth of 1% of the assessed valuation of the property registered, id. § 432(n); (3) payment of miscellaneous fees, id. § 432; (4) cost of the survey required, id. § 381; and (5) attorneys' fees for conducting the registration proceedings.

<sup>27</sup> McDougal and Brabner-Smith, *supra* note 19, at 1139. The alleged error in Prof. Powell's statistics is that he includes the expense of fees and of a survey in the costs for title registration, while omitting them from the costs of title insurance, although a purchaser would probably incur the same expenses under both systems.

<sup>28</sup> Powell 52.

<sup>29</sup> The fee for a transfer certificate is \$6, N.Y. Real Prop. Law § 432(d).

<sup>30</sup> See McDougal and Brabner-Smith, *supra* note 19, at 1142.

concerned over the prospective savings he has gained for a subsequent purchaser. To more evenly divide the cost of registration, the initial expense to the registrant could be reduced and the differential in cost recovered for the state by a pro rata tax imposed on each subsequent owner.<sup>31</sup> Alternatively, if the Torrens System were adequately accepted by the public, registration of a title might be considered in the nature of a capital expenditure which would increase the value of the property; upon resale, the initial registrant would recover the costs of the registration proceedings.

Inertia is both a law of physics and of human behavior; and the necessity for commencing a judicial proceeding in order to register a title undoubtedly discourages many landowners. In addition, it adds significantly to the cost thereof. Consequently, if registration could be accomplished by a simple administrative procedure which would avoid the necessity for a plenary action, the public might be more attracted to it.<sup>32</sup>

Title registration has been further reprovved with the allegation that the holder of a registered title has gained little security for his efforts since the title certificate is not conclusive against all outstanding interests.<sup>33</sup> Though this allegation may be true under the laws of other states,<sup>34</sup> there is no doubt that in New York the words of the legislature<sup>35</sup> in imparting absolute conclusiveness to the certificate have been enforced by the courts.<sup>36</sup> This is not to say that cases cannot arise in which a certificate might have to be set aside,<sup>37</sup> but for practical purposes, in New York this objection to title registration has no validity.

It is generally agreed that the greatest obstacle title registration has had to overcome in order to gain general acceptance—an obstacle which it has been unable to meet—is the opposition of those groups whose economic lives are threatened by it.<sup>38</sup> Until recently, many lending

<sup>31</sup> *Id.* at 1150. See also Johnstone "Title Insurance," 66 *Yale L.J.* 492, 515 (1957) (hereinafter cited as Johnstone).

<sup>32</sup> See Note, "A Comparison of Land and Motor Vehicle Registration," 48 *Yale L.J.* 1238 (1939). But cf. *People ex rel. Kern v. Chase*, 165 *Ill.* 527, 46 *N.E.* 454 (1896), which declared title registration by an administrative agency to be unconstitutional, as an illegal grant of judicial power. This case, however, was decided prior to the advent of administrative law on the American scene as a significant agency of government. See *Conn. Mutual L. Ins. Co. v. Moore*, 333 *U.S.* 541, 547 (1948); *Twin Falls Canal Co. v. Huff*, 58 *Idaho* 587, 76 *P.2d* 923 (1938); *Clark v. Briscoe Irr. Co.*, 200 *S.W.2d* 674 (*Tex. Civ. App.* 1947).

<sup>33</sup> See Note, 42 *Harv. L. Rev.* 945 (1929).

<sup>34</sup> See Powell, Supplement A, ¶¶ 5-12 at 92-96, conclusiveness of a title certificate in Calif.; in Minnesota, Supplement G, ¶¶ 7-11 at 204-05; in Oregon Supplement L, ¶ 3 at 250.

<sup>35</sup> *N.Y. Real Prop. Law* § 391.

<sup>36</sup> *City of New York v. Wright*, 243 *N.Y.* 80, 152 *N.E.* 472 (1926); *Hunt v. Hay*, 214 *N.Y.* 578, 108 *N.E.* 851 (1915); see also Powell 33.

<sup>37</sup> See *Minnetonka State Bank v. Minnesota State Sunshine Society*, 189 *Minn.* 560, 250 *N.W.* 561 (1933) (two inconsistent outstanding certificates of title); *Baart v. Martin*, 99 *Minn.* 197, 108 *N.W.* 945 (1906) (title certificate set aside because of fraud).

<sup>38</sup> *McDougal and Brabner-Smith*, *supra* note 19, at 1147, summarize the situation in

institutions which insist on financing only insured titles have been unwilling to make loans secured by real property which was registered, since no title insurance company would be willing to insure such titles. As a result the owners of registered lands have been denied the usual commercial advantages of property ownership.<sup>39</sup>

Furthermore, the registrar, unlike title insurance companies, is unable to advertise the advantages of the statutory system of title registration; consequently, the public is dependent upon members of the bar and real estate brokers to provide them with information concerning it. Unfortunately, too few attorneys or brokers realize that title registration exists in New York. Those who are knowledgeable dislike abandoning comfortable and profitable methods of property transfer in order to become acquainted with new, less remunerative procedures.<sup>40</sup>

Advocates of title registration have suggested that only by making title registration compulsory would there be any extensive use of the system.<sup>41</sup> Registration is compulsory, in whole or in part, in Australia, England, Ireland, Germany, Austria, Hungary, Canada, Hawaii, the Philippines and Switzerland,<sup>42</sup> and in these jurisdictions it has met with great success. However, there appears to be little interest in any reform so radical and its constitutionality is questionable.<sup>43</sup>

### B. Title Insurance

Competing successfully against title registration is the practice of title insurance which, although predicated upon the existing public records, has resulted in each title company preparing, in effect, a private title certificate on the status of all titles insured.

The need for a system of public records of land titles to prevent fraudulent claims founded upon undisclosed transactions and to protect

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these words: "The chief, major, proximate, and direct cause of the non-use of, or of the public 'disinclination' to use, the Torrens system has been the bitter, multi-form opposition—lobbying against any reform, wounding statutes when enactment is inevitable, conspiring with lending agencies, spreading adverse publicity, and so forth—of title companies and title lawyers." See also *id.* at 1147 n.125.

<sup>39</sup> See *Matter of Carns*, 181 Misc. 1047, 1051, 43 N.Y.S.2d 497, 501 (Sup. Ct. N.Y. County 1943). Quite the contrary situation obtains in the Philippines and Hawaii, where title registration is well established. There the banks prefer to make loans secured by registered titles. See Patton, "Extension of the Torrens System into Hawaii, the Philippine Islands and Latin-American Jurisdictions," 36 *Minn. L. Rev.* 213 (1952).

<sup>40</sup> Most title companies give a commission to the attorney or real estate broker representing the insured based on 15% of the premium paid for the insurance.

<sup>41</sup> Fairchild and Gluck, "Various Aspects of Compulsory Land Title Registration," 15 *N.Y.U.L. Rev.* 545 (1938).

<sup>42</sup> *Id.* at 551.

<sup>43</sup> See *Anderson v. Shepard*, 285 Ill. 544, 121 N.E. 215 (1918), in which an Illinois act requiring that only representatives of decedents' estates register lands was declared unconstitutional. But Fairchild and Gluck, *supra* note 41, at 561-69, argue that a statute can be drafted which would not violate the federal or state constitutions; accord, Note, "A Comparison of Land and Motor Vehicle Registration," 48 *Yale L.J.* 1238 (1939).

bona fide purchasers was recognized quite early in the development of our national legal institutions.<sup>44</sup> In response to this need the American colonists enacted statutes requiring the recording of all transactions involving title to real property.<sup>45</sup>

As land transactions increased in volume and new interests and liens in lands were created, it became apparent that many claims to real property did not appear in the public records.<sup>46</sup> People began to seek new means by which they could obtain some type of protection against title losses, and in the last quarter of the nineteenth century the concept of insuring title to property was conceived.<sup>47</sup> Since then the use of title insurance by owners and mortgagees has grown rapidly, so that today some land in every state is insured<sup>48</sup> by one or more of the 147 title insurance companies in the country authorized to write such policies.<sup>49</sup> The volume of title insurance written varies greatly throughout the states, with its greatest use occurring on the Pacific coast and in metropolitan areas.

Presently, there are 13 domestic companies organized to write title insurance policies in the State of New York.<sup>50</sup> During 1956 these companies wrote 185,000 policies insuring \$4,220,000,000 worth of property.<sup>51</sup> The overwhelming portion of this insurance was on property located within New York City, Westchester, Nassau or Suffolk counties, in which areas it is relatively rare for a purchaser of property valued over \$50,000 not to take out title insurance.<sup>52</sup>

State control of title insurance company activity was made considerably more stringent after the nineteen-thirties.<sup>53</sup> Presently, title com-

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<sup>44</sup> See Morris, *Studies in the History of American Law* 69-73 (1930).

<sup>45</sup> The earliest recording act, as we know it today, was enacted by the Massachusetts Bay Colony in 1640. See 4 *American Law of Property* § 17.4 (Casner ed. 1952); it is generally acknowledged that the development of recording statutes is unique to America, although they may have been influenced by certain European practices. *Id.* § 17.5.

<sup>46</sup> The following is a list of some of the matters which can affect title to real property and for which the recording acts fail to provide notice: ". . . [F]raud, forgery and false impersonation, alteration, want of legal delivery, questions of fact, wrongful possession of a deed, conditional delivery, identity of persons, copyists' errors, minors and others under a disability, insanity, afterborn children, and pretermitted heirs, void judgments and decrees, usury, mechanics liens, adverse possession, unrecorded instruments, visible and existing easements, streams, lakes, rivers, whether land is riparian or nonriparian, and whether new lands are alluvion, accretion or otherwise, overlapping, and finally exercise of police powers." Comment, "Title Insurance in California," 39 *Calif. L. Rev.* 235, 238-39 (1951).

<sup>47</sup> The first title insurance company was organized in Philadelphia, Pa., in 1876. See Rhodes, "The Insurance of the Real Estate Title," 10 *Conn. B.J.* 115, 206, 211 (1936).

<sup>48</sup> Johnstone, "Title Insurance," 66 *Yale L.J.* 492, 493 n.5 (1957).

<sup>49</sup> *Id.* at 492.

<sup>50</sup> Until recently there were 14 such companies, but during 1957 United Title & Mortgage Guaranty Co. and Lawyers Mortgage & Title Company merged.

<sup>51</sup> These statistics were supplied by the New York State Title Association.

<sup>52</sup> The number of policies written in these areas was 173,616, which is 93.85% of the total policies issued in the state.

<sup>53</sup> During the nineteen thirties, thirty-one of the forty-four title and mortgage guarantee

panies are required to have a minimum paid-in capital of at least \$250,000, and an initial paid-in surplus equal at least to fifty (50) per cent of capital.<sup>54</sup> Furthermore, they are required to maintain a statutory minimum reserve<sup>55</sup> and their powers are strictly limited.<sup>56</sup> Insurance policy forms,<sup>57</sup> rate schedules, classification of risks, and rules as to commissions to be paid, as well as any changes thereto, must all be filed with the State Superintendent of Insurance.<sup>58</sup>

An applicant for title insurance is actually purchasing two services from a title company: (1) examination of the state of title to the subject property; and (2) insurance against title losses. Critics of title insurance allege that since all defects appearing in the chain of title will be excepted from the coverage of the policy,<sup>59</sup> the insurance risks assumed by the title companies are minimal; in effect, they virtually insure only against the errors of their own employees.<sup>60</sup>

Title insurance is not written for any fixed period of time but remains in effect until there is no further risk to the insured. In a fee policy this occurs when the insured disposes of the property and there is no further liability under any title covenant. A mortgagee policy, however, terminates when the mortgage is satisfied or released. Though mortgagee policies customarily include protection for assignees of the mortgage, fee policies do not and each subsequent grantee must obtain new insurance. Policies generally provide that the insurer will defend or prosecute any suit affecting the title to the insured premises and will be liable for specified losses which the insured may sustain as a result of a defect in title. In New York, title policies usually guarantee that the insured will be able to convey marketable title except as noted therein.<sup>61</sup>

Cost of title insurance differs throughout the counties of the state and is based upon a fixed rate per thousand dollars of insurance. Furthermore, the premium varies, depending upon whether title to a fee, a mort-

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companies organized in New York during the period 1920-1930 were required to liquidate. See Johnstone, 512 n.89.

<sup>54</sup> N.Y. Ins. Law § 430.

<sup>55</sup> Id. § 434.

<sup>56</sup> Id. §§ 432, 436.

<sup>57</sup> Id. § 438.

<sup>58</sup> Id. § 440.

<sup>59</sup> See Johnstone, 494-98, discussing the risks usually covered and excepted from insurance policies.

<sup>60</sup> See Comment "Title Insurance in California," 39 Calif. L. Rev. 235, 247-49 (1951). The relatively small percentage of losses of title insurance companies compared to losses of other insurance companies would seem to support the argument that the risks assumed by title companies are negligible. For 1956 average percentage of loss to premiums on title insurance in New York was 6.4%, while on New York life insurance policies it was 33.6%, and on accident and health insurance policies it was 68.4%, and for New York stock fire insurance policies it was 51.8%. See statistical tables from N.Y. Ins. Report 27, 37, 105, 128, 156 (1957).

<sup>61</sup> In some states, title companies are not permitted to insure marketability, e.g., Texas. See Johnstone, 496.

gage or a leasehold is being insured.<sup>62</sup> Generally, in New York, insurance is cheapest for property located in the counties of Bronx, Richmond, Kings, Queens, Westchester and Nassau; more expensive in New York and Suffolk Counties, and most expensive in the upstate counties. In addition to the scheduled premiums, title companies make various additional charges for tax searches, surveys and other services.

Outside of the New York City area,<sup>63</sup> many of the title companies use the "approved attorney" system in which a company will insure property based on the title opinion rendered by an attorney in whom they have great confidence. The cost of this type of insurance is considerably less than the standard type of policy sold in which the company examines the title.<sup>64</sup>

That title insurance is not a completely satisfactory answer to the problem of securing titles cannot be doubted by disinterested observers. Its expense, limited insurance coverage, and duplication of public records,<sup>65</sup> make it considerably less valuable socially than title registration. In addition, as a result of the control title companies have over land transactions in some areas, standards of marketability of title, and real property law in general, are virtually made by private companies rather than by public agencies.<sup>66</sup> Nevertheless, there is little likelihood that title insurance will be replaced in New York by any other system offering similar services. And, as has occurred in other industries which vitally affect the public interest,<sup>67</sup> more extensive government regulation may be necessary to make certain, if private competition does not, that title companies charge fair rates, provide adequate insurance cover-

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<sup>62</sup> The Title Guarantee & Trust Co., Guaranteed Title & Mortgage Co. and the Home Title Guaranty Co. are members of the New York Board of Title Underwriters which fixes standard rates for their members; e.g., rates for fee insurance average about \$70 per thousand dollars in New York County. Other title companies in the state fix their own rates which are generally 8-10% lower than those rates prescribed for Board members. Mortgage insurance is cheaper than fee and leasehold insurance, and one wonders what justification there is for this difference in premiums. Perhaps it may not be best explained by the bargaining power of the large lending institutions which provide the insurance companies with such a large proportion of this type of business (approximately 80% of the national non-farm real estate mortgage debt is held by such institutions). See Johnstone, 502.

<sup>63</sup> The Lawyer's Title Insurance Corp. was the only title company using the approved attorney system in New York City until it recently decided to discontinue its use in the City.

<sup>64</sup> Generally, insurance sold under this plan costs \$5 per thousand, of which the company pays the approved attorney 25% of the premium instead of the usual 15% commission. In addition, the attorney will charge the client for the title search.

<sup>65</sup> Some title companies maintain complete title plants, i.e., they reproduce for their own purposes all recorded instruments affecting realty. See Johnstone, 506.

<sup>66</sup> See Comment, "Title Insurance in California," 39 Calif. L. Rev. 235, 244 (1951).

<sup>67</sup> Life, accident and health insurance companies in New York are subject to greater regulation than title insurance companies. See N.Y. Ins. Law §§ 190-224, e.g., limitation of expenses § 212; limitation on accumulation of surplus § 207; misrepresentations are prohibited § 211. Similar controls are imposed on casualty insurance companies; see N.Y. Ins. Law §§ 310-33.

age and are capable of meeting all losses incurred. Title insurance has now become too important to the community to permit it to continue without periodic examination of its social responsibility.

### *C. Title Abstracts and Opinions*

The traditional method by which a prospective purchaser of property ascertains whether the title he is to acquire is unfettered by adverse claims is by a title abstract and opinion prepared by an attorney after examination of the public records. In a great many counties of the state this system is still the predominant method on which purchasers of property rely for the security of their title. In fact, some law offices have amassed abstracts of title for a major portion of the properties in their locality.

Multitudinous land transactions during the years have, however, produced voluminous records and many attorneys have found title abstracting too laborious and unremunerative a task. To relieve them of this burden, the title abstractor offers his services to the legal community. By virtue of peculiar experience and interest, the abstractor is capable of examining titles more efficiently and less expensively than attorneys. And based upon the abstract of title submitted to him the attorney prepares the opinion of title.

Obviously, this system offers meager security to the purchaser of property who has relied thereon. Although the attorney or abstractor may be liable in contract or tort<sup>68</sup> for errors in the opinion or abstract, such potential liability is not of great value. By the time any adverse claim is made an individual attorney or abstractor may be deceased or unable to satisfy any judgment entered against him. Furthermore, too many claims can be asserted against a title which arise from matters not of record, so that the title examiner is unable to forewarn his client of their existence.<sup>69</sup>

The cost of obtaining an opinion of title is considerably less than title insurance or title registration,<sup>70</sup> but, of course, either of those competing systems offers greater protection. As is the case with title insurance, each purchaser of property must obtain a new abstract and title opinion.<sup>71</sup> An abstract that satisfies Smith's attorney that title is valid and marketable may at a later date not meet the requirements of the attorney for

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<sup>68</sup> See *Cole v. Vincent*, 229 App. Div. 520, 242 N.Y. Supp. 644 (4th Dep't 1930); 28 A.L.R.2d 891 (1951); Patton, *Land Titles* § 44 (1957).

<sup>69</sup> See note 46 supra; for a classic "horror story" of the insecurities of property ownership, see Crocker, "The History of a Title," 22 Minn. L. Rev. 129 (1937).

<sup>70</sup> One abstract company in New York City charges \$50 for a title abstract of any parcel of property within the city limits, with the search extending back forty years.

<sup>71</sup> In some areas, the seller supplies an abstract of title to the buyer.

Jones, Smith's vendee. Therefore, the absence of any standards of marketability is another of the grievous shortcomings of this system.

The systems of conveyancing described above are not unique to New York, nor are their disadvantages peculiar to it by virtue of special conditions or laws. If, as is most likely, the public rejection of title registration continues, security of ownership and certainty of marketability based upon public records will only be achieved by changes in the existing property law. Some such changes are discussed in connection with the three remaining sections of this paper.<sup>72</sup> One important reform in this regard not mentioned elsewhere is the desirability of creating a tract index for the land records of every county in the state.<sup>73</sup> Such an index will greatly aid the title examiner in determining what outstanding claims of record have been filed against the property. The beginning of such a program has been made for the counties comprising New York City<sup>74</sup> and Nassau County and its use should be made uniform throughout the state.

## II.

### ELIMINATING STALE CLAIMS

Since the twelfth century actions concerning real estate have been regulated by statutes of limitation<sup>75</sup> whose service to the public interest has been recognized as providing the repose and security necessary for legal transactions.<sup>76</sup> In fact, no modern system of jurisprudence exists which does not provide some limitation in time upon the rights of citizens to commence actions. The extent to which the law of real property has applied this just, equitable, and practical doctrine to title problems is one measure of its effectiveness in any jurisdiction. Within the past thirty years this principle has been used with modification in an attempt to solve, what has been called, "The Crisis in Conveyancing."<sup>77</sup>

At present in New York there are a number of statutes which limit to a period in gross the time within which rights affecting real property

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<sup>72</sup> For other suggested changes to make the public records contain a more complete title history, see Basye, *Clearing Land Titles* §§ 31-45 (1953) (hereinafter cited as Basye). E.g., Prof. Basye suggests that recitals by affidavit as to certain matters not presently appearing of record and affecting a title be recorded and accepted as evidence of the facts stated therein.

<sup>73</sup> See Spies, "A Critique of Conveyancing," 38 Va. L. Rev. 245 (1952).

<sup>74</sup> E.g., see the Administrative Code of the City of New York § 1052-8.0 which establishes the block and lot index (local name for the tract index) for New York County.

<sup>75</sup> See opinion of Justice Werner in *Brooklyn Bank v. Barnaby*, 197 N.Y. 210, 227, 90 N.E. 834, 840 (1910); 3 American Law of Property § 15.1 (Casner ed. 1952). However, the statute of 21 James I, c. 16 (1623) is acknowledged as the immediate ancestor of the modern statute of limitations.

<sup>76</sup> See *Guaranty Trust Company v. United States*, 304 U.S. 126, 136 (1938); *Gregoire v. Putnam's Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948).

<sup>77</sup> The title of a law review article by John C. Payne, 19 Mo. L. Rev. 214 (1954).

must be asserted.<sup>78</sup> The most important of these is section 36 of the Civil Practice Act which requires that an action for the recovery of real property shall be commenced within fifteen years from the time the cause of action descends or accrues.<sup>79</sup> Certain other interests in property have been created by statute for a specified duration of time, at the expiration of which they are extinguished.<sup>80</sup> Another type of limited interest in property, albeit not real property, is that of a chattel mortgage which is valid for only three years unless a notice is filed renewing the lien.<sup>81</sup>

These concepts of limitations on rights of action and of terminable property interests are neither novel to the law of New York nor to the generally prevailing law throughout the country. Employment of such principles more extensively in the law of real property can help reduce the many doubts and defects that presently encumber titles and prevent their effortless and efficient transfer. In recent years several mid-western states<sup>82</sup> have enacted legislation embodying these ideas with this end in mind and with the further hope that the appraisal of a title could be based on an examination of the land records which is limited to a relatively recent and constant period of time.<sup>83</sup>

Iowa adopted the pioneer statute in this field in 1919. It provided that all claims against a holder in possession of the record title to real estate arising before January 1, 1900 were barred unless notice thereof was filed prior to July 4, 1920.<sup>84</sup> Under the statute, possession of real estate is proven of record by the filing of an affidavit, which recites the

<sup>78</sup> E.g., N.Y. Civ. Prac. Act §§ 31-43 (limitation on actions for the recovery of real property); id. § 47-a (actions on bonds and mortgages limited to six years); N.Y. Real Prop. Law § 460 (2-year limitation on dower actions); N.Y. Aband. Prop. Law § 206(1) (40-year limitation on action against state to release escheated property); id. § 215 (15-year limitation on actions against state for value of property acquired by it as the result of a judgment of escheat and thereafter sold); N.Y. Stock Corp. Law § 17 (1-year limitation in which to challenge validity of corporate mortgage for lack of consent of stockholders).

<sup>79</sup> Except that the state has forty years in which to bring such an action, N.Y. Civ. Prac. Act § 31 and certain statutory disabilities extend the time in which an action may be commenced, id. § 43.

<sup>80</sup> E.g., id. § 510 (a docketed judgment is a lien on real property for 10 years); N.Y. Lien Law § 17 (a mechanic's lien is only valid for one year unless continued by court order); N.Y. Tax Law § 249-ll (claim of state for estate taxes is lien on real property for fifteen years for property valued at \$10,000 or less, and for twenty years on property valued at more than \$10,000).

<sup>81</sup> N.Y. Lien Law § 235.

<sup>82</sup> Iowa Acts 1919, c. 270; Ind. Stat. Ann. §§ 2-628-37 (Burns 1946); Mich. Stat. Ann. §§ 26.1271-79 (1953); Minn. Stat. Ann. § 541.023 (1945); Neb. Rev. Stat. §§ 76-288-98 (1943); N.D. Rev. Code § 47.19A02 (1943); S.D. Code § 51.16B12 (1939); S.H.A. c. 83, § 10a.

<sup>83</sup> The desire to make land freely marketable has in the past led to significant changes in substantive law, e.g., the development of the rule against perpetuities by English courts from 1682 through 1833, was to prevent restraints on alienation of property. 6 American Law of Property § 24.4 (Casner ed. 1952).

<sup>84</sup> Iowa Code Ann. § 614.17 (1946). This act has been amended periodically to make the dates more current, and presently it requires all claims arising before January 1, 1940, to be recorded within one year from and after July 4, 1951. Iowa Acts 1951, c. 209.

facts of possession, with the local recorder who enters upon the margin of the record a certificate to such effect.

Although the form of the act is similar to a statute of limitations, it would be incorrect to regard it solely as such. The significant differences are that the Iowa law extinguishes all future and non-possessory claims, notice of which has not been filed within the requisite time, whether or not they have given rise to a present cause of action; and it is the filing and not the commencement of an action that is the means by which property rights are preserved. Both the bar<sup>85</sup> and the judiciary<sup>86</sup> have welcomed the statute as a partial solution to the problem of conveyancing in Iowa.

Wisconsin and Minnesota, in 1941 and 1943 respectively, adopted statutes which substantially emulated the Iowa act in barring outstanding interests in property unless notice thereof was filed.<sup>87</sup> Enactment of such a statute by Wisconsin was received with the following sanguine praise:

The statute will promote economy in land transactions by simplifying abstracts, reducing the cost of title insurance, and minimizing litigation. And there should be little damage to vested property interests, since the apprehension of buyers which induces lengthy searches is disproportionate to the actual existence of ancient adverse claims.<sup>88</sup>

The Wisconsin statute intends to bar all claims to an interest in real property asserted by one not in possession founded upon an instrument or event more than thirty years old, unless within such thirty-year period a notice of the claim has been placed on the record. However, actions to enforce recorded easements or restrictive covenants are not barred until a period of sixty years has elapsed since recordation of the instrument containing such encumbrance. Claims of the state, of remaindermen and reversioners, and of persons under a disability are all within the statute. An exception is made for real estate—the record title to

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<sup>85</sup> See Iowa Title Standard No. 10.1 which applies act to title transfers. See Note, 2 Drake L. Rev. 76 (1953).

<sup>86</sup> See *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 978, 299 N.W. 553, 555 (1941), which held that the interests of two contingent remaindermen were barred as a result of failure to record the required statutory notice, by July 4, 1932, despite the fact that on said date neither of them had attained their majority. The court stated, in support of its decision: "Nor are we concerned with the policy of the lawmakers in enacting this measure. We may observe, however, that there can be little doubt of the desirability of statutes giving greater effect and stability to record titles. We believe it our duty to enforce this statute as written." See also *Tesdell, Jr. v. Hanes*, — Iowa —, 82 N.W.2d 119 (1957), in which the Iowa Supreme Court held that plaintiff in an action for a declaratory judgment had a marketable title since there had been compliance with the provisions of the Iowa Marketable Title Act.

<sup>87</sup> Wis. Laws 1941, c. 293, now Wis. Stats. Ann. § 330.15 (1950); Minn. Laws 1943, c. 529, now Minn. Stats. Ann. § 541.023 (1945).

<sup>88</sup> 55 Harv. L. Rev. 886, 888 (1942). See also Tulane and Axley "Title to Real Property—Thirty-Year Limitation Statute," 1942 Wis. L. Rev. 258.

which is in the state—and for railroad or public service corporations. Furthermore, a notice recorded after the expiration of the thirty-year period is effective except as to the rights of a purchaser for value.<sup>89</sup> This provision evidences that the primary purpose of the act is to promote marketability of titles.

In Minnesota a claim against property in the possession of another is barred unless within forty years after the execution of the instrument or the occurrence of the event that gave rise to the claim a verified notice is filed in the office of the registrar of deeds. Failure to file results in a conclusive presumption of abandonment of the claim, and the title cannot be deemed unmarketable as a result thereof. If such notice relates to vested or contingent rights claimed under a condition subsequent or other type of restriction, the person filing it has the burden of showing why such interest has not become nominal. The statute excepts the interests of certain public, religious, and charitable corporations, and, of course, the rights of the federal government which, in any event, could not be adversely affected by it. No exception, however, is made for persons under any form of disability.

In one important respect this act has been criticized as failing to achieve its objective of limiting the period of title search.<sup>90</sup> By requiring a notice of an interest in real property to be *filed within forty years* after the instrument, event, or transaction by which it was created was executed or occurred, a prospective purchaser can no longer rely on the record of a title for the past forty years. For example, if the reversioner of a determinable fee files a notice of his interest immediately after the instrument has been recorded, a search of the records forty-nine years later by a prospective purchaser for all claims filed within the past forty years would not reveal it. It has been suggested that this defect can be remedied by requiring successive notices to be filed every forty years.

Until recently, it had been assumed<sup>91</sup> that the act barred all future and non-possessory interests, notice of which had not been filed and applied "to any right, claim, interest, encumbrance or lien,"<sup>92</sup> including future non-possessory interests. However, as a result of the opinion of the Supreme Court of Minnesota in *Wichelman v. Messner*,<sup>93</sup> this view no longer obtains; the court there indicated that the statute will, to some extent, be restrictively interpreted.

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<sup>89</sup> Originally the act protected bona fide purchasers and in response to criticism the statute was amended to protect all purchasers for value. See Tulane and Axley, *supra* note 88.

<sup>90</sup> Basye 279.

<sup>91</sup> Basye 276.

<sup>92</sup> Minn. Stats. Ann. § 541.023, Sub. 2 (1945).

<sup>93</sup> — Minn. —, 83 N.W.2d 800 (1957).

The *Messner* case arose out of the following facts: A parcel of property was granted in 1897 to a local school district on the condition that the premises be used as a schoolhouse "and that whenever such occupancy and use of the same shall cease and terminate said premises shall revert to said parties of the first part, their heirs and assigns." In 1946 the school was closed and in 1952 it was sold to the defendant. Plaintiff, an unsuccessful bidder for the property, solicited the interests of the heirs of the original grantor, which he acquired for nominal amounts, and then commenced the instant action to determine adverse claims to the property and to obtain possession thereof.

The defendants contended that by virtue of the failure of plaintiffs to file the notice required by the state marketable title act, their interest had been conclusively presumed abandoned. Plaintiffs replied that the act only protects a forty-year recorded title from adverse claims which arise from a separate instrument and has no applicability to adverse claims predicated upon the same recorded instrument. The court rejected this argument as contrary to the express language of the statute, the intent of the legislature, and the purpose of the statute in eliminating ancient claims which fetter marketability. Furthermore, it held that the "source of title"<sup>94</sup> to which the act refers and which it protects is fee simple ownership, absolute or defeasible, and that lesser interests cannot invoke its protection.<sup>95</sup>

In the course of its opinion, the court, in extensive dicta, comments on the entire scope and application of the act and reviews related decisions in other states. It gratuitously discusses the effect of the act on the following property interests:

1. Party-wall agreements and utility easements: These interests, it is stated, cannot be barred by the act since their owners will always be

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<sup>94</sup> Minn. Stats. Ann. § 541.023 (1945), sub-division 1 provides:

As against a claim of title based upon a source of title, which source has then been of record at least forty years, no action affecting the possession of title of any real estate shall be commenced by a person, partnership, corporation, state, or any political division thereof, after January 1, 1948, to enforce any right, claim, interest, incumbrance or lien founded upon any instrument, event or transaction which was executed or occurred more than forty years prior to the commencement of such action, unless within forty years after such execution or occurrence there has been recorded in the office of the register of deeds or filed in the office of the register of titles in the county in which the real estate affected is situated, a notice sworn to by the claimant or his agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance or lien is mature or immature. If such notice relates to vested or contingent rights claimed under a condition subsequent or restriction it shall affirmatively show why such condition or restriction is not, or has not become nominal so that it may be disregarded under the provisions of Minnesota Statutes 1945 Section 500.20, subdivision 1.

See 41 Minn. L. Rev. 232 (1957).

<sup>95</sup> — Minn. at —, 83 N.W.2d at 816.

in possession, and persons in possession are exempt from the requirement of filing notice. But what of an easement of which the owner is not in possession; should he not be required to file?

2. Mineral rights: The court is of the opinion that the reservation or conveyance of mineral lands, in which the mineral estate is severed from the surface estate, constitutes the creation of a separate and distinct fee simple, and that the owner in fee simple, whether of surface or sub-surface lands, does not have to file the statutory notice. This, however, assumes that the owner of the mineral estate is in possession, which may not always be the case. In addition to which, the mineral interest granted may be less than fee ownership. In both these situations the interested party should be required to file. Otherwise, a prospective purchaser would be justified in entertaining the usual presumption that the owner of the surface land is entitled to all mines beneath.<sup>96</sup>

3. Mortgages: The court states that recorded mortgages represented by a "current active relationship with the fee owner" are exempt from the requirement of filing. It takes the view that payment on the mortgage, when coupled with its terms, is "conclusive notice" of the mortgagee's living interest. If the court's view prevails, a prospective purchaser would be required to investigate the facts behind each mortgage recorded forty years ago or more to ascertain whether it is active or not. Marketability of titles would hardly be advanced by this interpretation of the statute.

4. Leases: Consistent with its view that "claim of title based upon a source of title" means fee simple ownership, the court holds that a lessee cannot invoke the protection of the act. But should not the interests of a long term lessee be protected by the statute?

5. Remainder Interests: Since a life estate does not constitute fee simple ownership, no claim of title can be based thereon and a reversioner or remainderman need not file a notice of such an interest as protection against the life tenant.

Despite the all-inclusive nature of the language used in the statute to bar property rights, notice of which has not been filed within 40 years, the Supreme Court of Minnesota has carved out of its purview the above interests which represent a considerable segment of the types of claims which clog titles. Mr. Justice Murphy concludes the opinion, on behalf of the court, with the following quotation in support of the decision:

"These statutes [marketable title acts] reflect the appraisal of state legislatures of the actual economic significance of these interests (rights of reentry and possibilities of reverter), weighed against the inconvenience

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<sup>96</sup> 58 C.J.S. § 132, at 211.

and expense caused by their continued existence for unlimited periods of time without regard to altered circumstances." *Trustees of School of Township No. 1. v. Batdorf*, 6 Ill. 2d 486, 492, 130 N.E.2d 111, 115; see 43 Ill. L. Rev. 90. They must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests. (at 825).

However, the court, in the course of its decision, repudiates the judgment of the Minnesota legislature, which, in enacting the marketable title act, has clearly indicated that it is to apply to *all* property rights. In place thereof, the court has substituted its conception of which economic interests are protected by it, thereby reducing the effectiveness of the act.<sup>97</sup>

After extensive study of the marketable title statutes of other jurisdictions,<sup>98</sup> Michigan in 1945 adopted an act which is significantly different from the Iowa, Wisconsin and Minnesota statutes discussed above and which has served as a model for similar enactments by South Dakota, North Dakota and Nebraska. To avoid any doubt as to its purpose, the legislature incorporated the following statement into the act:

This act shall be construed to effect the legislative purposes of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined herein, to rely on the record title covering a period of not more than 40 years prior to the date of such dealing and to that end to extinguish all claims that affect or may affect the interest thus dealt with. . . .<sup>99</sup>

Striking a new approach to the problem,<sup>100</sup> the act first defines marketable title as a 40-year unbroken chain of record title to property not in the hostile possession of another.<sup>101</sup> The owner of a marketable title shall hold such land free and clear of any and all interests which occurred prior to a 40-year period, unless a verified notice is filed by the claimant of such an interest within such period.<sup>102</sup> No disability suspends the running of the 40-year period, and provision is made for the filing of such notice by another person on behalf of someone who, for reasons set forth in the statute, is unable to file the notice.<sup>103</sup> A number of interests are excepted specifically from the operation of the statute, the most significant of which are the lessor's reversionary interest and the interest of a mortgagee under an instrument not due.<sup>104</sup>

<sup>97</sup> The Ind., Iowa, Mich., and Wis. statutes all bar interests of remaindermen. See note 82 *supra*; 1947 Wis. L. Rev. 681.

<sup>98</sup> See Aigler, "Clearance of Land Titles—A Statutory Step," 44 Mich. L. Rev. 45 (1945).

<sup>99</sup> Mich. Stat. Ann. § 26.1276 (1953).

<sup>100</sup> See discussion p. 654 *infra*, concerning this definition of marketable title.

<sup>101</sup> Mich. Stat. Ann. §§ 26.1271-72 (1953).

<sup>102</sup> *Id.* § 26.1273.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Id.* § 26.1274.

Contrary to the Wisconsin statute, which only protects purchasers, the Michigan statute applies to any owner of a record title for forty years. By its express language the statute applies to all interests;<sup>105</sup> however, we have already seen<sup>106</sup> that such language may be restrictively interpreted by the courts so as to narrow its scope. To date, no judicial decision has applied the statute. But a title standard adopted by the Michigan State Bar Association<sup>107</sup> so interprets the act that any interest which appears in the record chain of title is not barred by the failure to file a notice thereof.<sup>108</sup> This reduces the scope of claims affected by the statute and, in effect, perpetuates such interests as possibilities of reverter and rights of re-entry. It remains to be seen whether the Michigan courts will adopt this interpretation and whittle away at the inclusive language used in the statute.<sup>109</sup>

A third form of statute which endeavors to promote marketability through a temporal limitation of interests in property has been adopted in Indiana<sup>110</sup> and Illinois.<sup>111</sup> The Illinois act automatically extinguishes possibilities of reverter and rights of re-entry after fifty years and makes no provision which permits continuance of such interests by filing of a notice.<sup>112</sup> The Indiana statute bars the claims of all interests in real property upon which neither a suit has been commenced nor a notice filed within fifty years. Filing of the required notice merely extends the time for the commencement of an action to enforce such claim for one year. By requiring litigation where no cause of action may exist, and by not permitting the preservation of an interest in real estate beyond the stated period, the Indiana act may be constitutionally defective.<sup>113</sup>

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<sup>105</sup> Prof. Aigler, who assisted in the drafting of the statute, has expressed the view that the act extends "to any interest in land" and is not meant to be confined solely to fee ownership. See Aigler, *supra* note 98, at 48.

<sup>106</sup> See discussion in text, *Wichelman v. Messner*, p. 630 *supra*.

<sup>107</sup> Title Standard 1.7, 35 Mich. St. B.J. 27 (1956).

<sup>108</sup> Cf. *Wichelman v. Messner*, *supra* note 93, which comes to a contrary result based on a similar statute.

<sup>109</sup> It is rather difficult to appreciate how this could be rationalized in view of the statutory admonition that "The claims hereby extinguished shall mean any and all interests of any nature whatever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental." Mich. Stat. Ann. § 26.1276 (1953).

<sup>110</sup> Ind. Stat. Ann. §§ 2.628-637 (Burns 1946).

<sup>111</sup> Ill. Ann. Stat. c. 30, §§ 37b-37l (Smith-Hurd 1942). See also *id.* c. 83, § 10-a for the Illinois version of the more standard limitation type of marketable title act providing that claims to real property more than 75 years old shall not constitute notice nor be admitted into evidence. Any claim can be preserved for 10 years by filing within 3 years of the 75-year period a notice thereof. The permitted length of time and the many exceptions set forth in the statute severely limit its effectiveness.

<sup>112</sup> The act has been declared constitutional in *Trustees of Schools of Township No. 1, Batdorf*, 6 Ill. 2d 486, 130 N.E.2d 111 (1950).

<sup>113</sup> See *Girard Trust Co. v. Penn. R. Co.*, 71 Pa. D. & C. 533 (1950) and discussion p. 636 *infra*.

Certainly, no valid purpose is served by requiring that a suit be commenced in addition to filing of a notice.<sup>114</sup>

Although the United States Supreme Court has not spoken as to the constitutionality of any of the marketable title acts discussed above, the Minnesota act has been declared constitutional by the Supreme Court of that state,<sup>115</sup> the Supreme Court of Iowa has assumed the validity of its statute,<sup>116</sup> and the Michigan statute was considered, in a scholarly review of the problem, not to have violated any constitutional prohibitions.<sup>117</sup>

Enactment of marketable title statutes, as these acts are known, can only be constitutionally justified as an exercise of the police power of the state. That such power extends to the control of titles to land cannot seriously be questioned. The United States Supreme Court, speaking by Mr. Chief Justice White, has said:<sup>118</sup>

As it is indisputable that the general welfare of society is involved in the security of titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects is in the very nature of government. (at 59).

Marketable title statutes have won the enthusiasm and praise of most commentators as a means of simplifying title transactions and promoting the greater alienability of land.<sup>119</sup> Consequently, such legislation is reasonably related to its worthwhile aims and must be considered a legitimate exercise of the police power.<sup>120</sup>

The two primary reasons advanced against the validity of such statutes are that they deprive one of property without due process of law and impair the obligation of contract. On general principles, neither argument has merit. However, any specific statute may be drafted so poorly as to impinge on a constitutional guarantee. Under the Iowa, Minnesota or Michigan statutes, or their counterparts in other states, no one need forfeit any property interest, provided he is sufficiently alert to the requirement of these statutes that he file a notice of such interest. Failure to file, may have consequences similar to a failure to record an

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<sup>114</sup> Basye 269. Also see 27 Ind. L.J. 101 (1951) in which the author suggests four different constructions of the statute in an effort to determine the purpose of requiring the commencement of an action and rejects all four interpretations as senseless.

<sup>115</sup> *Wichelman v. Messner*, — Minn. —, 83 N.W.2d 800 (1957).

<sup>116</sup> *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941); see also *Lytile v. Gulliams*, 241 Iowa 523, 41 N.W.2d 668 (1950); *Swanson v. Pontralo*, 238 Iowa 693, 27 N.W.2d 21 (1947).

<sup>117</sup> Aigler, "Constitutionality of Marketable Title Acts," 50 Mich. L. Rev. 185 (1951).

<sup>118</sup> *American Land Co. v. Zeiss*, 219 U.S. 47 (1911).

<sup>119</sup> Aigler, *supra* note 98; Leahy, "The North Dakota Marketable Record Title Act," 29 N. Dak. L. Rev. 265 (1953); 55 Harv. L. Rev. 886 (1942); 1947 Wis. L. Rev. 681.

<sup>120</sup> See *Breard v. Alexandria*, 341 U.S. 622, 640 (1950).

instrument under the recording acts in effect in all states—in both instances property rights can be lost. Yet, the constitutionality of the recording acts is not questioned. Furthermore, by requiring the filing of such notice no contractual right is impaired. The state has traditionally had the power to prescribe the time and manner in which rights may be enforced, provided a reasonable time is allowed to assert such rights before they are extinguished.<sup>121</sup>

Three fairly recent decisions issued by the highest courts of Kansas,<sup>122</sup> Pennsylvania,<sup>123</sup> and Florida,<sup>124</sup> holding as unconstitutional statutes which limit an interest in real property, should not be interpreted as a judicial indictment of all marketable title acts. In all three cases the offending statute contained the same evil of requiring commencement of an action in order to preserve the property interest otherwise terminated by law, despite the fact that no cause of action may yet have accrued. The Pennsylvania court found the statute of that state<sup>125</sup> objectionable because it required “. . . parties to institute an action where no controversy exists. . . .”<sup>126</sup> The Kansas court characterized the statute before it<sup>127</sup> as the conversion of an estate in possession to a mere right of action. Florida’s Supreme Court held unconstitutional a state statute<sup>128</sup> abolishing possibilities of reverter after twenty-one years as impairing the obligation of contracts.

The constitutionality of marketable title statutes will not be sustained if the courts adopt a vested rights theory of property which views such rights as absolutes untempered by social needs. A more fruitful analysis of the validity of such statutes would assess the relative importance of the following elements: (1) gravity of the evil to be corrected; (2) effectiveness of the corrective measures adopted; (3) extent of the loss resulting from adopted measures; and (4) availability of alternate

<sup>121</sup> *Turner v. New York*, 168 U.S. 90 (1897).

<sup>122</sup> *Murrison v. Fenstermacher*, 166 Kan. 568, 203 P.2d 160 (1949).

<sup>123</sup> *Girard Trust Company v. Pennsylvania R. Co.*, 364 Pa. 576, 73 A.2d 371 (1950).

<sup>124</sup> *Biltmore Village, Inc. v. Royal*, 71 So. 2d 727 (Fla. 1954); but cf., *Trustees of Schools of Township No. 1 v. Batdorf*, 6 Ill. 2d 486, 130 N.E.2d 111 (1950), which held a similar statute to be constitutional.

<sup>125</sup> Pa. P.L. 1692 (1949), Pa. Stat. Ann. tit. 68, §§ 451-57 (Supp. 1956). Section 451, which sought to quiet title to realty and facilitate alienation thereof by creating a presumption of payment, satisfaction or release of any claim for money charged against realty for a period of 50 years, except if an action or proceeding has been instituted for the collection thereof.

<sup>126</sup> *Girard Trust Co. v. Penn. R. Co.*, 71 Pa. D. & C. 533, 545, aff’d, 364 Pa. 576, 73 A.2d 371 (1950).

<sup>127</sup> Kans. Gen. Stat. §§ 67-612 (Supp. 1947), which provides that certain deeds recorded for more than 25 years prior to the effective date of the act shall be conclusively presumed to have conveyed perfect title, unless an action is brought within one year from such date.

<sup>128</sup> Fla. Laws c. 26927 (1951), which cancels all possibilities of reverter in deeds in effect for more than 21 years, except that the holder of such a reverter is given one year in which to assert his rights by commencement of suit.

methods of correction.<sup>129</sup> Constitutionality would thereby be determined by operative factors rather than *a priori* reasoning.

There is no law or reason peculiar to New York which should prevent the legislature from adopting a marketable title act once it is agreed upon its wisdom. Enactment of statutes of limitation has long been recognized in this state as not violative of any constitutional guarantee. As expressed by the Court of Appeals:

. . . such a statute (of limitations) will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right.<sup>130</sup>

The legislature and courts of New York have garnered considerable experience with statutes of limitation affecting tax sale deeds which suggest similar constitutional problems to those raised by marketable title acts. Section 132<sup>131</sup> of the Tax Law provides that every conveyance executed by the Comptroller and others, pursuant to a tax sale and recorded for two years, shall be conclusive evidence of the regularity of such sale; the conveyance may be subject to cancellation for certain specified causes, pursuant to an action brought within five years from the date fixed for redemption. Although the first portion of the statute is couched in terms of a curative act,<sup>132</sup> the latter part has been interpreted and applied as a statute of limitation,<sup>133</sup> and its constitutional validity has not been denied.

Whether marketable title statutes will fully justify the tremendous optimism for the reform some of their proponents have predicted<sup>134</sup> is ques-

<sup>129</sup> See Note, 55 Colum. L. Rev. 235 (1955); *Wichelman v. Messner*, supra note 115, at 811.

<sup>130</sup> *Meigs v. Roberts*, 162 N.Y. 371, 378, 56 N.E. 838, 840 (1900).

<sup>131</sup> This section is originally derived from the Laws of 1885, c. 448, as amended by Laws of 1891, c. 217.

<sup>132</sup> The distinction between a curative act and a statute of limitations is made by Chief Judge Cullen in *Meigs v. Roberts*, 162 N.Y. 371, 56 N.E. 838 (1900): one is enacted to cure past irregularities which are not jurisdictional and the other to extinguish substantial rights by barring an action thereon.

<sup>133</sup> *Dunkum v. Maceck Building Corp.*, 256 N.Y. 275, 176 N.E. 392 (1931); *Halstead v. Selberstein*, 196 N.Y. 1, 89 N.E. 443 (1909); *Meigs v. Roberts*, supra note 132; *Matter of Kantor*, 280 App. Div. 605, 117 N.Y.S.2d 110 (2d Dep't 1952); *Doud v. Huntington Hebrew Congregation*, 178 App. Div. 748, 165 N.Y. Supp. 908 (2d Dep't 1917). But cf. *Cameron Estates v. Deering*, 308 N.Y. 24, 123 N.E.2d 621 (1954); *People v. Faxon*, 111 Misc. 699, 182 N.Y. Supp. 242 (Sup. Ct. Saratoga County 1920). In the *Deering* case the six-year conclusive presumption of validity of recorded tax deeds contained in the Suffolk County Tax Act was at issue. The court, in holding this section of the statute as inapplicable to void deeds, characterizes it as a curative act rather than a statute of limitation. Unfortunately, the opinion is not clear as to the court's reasons for its decision in this regard. The dissent by Judge Desmond views the act as a statute of limitations and, therefore, holds that the action is barred regardless of whether or not the deed was originally void or voidable. However, he too fails to state why, in his opinion, the act limits actions rather than cures defects. In the event that the majority intended its opinion to apply to a statute of limitations, then it would be inconsistent with the cases cited in this note and might obviate the value of any marketable title act in the state.

<sup>134</sup> E.g., *Basye* 274; see note 118 supra.

tionable. The property interests excepted from the purview of these statutes, although few in number, prevent the title examiner from searching the records for only the limited period of time set forth in the statute.<sup>135</sup> The length of time during which a title will be examined, in the final analysis, will be determined by the longest period during which any valid claim can exist. Furthermore, some critics of the existing system, although regarding such statutes as ". . . a step in the right direction . . ." fundamentally consider them as unsatisfactory compromises. More extensive and far-reaching reform is advocated in which all non-possessory interests are individually considered, and either abolished or severely limited in order to prevent their clogging land records.<sup>136</sup>

A marketable title statute may not be the panacea for our conveyancing ills; however, by eliminating stale claims it can do much to reduce the number of outstanding defects in a record title. The advantages resulting to the public therefrom in accelerating the alienability of land and reducing the number of actions to quiet title outweigh by far the desirability of permitting claimants to sit unrestrictedly on their rights. Indeed, in our modern world which requires decisiveness in human conduct, there is no reason to indulge those who act otherwise. Passage of such a statute in New York can only help improve the efficacy of our conveyancing system.

### III.

#### CURATIVE STATUTES

No form of human endeavor is free from the possibility of error. And conveyancing with its attendant formalities and niceties provides excellent opportunity for many irregularities, omissions, and defects to occur. Although in recent times, most instruments transferring real property have been prepared by attorneys rather than grantors, notaries, or public officials, thus raising the general quality of such instruments, the volume of land transactions is so enormous that errors inevitably result.

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<sup>135</sup> See Aigler, *supra* note 98, at 54. Ralph Jossman of the Committee on Titles of the Michigan Bar Association, in a letter dated December 10, 1957, addressed to the writer, states that the Michigan State Bar Association has declined to adopt a title standard approving the use of a forty-year abstract for this reason.

<sup>136</sup> Payne, "The Crisis in Conveyancing," 19 *Mo. L. Rev.* 214 (1954). In Prof. Payne's view, the Michigan statute is "an oversimplified attack on an inherently complicated problem," *id.* at 224, and he suggests that the variety of property interests must each be treated in a different manner, e.g., liens, limited to a short period of years, mortgages limited to a twenty-year period with provision for re-recording thereafter, future interests should all be placed in trust or abolished, and co-ownership of property should be eliminated. Though Prof. Payne's ideas are so radical that the "cure" may seem worse than the "disease," it is well to remember that other societies have prevented the development of such property interests because of their adverse affect on land alienability. In France, for instance, future interests are not recognized for this reason. See Max Rheinstein, "Some Fundamental Differences in Real Property Ideas of the 'Civil Law' and the Common Law Systems," 3 *U. Chi. L. Rev.* 624 (1936).

The possible consequences of a defective conveyance are manifold; it may be: (1) invalid between the parties; (2) incompetent to be recorded; (3) inadequate to constitute constructive notice; (4) inadmissible in evidence; and (5) ineffective to provide marketable title.<sup>137</sup>

A carelessly drawn deed, therefore, can provoke litigation, result in the loss of money, or impede the alienability of land. The grantee who accepts such a deed traditionally has two remedies available to him. He can request a corrected deed from the grantor or he can petition a court of equity for relief. The first alternative has its obvious limitations in that the grantor may be deceased or unwilling to issue a corrective deed. The second alternative is costly, time consuming, and without assurance of success. The need for an effective and inexpensive method of curing otherwise valid titles of minor defects and irregularities has, consequently, prompted the rise of a special form of legislation known as curative or validating statutes. These statutes so contribute to the efficient operation of a conveyancing system that any system which lacks such legislation must be considered incomplete.

A curative statute is defined as:

. . . one whose purpose is to cure past errors, omissions, and neglects . . . [and] is . . . intended to give legal effect to a past act ineffective because of non-compliance with legal requirements.<sup>138</sup>

The great virtue of curative legislation is that it imparts legality and efficacy to a legal act according to the intent of the parties without the necessity of judicial intervention. Its social value is so appealing that some form of curative legislation can be found in every state<sup>139</sup> and the courts have encouraged their enactment.<sup>140</sup>

Frequently, these statutes have been attacked as legislation which is *ex post facto*, impairs the obligation of contracts, or deprives one of vested property rights. The United States Supreme Court, early in its judicial life, rejected the triad of this argument in *Watson v. Mercer*.<sup>141</sup> Plaintiff therein had instituted an action of ejectment to recover land acquired by descent from James Mercer and his wife, Margaret. The defendants were the remote grantees of said James and Margaret Mercer through one named Thompson who was their immediate grantor. The deed from James and Margaret Mercer to Thompson, dated May 8, 1785, was not acknowledged by Margaret according to the law of Pennsylvania then in effect for the conveyancing of real estate by *femes covert*.

<sup>137</sup> Basye 294.

<sup>138</sup> 16A C.J.S. § 421 at 124.

<sup>139</sup> 3 American Law of Property § 12.84 (Casner ed. 1952).

<sup>140</sup> E.g., see *Bennett v. Fisher*, 26 Iowa 497, 501 (1868).

<sup>141</sup> 33 U.S. (8 Pet.) 88 (1834).

However, in 1826, Pennsylvania enacted a statute, the object of which was to cure all defective acknowledgments of this sort and impart to them the same effect as if they had originally been taken in the proper form. Mr. Justice Story delivered the unanimous opinion of the court which sustained title in the defendants and held that:

. . . [I]t is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective law generally; but only *ex post facto* laws. Now, it has been solemnly settled by this court that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws . . . .

In the next place, does the Act of 1826 violate the obligation of any contract? In our judgment it certainly does not, either in its terms or its principles. . . . So far, then, as it has any legal operation it goes to confirm, and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. . . .<sup>142</sup>

The Court did not and, at that time, could not have concerned itself with the question of whether the statute violated the constitution of the State of Pennsylvania. However, after the enactment of the fourteenth amendment in 1868, the proponents of the vested rights theory no longer had to rely solely on natural law in opposing curative legislation,<sup>143</sup> and sought support from the due process clause contained in that amendment. But most courts rejected this argument, substantially adopting the attitude of the New Jersey court, which stated:

But laws curing defects, which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case.<sup>144</sup>

Therefore, curative statutes have, in general, been held constitutional<sup>145</sup> provided there has been no interference with the rights of innocent third parties that have accrued in the interim between the occurrence of the defect and the date of the enactment of the statute. As between the parties to the instrument, such a statute will always validate the defect *ab initio*; but as to third parties, there is a constitutional requirement that the statute must operate only from the passage of the act.<sup>146</sup>

<sup>142</sup> *Id.* at 110-11.

<sup>143</sup> *Russell v. Rumsey*, 35 Ill. 362 (1864).

<sup>144</sup> *Elmer, J.*, in *State v. City of Newark*, 27 N.J.L. 185, 197 (1858).

<sup>145</sup> See 57 A.L.R. 1197 (1928) (Constitutionality of Curative Acts).

<sup>146</sup> E.g., *Hill v. Yarborough*, 62 Ark. 320, 35 S.W. 433 (1896); *Snortum v. Snortum*, 155 Minn. 230, 193 N.W. 304 (1923).

The general limitation upon legislative power to enact curative or validating legislation has been accurately expressed as follows:

If the thing wanting or which failed to be done, and which constitutes the defect in the proceeding is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.<sup>147</sup>

Furthermore, the legislature cannot by a curative act make a void deed valid or transfer property from one person to another where the defect is so material that no title was initially conveyed.<sup>148</sup>

Irregularities that may be cured by statute are numerous, and the legislation which has been enacted by the states is diverse.<sup>149</sup> The primary types of defects cured include those in instruments which are improperly executed, lack a seal, or are improperly attested or inadequately acknowledged. Statutes of some states such as California are very broad and cure "any defect, omission or informality" in an instrument affecting title to property and relating to its execution, certificate of acknowledgment or absence of such a certificate.<sup>150</sup> In comparison, other states have adopted statutes which cure a very limited class of defects. For instance, the statute in force in Arkansas only validates deeds containing acknowledgments which are defective as a result of eight specific situations.<sup>151</sup> In Missouri the statute<sup>152</sup> operates retrospectively so that the only defectively acknowledged deeds validated are those which had been recorded one year previous to 1939, the date the law was adopted.<sup>153</sup> Such a statute has to be re-enacted periodically to advance the date of instruments within its purview. In other states these statutes operate prospectively and only instruments recorded after the enactment of the statute are affected.<sup>154</sup>

<sup>147</sup> 2 Cooley, Constitutional Limitations 775-76 (8th ed. 1927).

<sup>148</sup> See *Wallace v. McEchron*, 176 N.Y. 424, 429, 68 N.E. 663, 665 (1903); *Ostrander v. Bell*, 199 App. Div. 304, 192 N.Y. Supp. 262 (3d Dep't 1921).

<sup>149</sup> For a complete discussion of various defects cured by different state enactments see *Basye* §§ 231-364 at 336-537.

<sup>150</sup> Cal. Civ. Code § 1207 (Deering 1949). However, this broad statutory language has been restricted by judicial interpretation. See *McCroskey v. Ladd*, 28 Pac. 216 (Cal. 1891), in which a deed from a corporation failed to recite the authority of the directors to convey the property and lacked a seal. These defects the court held were not cured by this statute and, consequently, plaintiff's title was rendered unmarketable.

<sup>151</sup> Ark. Stats. Ann. § 49.213 (1947).

<sup>152</sup> Mo. Ann. Stat. § 490.340 (1949).

<sup>153</sup> *Hatcher v. Hall*, 292 S.W.2d 619 (Mo. 1956), held, in conformity with previous Missouri decisions, that this statute is one of repose and only applies to deeds recorded one year prior to its last enactment. To date the statute has been reenacted six times: 1939 § 1845; 1929 § 1681; 1919 § 5368; 1909 § 6313; 1899 § 3118; 1889 § 4864.

<sup>154</sup> E.g., see *Jackson v. Hudspeth*, 208 Ark. 55, 57, 184 S.W.2d 906, 908 (1945).

Another basis of difference between various curative statutes is the requisite length of time an instrument must be recorded before the statute is operative. In Michigan the statute validates the defective instrument immediately upon recordation.<sup>155</sup> But in Ohio a deed defective by virtue of certain statutory reasons is not cured until recorded for more than twenty-one years.<sup>156</sup>

The extent of the cure provided by such statutes is a further point of variance. The act of Illinois imparts to a recorded deed containing a defective attestation or acknowledgment clause constructive notice only to subsequent purchasers and creditors, as if no defect existed; but such deed cannot be read into evidence unless the defects of the acknowledgment are proven according to the rules of evidence.<sup>157</sup> Colorado's statute provides that defectively acknowledged instruments recorded for twenty years are acceptable as prima facie evidence of their contents.<sup>158</sup> The operative language of the curative statutes of most states, however, validates the instrument bearing the defect without mention of the question of evidence.<sup>159</sup>

The foregoing brief survey of curative acts indicates what can be accomplished by such legislation and helps establish the following basic desiderata by which the value of a particular curative statute should be measured:

1. Validation of all formal defects and omissions.
2. Qualification of the instrument for recordation, making it effective to give notice to third parties and admissible in evidence.
3. Protection of the rights of third parties who have acquired an interest for value prior to the date the defect is cured.
4. Effectuation of such cure immediately or within a reasonably short time.

Let us examine the relevant New York curative statutes in light of these standards, to determine their sufficiency. The statutes in question are the following two sections of the New York Real Property Law:<sup>160</sup>

§ 306 Certificate of acknowledgment or proof:

A person taking the acknowledgment or proof of a conveyance must indorse thereupon or attach thereto, a certificate, signed by himself, stating all the matters required to be done, known or proved on the taking of

<sup>155</sup> Mich. Stat. Ann. § 26.824 (1953). This statute, however, only affects conveyances made in good faith and upon a valuable consideration.

<sup>156</sup> Ohio Rev. Code § 5301.07 (Page 1953).

<sup>157</sup> Ill. Ann. Stat. c. 30, § 30 (Smith-Hurd 1934).

<sup>158</sup> Colo. Rev. Stat. §§ 118-6.2, 118-6.6, 118-6.7 (1953).

<sup>159</sup> E.g., Md. Ann. Code art. 21, §§ 96-100 (1957); Ind. Stat. Ann. § 15.130e (Burns 1950).

<sup>160</sup> Defects in notarization of all instruments are cured by Uncon. Laws of N.Y. § 7001 (1949).

such acknowledgment or proof; together with the name and substance of the testimony of each witness examined before him, and if a subscribing witness, his place of residence.

Any conveyance which has heretofore been recorded, or which may hereafter be recorded, shall be deemed to have been duly acknowledged or proved and properly authenticated, when fifteen years have elapsed since such recording; saving, however, the rights of every purchaser in good faith and for a valuable consideration deriving title from the same vendor or grantor, his heirs or devisees, to the same property or any portion thereof, whose conveyance shall have been duly recorded before the said period of fifteen years shall have elapsed. (As amended L. 1954, c. 210, § 1, eff. Sept. 1, 1954.)

§ 332 The record of certain conveyances validated:

1. The record made prior to July first, nineteen hundred fifty-five in the office of the recording officer of any county in this state of any deed, mortgage, assignment or satisfaction piece of a mortgage, or other conveyance or power of attorney, otherwise authorized to be recorded therein, notwithstanding that the certificate of acknowledgment or proof did not set forth the place of residence of a subscribing witness or of a corporate officer or director, or did not set it forth with sufficient particularity, and notwithstanding any other defect in the form of the certificate of acknowledgment or proof or the failure to append thereto a certificate as to the authority of the person who took the acknowledgment or proof, to take the same, or any defect in the form of such certificate of authority, shall be in all respects as valid and effectual as though such certificate of acknowledgment or proof or certificate of authority had been in proper form or such certificate of authority had been appended to such instrument. Provided only that such person was duly authorized at the time of taking the proof or acknowledgment to take the same in the county where the instrument is recorded or in the place, whether within or without the United States, where the same was taken.

2. All acknowledgments or proofs of conveyance of real property made or taken prior to April tenth, nineteen hundred thirty, before a judge, clerk, deputy clerk or special deputy clerk if a court not of record of this state are confirmed.

3. All acts of the secretary of state of any state or territory of the United States in authenticating a certificate of acknowledgment or proof of a conveyance of real property within the state, performed before October first, nineteen hundred twenty-five, are hereby confirmed, provided that the said certificate of authentication is in the form required by the laws of this state on March twenty-third, nineteen hundred twenty-six or now required by law.

4. If an instrument is recorded hereafter notwithstanding the omission from the certificate of acknowledgment or proof of the street and street number of a subscribing witness or of a corporate officer or director contrary to the provisions of section three hundred four and three hundred nine of this chapter, the record of such instrument shall not be invalidated by reason of such omission nor shall the title founded on such instrument be impaired thereby.

5. Nothing in this section shall effect any pending action or proceeding nor the rights of any purchaser in good faith and for a valuable considera-

tion whose conveyance shall have been duly recorded before this section as amended shall take effect. (As amended L. 1955, c. 593, § 3, eff. July 1, 1955.)

It is apparent, therefore, that the only formal defects cured by the New York statutes relate to acknowledgments and certificates of acknowledgment and authentication. Is the first criterion of the posited standards, that a curative act validate all formal defects, then satisfied? Perhaps on first impression it would appear so, since under New York law the only formal requirement for recording a conveyance is that it be duly acknowledged or proved and be accompanied by a certificate thereof.<sup>161</sup> No form of certificate for an individual acknowledgment is demanded; the sole statutory requisite of such acknowledgment is that it must have been made before an officer who knows, or has satisfactory evidence, that the person making the acknowledgment is the person who executed the instrument and is described in it.<sup>162</sup> However, the statute does prescribe a required form of certificate for a corporate acknowledgment.<sup>163</sup>

Investigation of title records discloses many other defects which have been cured under legislation in sister states, but in many instances the substantive law of New York is such that there is no need for similar curative legislation here. For instance, statutes that validate instruments which lack a seal,<sup>164</sup> or are unattested,<sup>165</sup> or employ unconventional words of conveyance,<sup>166</sup> need not concern us since an instrument in New York must neither be sealed<sup>167</sup> nor attested<sup>168</sup> to be effective; nor are any special words of art necessary to convey property.<sup>169</sup> The abolition of dower and curtesy in New York for property acquired by married persons after 1930<sup>170</sup> has substantially eliminated the need for curative legislation on that question.

In certain specific circumstances in New York, in order for a conveyance to be acceptable for recordation, it is necessary that the place of residence of the purchaser be recited therein.<sup>171</sup> But the statute requiring this provides that if a recorded conveyance does not comply, such conveyance is not affected by the noncompliance, nor is the title founded on

<sup>161</sup> N.Y. Real Prop. Law § 291.

<sup>162</sup> *Id.* § 303.

<sup>163</sup> *Id.* § 309.

<sup>164</sup> E.g., Neb. Rev. Stat. § 76.213 (1943).

<sup>165</sup> E.g., Wyo. Com. Stat. § 66.302 (1945).

<sup>166</sup> E.g., Del. Code Ann. tit. 25, § 131 (1953).

<sup>167</sup> *Heburn v. Reynolds*, 73 Misc. 73, 132 N.Y. Supp. 460 (County Ct. Oneida County 1911); N.Y. Real Prop. Law §§ 242-43.

<sup>168</sup> *The Commissioners of the U.S. Deposit Fund v. Chase*, 6 Barb. 37 (N.Y. 1849).

<sup>169</sup> *Turner v. May*, 202 Misc. 320, 117 N.Y.S.2d 778 (Sup. Ct. Columbia County 1952); N.Y. Real Prop. Law §§ 240(3), 258.

<sup>170</sup> N.Y. Real Prop. Law § 190; see *Matter of Smith*, 202 Misc. 64, 107 N.Y.S.2d 993 (Surr. Ct. Broome County 1951).

<sup>171</sup> N.Y. Real Prop. Law § 333.

such a conveyance impaired.<sup>172</sup> The impact of this section, then, is to impose a ministerial duty upon the registrar of titles, which duty is such that there is no adverse effect on the titles recorded if it is not performed.

However, there are defects appearing in recorded instruments in New York which are not eliminated by the existing New York curative statutes. Sections 306 and 332 of the Real Property Law apply solely to "conveyances." Consequently, these sections do not validate acknowledgments contained in executory contracts and powers of attorney since the statutory definition of "conveyances" excludes such instruments.<sup>173</sup> Since these instruments are required to be acknowledged or proved in a manner similar to a deed, a defective acknowledgment, though not affecting the validity of the instrument between the immediate parties, would render it invalid as to third persons without notice.<sup>174</sup> This might operate to the serious disadvantage of a contract vendee. However, a deed executed pursuant to a defectively acknowledged, but recorded, power of attorney would not necessarily be invalid, since the recorded power, albeit defective, would still be some proof of the authority of the persons executing the instrument.

Another problem in conveyancing which often arises with respect to powers of attorney and which adversely affects marketability is the defective exercise of the power by its donee who acts personally, failing to indicate that he is acting for the donor of the power.<sup>175</sup> Virginia, for example, has adopted a curative act which makes such a conveyance valid as an act performed on behalf of the donor.<sup>176</sup>

Since conveyances by corporations are subject to many rules of law,<sup>177</sup> there is great opportunity for numerous defects to appear of record. A corporate deed may be irregular for a variety of reasons, including: failure to affix the corporate seal, lack of authority in the person executing the instrument, defect in corporate existence, and conveyancing constituting an ultra vires act.<sup>178</sup> The legislatures of various states have been concerned with many of these problems and numerous curative statutes have been enacted.<sup>179</sup> In New York, however, the problem has been

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<sup>172</sup> *Ibid.*

<sup>173</sup> *Id.* § 290(3).

<sup>174</sup> See *Spraker v. Spraker*, 152 Misc. 867, 870, 274 N.Y. Supp. 454, 457 (Sup. Ct. Herkimer County 1933).

<sup>175</sup> Patton, Land Titles §§ 408-10 (1957).

<sup>176</sup> Va. Code Ann. § 55-23 (1950); see also Ohio Rev. Code Ann. § 1337.03 (Page 1954); Pa. Stat. Ann. tit. 21, § 303 (1955).

<sup>177</sup> E.g., see N.Y. Stock Corp. Law § 20; N.Y. Gen. Corp. Law §§ 50-53.

<sup>178</sup> See *Basye* 427-63, at §§ 291-301 for an extended discussion of this problem.

<sup>179</sup> E.g., conveyance by a dissolved corporation: Ark. Stat. § 50-426 (1947); Cal. Corp. Code § 5403 (1953); corporate conveyances prior to incorporation validated: Colo. Rev. Stat. Ann. c. 118-8-6 (1953); authority to execute conveyance conferred retroactively: Fla. Stat. Ann. § 692.02 (1944); deeds lacking corporate seal validated: Iowa Code Ann. § 589.6

virtually ignored.<sup>180</sup>

Many other defects, which affect recorded instruments in this state, could be cured by legislation, such as conveyances by infants, incompetents, partnerships and fiduciaries, defects in description and in judicial proceedings, and errors in recordation.<sup>181</sup>

The foregoing discussion is intended to demonstrate that a curative act which focuses solely on irregularities with respect to acknowledgments is at best incomplete. Aware that title security and marketability can be greatly advanced by use of curative legislation to its fullest potential, many states have abandoned legislation which validates specific defects and have enacted general statutes which apply to all irregularities constitutionally capable of being corrected by law.<sup>182</sup>

We now turn to the second criterion of desirable curative legislation: all defects cured should be effective to give record notice to third parties and be admissible in evidence. Though the recording law of New York declares that every conveyance not recorded is void as against all subsequent purchasers,<sup>183</sup> it makes no specific mention of notice to such persons. "But the courts, by construction, make the record of a conveyance, notice to subsequent purchasers; but this doctrine is subject to the limitation, that it is notice only, to those claiming under the same grantor, or through one who is the common source of title."<sup>184</sup> Once an instrument is properly recorded it, therefore, constitutes constructive notice. A defective instrument, although recorded, would not impart such notice unless the defect were cured by statute.<sup>185</sup> To the extent that New York acts validate irregular acknowledgments, such acknowledgments and the instruments to which they attach provide constructive notice to third parties.

Under the New York Civil Practice Act,<sup>186</sup> a conveyance duly recorded or entitled to be recorded is admissible in evidence. A recorded instrument bearing an acknowledgment validated by statute would, therefore, be considered as duly recorded and admitted into evidence. Such in-

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(1946); N.C. Gen. Stat. §§ 55-158 (1950); deeds of corporations defectively formed validated: Me. Rev. Stat. Ann. c. 168, § 41 (1954); Md. Ann. Code art. 23, § 124 (1957); corporate deed executed as individual deed validated: Pa. Stat. Ann. tit. 15, §§ 685, 687 (1938).

<sup>180</sup> But see N.Y. Gen. Corp. Law § 14(2)—seal on instrument creates a presumption that instrument authoritatively executed.

<sup>181</sup> See *Basye* 336-537, §§ 231-364.

<sup>182</sup> E.g., Iowa Code Ann. §§ 589.2-4 (1946); Mont. Rev. Codes Ann. §§ 39-133 (1947); Wis. Stat. Ann. § 235.20 (1955).

<sup>183</sup> N.Y. Real Prop. Law § 291.

<sup>184</sup> *Andrews, J. in Tarbell v. West*, 86 N.Y. 280, 288 (1881).

<sup>185</sup> *Basye* 359.

<sup>186</sup> Section 384(1)(2); § 386 applies the same rule to other instruments which are not considered conveyances, such as an executory contract for the sale of land or a power of attorney.

struments, however, do not have the benefit of weighted evidence.<sup>187</sup> For example, in Delaware the statute curing defective acknowledgments provides that such evidence shall be conclusive of the truth of the contents,<sup>188</sup> the Alabama statute expressly provides that recorded instruments are prima facie evidence.<sup>189</sup> But despite the bald language of the statute, there is some authority in New York which holds that a recorded acknowledgment has presumptive validity.<sup>190</sup>

Neither section 306 nor 332 of the Real Property Law can be assailed as constitutionally invalid for violating the rights of innocent third parties. Both sections of the New York curative legislation are explicitly inapplicable to purchasers in good faith and for a valuable consideration,<sup>191</sup> thereby satisfying our third criterion.

The fourth standard by which the New York curative acts should be judged is whether the statutory cures become operative immediately or within a reasonable time after recordation.

All conveyances recorded prior to July 1, 1955, containing any defects in the certificate of acknowledgment or proof thereof, are validated as of the effective date of the statute.<sup>192</sup> Immediate prospective validity is only accorded conveyances with certificates of acknowledgment that fail to recite the street or street number of the address of a subscribing witness or of a corporate officer or director. Thus a few specific defects in connection with the certificate of acknowledgment or proof are immediately validated. Errors occurring in acknowledgments or certificates thereof recorded after July 1, 1955, however, are not cured until fifteen years have elapsed from the recordation of such conveyance.<sup>193</sup> Although the legislature has recently reduced such period from twenty to fifteen years,<sup>194</sup> one questions the need for maintaining even the present

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<sup>187</sup> N.Y. Civ. Prac. Act § 384(3) expressly provides that a recorded conveyance is not conclusive and may be rebutted by other evidence.

<sup>188</sup> Del. Code Ann. tit. 25, § 132 (1953).

<sup>189</sup> Ala. Code Ann. tit. 47, § 28 (1940).

<sup>190</sup> *Spraker v. Spraker*, 152 Misc. 867, 274 N.Y. Supp. 454 (Sup. Ct. Herkimer County 1933).

<sup>191</sup> See text of statutes pp. 642, 643 supra, § 332 applies to all third persons, but § 306 only applies to persons who acquire rights from the same grantor. Quære whether this difference is significant in view of the fact that a recorded instrument is constructive notice only to persons claiming in the same line of title? See *Lizzo v. Craft*, 135 N.Y.S.2d 748 (Sup. Ct. Monroe County 1954), appeal dismissed, 284 App. Div. 862, 135 N.Y.S.2d 777 (4th Dep't 1954).

<sup>192</sup> N.Y. Real Prop. Law § 332(1).

<sup>193</sup> *Id.* § 306.

<sup>194</sup> N.Y. Laws 1954, c. 210 amended the waiting period from twenty to fifteen years. The report accompanying the bill stated, *inter alia*:

In handling real estate transactions the closing of titles are frequently delayed because objections are raised relative to the phraseology of an acknowledgment, proof or certificate of authentication. These delays can block the efficient handling of the real estate transactions and cause substantial embarrassment and cost to the parties involved.

Frequently the long lapse of time since an instrument was acknowledged defectively

fifteen year period. The argument has been advanced by some authors that to make curative acts immediately applicable to future transactions would

. . . seriously tend to relax the protective requirements imposed by society upon the performance of such acts. Moreover, it would detract from the effort to provide high standards of craftsmanship in the preparation of deeds and conveyances. It would constitute, in effect, advance authority to commit errors, to relax vigilance in the everyday tasks of conveyancing . . . .<sup>195</sup>

This argument assumes that elimination of a waiting period before a curative statute became effective would lessen the standards of conveyancing and thwart the protective purposes of an acknowledgment; it further assumes that a client should bear the cost of the errors committed by his attorney.

With respect to the first point, it is far from established that immediate validity would make attorneys less careful or vigilant in preparing conveyances. No attorney worthy of membership in the bar knowingly releases an instrument he has prepared unless he believes it adequate and correct for its purposes. In addition to ethical or professional considerations, this is true for the practical reason that an instrument defectively acknowledged would be rejected by the registrar to the embarrassment and inconvenience of the attorney preparing it. Any errors that do appear are inadvertent, and it is unlikely that their number would diminish by a curative statute of long duration. Furthermore, it would be significant to learn whether most errors in acknowledgments appear in conveyances prepared by attorneys or by laymen, and whether there has been a general lessening of standards with respect to instruments of conveyancing in states which make their validating statutes operative immediately or after a short delay.<sup>196</sup>

Any loss resulting from a defective conveyance is suffered by the client rather than by the attorney who supervised the transaction or the registrar who examined the deed. Since the client is not culpable, he ought not to bear the consequences of the error and, in all fairness to him, the situation should be rectified as soon as possible by curative legislation.

Concededly, the requirement of an acknowledgment for all convey-

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requires extensive investigation to locate the parties for the purpose of procuring a correction document. The time and effort involved is invariably costly. If it is impossible to secure correction documents the situation may necessitate costly legal action to clear a title.

New York State Legislative Annual 206 (1954).

<sup>195</sup> Basye 338.

<sup>196</sup> E.g., Cal. Civ. Code § 1207 (Deering 1949); Ill. Ann. Stat. c. 30, § 30 (Smith-Hurd 1934).

ances serves a valid social purpose: ". . . to make title secure and prevent frauds in conveyancing as well as to furnish proof of the due execution of conveyances."<sup>197</sup> However, it is not the act of acknowledgment itself which is of value; once performed, any clerical errors resulting in the certificate of acknowledgment should not impeach it. In addition, the advantages to the clearing of titles resulting from a curative statute effective after a brief period would appear to be of greater social value than those benefits resulting from postponement before a defect is cured in hopes of uncovering any fraudulent transactions.

Considering the legitimate and valuable objectives which can be, and have been in other states, accomplished by curative legislation, New York has failed to avail itself of an important means by which problems of conveyancing and marketability of title can be reduced. The present curative acts are too narrow in scope and remedy defects after too long a delay. Revision of these statutes to enlarge their ambit and shorten the time in which they operate is desirable.

#### IV.

##### STANDARDS OF MARKETABLE TITLE

As the large volume of real estate transactions reveals, a significant segment of our economy is devoted to the buying, selling and mortgaging of property.<sup>198</sup> One can assume then that real estate values would substantially decrease if marketability were not an incident of ownership. Consequently, a purchaser of property is very much concerned with whether his property can readily be sold or mortgaged, and a system of conveyancing which fails to facilitate such matters is inadequate.

The actual transfer of property by deed is generally no problem. In New York and many other jurisdictions the legislature has adopted short forms of conveyances which may be used.<sup>199</sup> Printed copies thereof may be purchased or secured gratis from the title companies, and the forms are so simple that they can often be competently completed by an experienced legal secretary. Why then are there so many problems associated with the transfer of a parcel of property that title may not close until a month or more after the signing of the contract of sale? The answer to this question is, in great part, our Anglo-American concept

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<sup>197</sup> Merwin, J., in *Armstrong v. Combs*, 15 App. Div. 246, 249, 44 N.Y. Supp. 171, 173 (3d Dep't 1897).

<sup>198</sup> E.g., the Register of the City of New York reports in a letter to the author dated December 19, 1957, that the following numbers of instruments were recorded in the counties of New York, Bronx, Kings and Queens during 1956: conveyances, 78,841; mortgages, 85,021; miscellaneous instruments, 5,667 and satisfactions, 217,366.

<sup>199</sup> N.Y. Real Prop. Law § 258. Use of these forms, however, is not mandatory.

of marketable title which requires the seller to offer to the buyer a marketable title.<sup>200</sup> It is of prime importance, therefore, that the standards by which marketable title is determined be reasonable, definite and easily ascertainable.

Historically, in courts of law there were only good and bad titles; a person either owned or did not own the particular property in dispute.<sup>201</sup> It was for equity to devise that twilight concept of marketable title in order to permit a seller to obtain a decree of specific performance against a reluctant buyer who had raised spurious objections to the seller's title; and also to protect the same buyer from being compelled to accept a conveyance of property, title to which, though vested in seller and considered good at law, was beclouded by certain defects. Even prior to the merger of law and equity, courts of law in New York adopted the concept of marketable title,<sup>202</sup> and today the courts of most jurisdictions apply the doctrine.<sup>203</sup>

As generally formulated, marketable title designates ". . . a title not necessarily perfect, or even good, in the law sense, but so free from all fair and reasonable doubts that they (courts of equity) would compel a purchaser to accept it in a suit for specific performance."<sup>204</sup> The purport of marketable title as evolved by the courts of this state is in accord with this definition. Based on various New York cases, Mr. Justice Benvenga of the New York supreme court has expressed the concept as follows:<sup>205</sup>

. . . [a] marketable title is a good title, one that is free and clear from encumbrances and encroachments or from material defects in the title, one which it is reasonably certain will not be called into question; in short, one which can be readily sold to a reasonable prudent purchaser or mortgaged to a person of reasonable prudence as security for the loan of money . . . .<sup>206</sup>

As is frequently the case in the law, the articulation of a legal standard

<sup>200</sup> Patton, Land Titles § 47 (1957); Friedman, Contracts and Conveyances of Real Property § 21 (1954).

<sup>201</sup> Patton, Land Titles § 46 (1957).

<sup>202</sup> See Moore v. Williams, 115 N.Y. 586, 22 N.E. 233 (1889).

<sup>203</sup> 92 C.J.S. § 189, at 23.

<sup>204</sup> See note 201 supra. See also definition in 4 American Law of Property § 18.7 (Casner ed. 1952).

<sup>205</sup> Pyramid Motor Freight Corp. v. Thorman Baum & Co., 114 N.Y.S.2d 614, 616 (Sup. Ct. N.Y. County 1948).

<sup>206</sup> But cf., Ossining Associates v. City of New York, 148 N.Y.S.2d 496, 499 (Sup. Ct. N.Y. County 1955), in which Mr. Justice Valente states that "A true test of marketability is whether the purchaser can use the property for its intended purposes." As applied to the facts of the case, in which a contract vendee sought to recover his down-payment alleging that certain building encroachments rendered title unmarketable, this definition was appropriate since the plaintiff intended to demolish the building and construct new premises. But what if the buyer's purposes are changed or he is required to sell the premises before realizing them; he would be the owner of a parcel of property which would be unmarketable to a future vendee except one who similarly intended to demolish the existing structure.

is easier than its application. Attorneys can agree that a title afflicted by reasonable doubt should not be foisted upon an unwilling buyer; but what constitutes reasonable doubt in a particular situation is resolvable too often only by litigation.

In addition to the attorney's concern that his client receive a title secure from present controversy, he must also be alert to the possibility that upon the sale of the same parcel of property the title examiner acting for the future purchaser may arrive at a different conclusion as to whether the title is free from a reasonable doubt. Consequently, an attorney may be reluctant to approve a title which has even the most insignificant defect since it may prove to be unsatisfactory to the next examiner of title. The result of this system is that the practices of the most conservative members of the title examining community become its standard. In many areas "flyspecking" or construing against title has become the norm, and acquisition of titles with remote contingencies and defects is discouraged and the saleability of property impeded.<sup>207</sup>

The obvious infirmities of this system of title examination<sup>208</sup> demand corrective action which will standardize title examination, thereby increasing the ease of land transactions. A spontaneous movement has developed in the bar associations of various counties and states in an attempt to provide a solution to this problem. These associations have adopted uniform standards of marketable title to be used as guides by title examiners in determining what presumptions of law and fact can be indulged without fear of negligence, and to provide a common basis upon which to measure the adequacy of a title. The distinction of developing the first title standard, in April of 1923, rests with the Livingston County Bar Association of Illinois.<sup>209</sup> The State Bar Association of Connecticut in 1938 adopted the first set of standards to be used uniformly throughout any state.<sup>210</sup> As of 1953, standards of marketable title had been recommended by seventeen state bar associations and twenty-eight county or city associations.<sup>211</sup> The midwest and mountain

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<sup>207</sup> See Payne, "Increasing Land Marketability Through Uniform Title Standards," 39 Va. L. Rev. 1, 9 (1953). In New York City the problem relevant to standards of marketable title has in some measure been eliminated since a great many of the titles conveyed are insured, in which event the contract of sale usually provides that the seller will deliver such title as shall be accepted and insured by a named title insurance company.

<sup>208</sup> The report submitted by the American Bar Association Committee on Substantive Changes in Real Property Law contains the following appraisal of the conveyancing system: "That the system fails to meet adequately the needs of present-day society permits of little argument." Proceedings of the Section of Real Property, Probate and Trust Law 81, 82 (1948-49).

<sup>209</sup> For a more complete discussion of the history of the title standard movement in this country, see Payne, *supra* note 207, at 1.

<sup>210</sup> 12 Conn. B.J. 100 (1938).

<sup>211</sup> Payne, *supra* note 207, at 20.

states, areas in which neither title insurance nor title registration are in common use, have tended to be the center of the movement.

Although adherence to title standards is for the most part voluntary, some courts have taken judicial notice thereof.<sup>212</sup> Of course, the most effective means of insuring their general usage is to have them enacted into state law. Only Nebraska, as yet, has seen fit to adopt such legislation.<sup>213</sup>

The Bar Association of Erie County was the first New York bar association to adopt standards for title examination. The Committee on Practice of Real Estate Law prepared the standards which were adopted by the directors of the Association on March 22, 1949. Several changes and amendments were subsequently approved in 1954-1955. The purposes of the standards are expressed by the Association in an introductory paragraph to the pamphlet in which they are published:

They [the standards] are not intended to establish a practice under which unmarketable titles may be transferred without objection. Rather, they are designed to establish a standard for the quantum of proof of marketability and to some extent, the measure of quality of such proof. If they provide a yardstick of uniform practice in this field, it is felt that a useful purpose has been served.<sup>214</sup>

On September 2, 1955, the Executive Committee of the New York State Bar Association approved and adopted twenty-five title standards.<sup>215</sup> Since that date, these standards have been formally adopted by the respective bar associations of Schenectady, Putnam, Richmond, Jefferson, Madison and Wyoming counties.<sup>216</sup>

The similarity of ideas and identity of language in the Erie County and New York State Bar Association standards cannot be explained by mere coincidence.<sup>217</sup> One can assume that the Committee on Real Property of the State Bar Association, which prepared the standards, either was familiar with the Erie County standards or with a third source common to both. Neither set of standards is by any means complete<sup>218</sup> and

<sup>212</sup> Grand Lodge A.O.U.W. v. Fischer, 70 S.D. 562, 21 N.W.2d 213 (1945).

<sup>213</sup> Neb. Laws 1947, c. 249, § 1; now Neb. Rev. Stat. §§ 76-601-644 (1943). See also Wis. Stat. Ann. § 235.69 (1955) which establishes a standard of title solely with respect to variance in names of parties.

<sup>214</sup> See "Standards for Title Examination," published by the Bar Association of Erie County (1955).

<sup>215</sup> *Ibid.*

<sup>216</sup> Letter dated November 13, 1957, from John F. Berry, Executive Secretary of the State Bar Association addressed to author.

<sup>217</sup> Four of the title standards are identical in language; those relating to: (1) presumption of regularity of chancery action; (2) variation in corporate names; (3) clerical errors appearing in discharge of mortgage; and (4) acknowledgments.

<sup>218</sup> This is recognized by the New York State Bar Association which in the foreword to its standards states that "The Committee further hopes that these standards will be added to from time to time . . . ."

many of the problems of the title examiner have not even been mentioned, such as the effect on marketability of unenforceable judgments, the period of record search, questions of joint tenancy or tenancy by the entirety, and the significance of ineffective restrictive covenants, to mention only a few.

Another criticism that may be made of the New York standards is that too many discuss only a single aspect of a title problem.<sup>219</sup> No effort is made to dispose exhaustively of the variety of difficulties that can arise in connection with any one general subject, such as corporate conveyances or conveyances by and to trustees. In this connection, the title standards adopted by the Bar Association of Michigan<sup>220</sup> could well serve as a model for completeness and organization. Ten general classifications of title traps were established with specific standards adopted for various particular matters that can arise under each category.<sup>221</sup> After the statement of a standard, its application is illustrated by one or more problems, and, where available or appropriate, authorities are cited or a comment inserted. Only an index and table of contents are lacking to make these standards a valuable tool to the title examiner and a genuine contribution to the law of conveyancing.

The value of title standards is illustrated by one reported decision in which the question of a marketable title was litigated, and which might have been avoided if the Bronx County Bar Association had in 1945 adopted standard 10 of the New York State Bar Association.<sup>222</sup> In *Levitt v. 1317 Wilkins Corp.*,<sup>223</sup> plaintiff sought to recover the sum of \$1,000 paid to defendant on signing of a contract to purchase a parcel of property. He alleged that title thereto was not marketable because the deed to one

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<sup>219</sup> Payne, *supra* note 207, at 23, who, in reviewing and analyzing the standards adopted throughout the country, concludes:

. . . [I]n general it can be said that none of the adoptions indicates a rational and comprehensive functional attack upon the problems faced by the title examiner. Without exception the standards represent piecemeal solutions of particular problems brought to the attention of bar association committees by individual practitioners. Moreover, many of the standards appear to have been drafted with the haste and lack of attention that might be expected in the case of an expression of nonbinding principles.

Prof. Payne further criticizes the title standard movement for failure of the state and county bar associations to adopt mutually complementary standards rather than similar standards. He suggests that the state standards be general propositions while the county standards should be devised to meet special local situations. Those standards adopted in New York by the state and county bar associations illustrate this failing, since no effort is made to develop interrelated rather than identical state and local standards.

<sup>220</sup> 35 Mich. State B.J. 10 (August 1956).

<sup>221</sup> E.g., there are thirty-one specific standards under the general rubric relating to mortgages and mortgage foreclosures. Michigan Title Standards, c. 8, Standards 8.1-8.31.

<sup>222</sup> This standard provides: "Corporate Names-Variations Objection: should not be made where the name of a corporation appearing in the chain of title prior to the examination date is substantially the same as the name appearing in the certificate of incorporation." Standard VIII of the title standards of the Bar Association of Erie County is identical.

<sup>223</sup> 58 N.Y.S.2d 507 (Sup. Ct. Bronx County 1945).

of the defendant's remote grantors erroneously referred to this grantor as Greemont Realty Co., Inc., while the correct name of the grantor was Greenmont Realty Co., Inc., by which name it had signed and acknowledged its deed of transfer. The court held that this was not a sufficient defect to taint the title as unmarketable. Countless similar disputes might have been eliminated by reference to a title standard.

The use of title standards, therefore, can be of great assistance in facilitating the transfer of land by eliminating concern with trivia and matters of no real consequence. The efficacy of their use will be directly related to: (1) the ability of the standards to achieve clarity of expression and a solution of the salient title problems of the community; and (2) the support and enthusiasm provided by the local bar in adhering to the voluntary standards.<sup>224</sup> Title standards will not cure all title problems; they are merely a technique by which marketability of title can be simplified. This makes them worthy of the extended consideration and cooperation of all lawyers and bar associations in the state.

Our present judicial concept of marketable title has been criticized by some as negative, and it is suggested that to eliminate the present confusion in title standards a more positive concept of marketability must be devised.<sup>225</sup> This argument is advanced: ". . . [I]n real estate transactions we have in fact heretofore been primarily concerned with unmarketability, not with marketability . . . [and it is proposed that marketability should] . . . depend solely upon [the state of the records] during some recent interval of time rather than upon their entire history. . . ." <sup>226</sup>

Advocates of such "modern marketability" applaud the pioneer enactment by Michigan in 1945<sup>227</sup> of a marketable title statute which, in addition to barring all claims and interests antedating a certain time,<sup>228</sup> defines marketable title in terms of record title during a specified period of time. The pertinent language of the statute is as follows:

Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as

<sup>224</sup> Perhaps attorneys would be more inclined to cooperate with such standards if the law provided that reliance thereon constitutes the exercise of due care in the examination of titles. See Neb. Rev. Stat. § 76-603 (1943), which enacts this principle.

<sup>225</sup> See Basye §§ 371-74, at 539-48; Payne, "The Why, What and How of Uniform Title Standards," 7 Ala. L. Rev. 25 (1954).

<sup>226</sup> Basye 539.

<sup>227</sup> Mich. Stat. Ann. § 26.1271 (1953). The following states subsequently enacted similar legislation: Neb. Rev. Stat. § 76-288 (1943); N.D. Rev. Code § 47-19A02 (1943); S.D. Code § 51.16B01 (1939).

<sup>228</sup> See p. 634 *supra*, for discussion of the limitation aspect of this statute.

are not extinguished or barred by application of the provisions of succeeding sections of this act and subject also to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed and which have been recorded during said 40 year period: *Provided, however*, that no one shall be deemed to have such a marketable record title by reason of the terms of this act, if the land in which such interest exists is in the hostile possession of another.<sup>229</sup>

Enthusiasm for the statute on the part of its votaries has been unlimited, and one writer comments that:

. . . [I]t (the statute) is quite easy to understand and to apply. There are no involved conditions or provisions to detract from its simplicity. The tremendous impetus which this new method of evaluating marketability of title promises to give to conveyancing procedure is obvious. It cuts loose from all old norms of judging marketability and substitutes a system that is efficient in practice and eminently fair in application. . . .<sup>230</sup>

There is a serious question whether this allegedly positive concept of marketability really simplifies the task of the title examiner. Upon searching a title, the examiner is faced with two questions: (1) For how long a prior period should he investigate the record; and (2) what notations appear of record during this period which adversely affect the title?

With respect to the first question, undoubtedly, a limitation on the period of search would be a great boon to title examination. But, such a limitation can be made effective only by the statutory extinction of all rights existing beyond the specified period; otherwise, the examiner is obliged to search the records for the time interval during which any adverse rights can possibly exist. The Michigan statute, however, excepts various property interests from its purview so that a record search of only forty years is incomplete and may not reveal all outstanding and valid claims against the property.<sup>231</sup> In addition, the statute does not intend to impose a substantive limitation on property rights; rather it is remedial and seeks to eliminate from the records worthless and invalid claims which impair title.<sup>232</sup>

Moreover, the so-called positive concept of marketability gives the title examiner no assistance on his second problem. He still has to evaluate whether a particular state of facts renders the security of ownership or possession so doubtful that the title is unmarketable. Differences of opinion arising from this evaluation produce the vast number of cases in which the question of marketable title is litigated. Un-

<sup>229</sup> Mich. Stat. Ann. § 26.1271 (1953).

<sup>230</sup> Basye 546.

<sup>231</sup> See note 131 supra and accompanying text.

<sup>232</sup> Michigan Title Standards, Standard 1.1.

fortunately, the Michigan statute does not assist the title examiner in this respect, and he must rely on reported decisions, title standards, and his own views, to determine the impact on title of the myriad situations that can plague it.<sup>233</sup> Marketability of title is a concept similar in a sense to health or justice; their absence is readily apparent, but their essence escapes verbal encasement.<sup>234</sup> Ultimately, reasonableness in view of the particular facts will control marketability rather than any mechanical definition. In the words of Mr. Justice Cardozo:

There is in all such controversies a penumbra where rigid formulas must fail. No test more definite can then be found than the discretion of the court, "to be carefully and guardedly exercised" . . . in furtherance of justice. In the exercise of that discretion, we declare this title unmarketable; the doubt too unsubstantial to place the purchaser in peril.<sup>235</sup>

### CONCLUSION

Review of the law of conveyancing in New York indicates that much can be done to improve the present system. Reform as to extinction of stale land claims, broader curative legislation, and more comprehensive and problem solving standards of marketable title, are the primary areas in which legislation is needed. New York has been less creative and progressive than other states in attempting to deal with the important question of title transfers. There is no reason why action should be delayed any longer. The state legislature, assisted by bar associations, must be urged to begin a program of study and research by which the necessary legislation can be drafted. We have had adequate experience with the present system to profit from its shortcomings and to have been motivated to provide a remedy. The law of conveyancing is too vital to our welfare to be further ignored.\*

<sup>233</sup> E.g., *Lynbrook Gardens, Inc. v. Ullmann*, 291 N.Y. 472, 53 N.E.2d 353, 152 A.L.R. 959 (1943) (seller claimed title under a statute the constitutionality of which is being contested); *Samuelson v. Glickman*, 113 App. Div. 654, 99 N.Y. Supp. 886 (2d Dep't 1906) (title subject to a party wall agreement).

<sup>234</sup> It appears that the negative concept of marketability cannot be avoided even by those who desire to think positively. See Payne, *supra* note 219, who makes the following comment about any suggested definition of marketable title: "Such a definition should contain a forceful statement to the effect that the only defects of record which should be considered material are those which create a substantial danger of adverse attack."

<sup>235</sup> *Norwegian E. F. Church v. Milhauser*, 252 N.Y. 186, 191, 169 N.E. 134, 135 (1929).

\* **ADDENDUM:** Since this article was written, the New York State legislature has enacted Chapters 863, 864, 865 and 866 of the Laws of 1958, which add five new sections to the Real Property Law. In substance, these sections provide as follows:

Section 345:—Conditions subsequent or special limitations restricting the use of land and rights of entry, or possibilities of reverter created thereunder, are extinguished and become unenforceable unless a declaration of intention, which complies with the requirements set forth in this section, is recorded not less than twenty-seven years nor more than thirty years after such condition or limitation was created, and unless a renewal declaration has been recorded after the expiration of nine years and before the expiration of ten years from the date of recording the initial or the last renewal declaration. Timely recording of such a declaration, entitled "Declaration of Intention to Preserve Restrictions on the

Use of Land," is required despite the fact that: (a) the person obliged to record may be subject to a disability such as infancy or incompetency; (b) or may have no knowledge of such restriction; (c) or an action to determine the validity of such a restriction may be pending; (d) or the existence of a judicial determination as to the validity of such restriction may have been entered.

The section does not apply where such restrictions were created in favor of the United States, the State of New York, or any governmental subdivision or agency thereof; the owner of a reversion following an estate for life; the owner of a reversion following an estate for years where the number of years of such estate will expire less than seventy years after the time required for recording of an initial declaration; the owner of a reversion on a lease of communication, transportation or transmission lines; a mortgagee or contractor-vendor of land, or the holder of any other security interest in land. In addition, this section does not apply in the event that a person required to file the statutory declaration has legally entered into possession of the land pursuant to a breach of any condition restricting its use or shall have obtained a judgment for the recovery of such land prior to the time specified for recording the required declaration. Limitations restricting the use of land are not extinguished by this section if such limitations are imposed by covenant, promise or negative easement, or if the right of entry or possibility of reverter is conditioned upon some event other than breach of a restriction on the use of such land.

Section 346:—No restriction on the use of land created by covenant, promise or negative easement or created on or after September 1, 1958, shall be enforced by injunction or judgment compelling the conveyance of the land so burdened if it appears that the restriction which was sought to be enforced is of no actual or substantial benefit to the person seeking its enforcement. When affirmative relief against such restriction is sought in an action to quiet title or otherwise, or relief is sought by way of defense or counterclaim in an action to enforce the restriction, if the court finds that such restriction is of no actual or substantial benefit to the person seeking its enforcement, it may determine that the restriction is not enforceable and shall adjudge that it shall be completely extinguished upon payment to the person who would otherwise be entitled to enforce it, in the event of a breach, of damages if any are sustained.

Section 347:—No possibility of reverter or right of entry created in a special limitation or condition subsequent on or after September 1, 1958, shall accrue by reason of a breach thereof, but upon the happening of such a breach the person who would have the right to enforce such possessory estate or right of entry may maintain an action in the supreme court to compel a conveyance of the property subject to such limitation. The relief provided by this section is to be granted only to protect a substantial interest in enforcement of such restrictions. The court may deny such relief or impose conditions on the granting thereof; or if it appears that granting such relief would be inequitable, the court may, in lieu thereof, restrain the repetition of such a breach or provide the relief requested upon such terms as to avoid unjust enrichment. This section does not apply to conveyances containing special limitations or conditions subsequent for benevolent, charitable, educational, public or religious purposes, which restrict the use of land to such purposes, or were created by a lease for a term of less than one hundred years, and restrict the use of the leased premises.

Section 348:—This section applies to special limitations or conditions subsequent created prior to September 1, 1958, and provides that the owners of an estate subject to such a limitation may maintain an action to obtain a judgment that such limitation is governed by Sections 346 and 347. The court may grant the relief requested if it finds that the primary purpose of the limitation or condition subsequent was to restrict the use of the land and that such restriction unreasonably limits the use and development of the land or unreasonably impairs the certainty of titles. In the event that a breach of the restriction has already occurred at the time such an action is brought, the court shall not grant the relief sought; however, if such relief is denied for this reason, unless the right of entry or possibility of reverter is asserted by the owner thereof in that action or in another action commenced within six months from the entry of judgment therein, such right of entry or possibility of reverter shall be extinguished as against those persons or their successors who are parties to the action.

Section 349:—Where land is held for benevolent, charitable, educational, public or religious purposes and the use of such land is restricted to such purposes by a special limitation or condition subsequent, an action may be brought in the supreme court to obtain relief from such restriction, provided two years have elapsed from the creation of such limitation or condition subsequent. The Attorney General shall be a party to such an action and the court in determining whether such relief shall be granted shall consider and make findings as to whether the primary purpose of the restriction was to limit the use of the

land; or whether the purpose of the restriction was to insure that the substantial value of the land rather than the land itself be devoted to benevolent, charitable, educational, public or religious purposes; or whether the restriction is substantially impeding the owner of the land in furtherance of its use for such purposes; or whether the person who would have the right of entry or possibility of reverter will suffer substantial damage by reason of its extinguishment or modification. The court is granted discretion to discharge or modify the restriction or to award damages for any injuries sustained as a result of such extinguishment or modification, or direct that the land may be conveyed, leased or mortgaged free of such restriction, and its judgment may contain any other provision as equity may require. The section does not apply to a right of entry or possibility of reverter which has accrued prior to September 1, 1958, or where the conveyance creating the restriction was made with or by the United States, State of New York or any governmental subdivision or agency thereof.

This legislation is salutary and should do much to eliminate one of the major title problems—possibilities of reverter and rights of entry—and make marketable titles which formerly suffered from such defects. In addition, properties which have not been developed because of uncertainties of title resulting from such restrictions may now be put to better economic use.